Chapter 8

The exclusion of insurance contracts

8.1 Section 8 of the bill excludes certain contracts from the unfair contract terms provisions. These exclusions are: certain shipping contracts which are already subject to a comprehensive legal framework dealing with contractual terms in a maritime law context; and contracts which are constitutions of companies or managed investment scheme.

8.2 Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance is not capable of being made the subject of 'relief' under any Commonwealth or State Act. 'Relief', in this instance, is in the form of the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable unjust, unfair or inequitable or relief for insureds from the consequences in law of making a misrepresentation.[1] Schedule 3 of the bill also exempts the constitutions of companies and managed investment schemes from its provisions (clause 12BL(3)).

8.3 The effect of this section means that the unfair contract provisions of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984* (ICA). The exemption is not achieved through a provision of the bill.

Opposition to the exemption of insurance contracts

8.4 The committee received considerable evidence opposing the exclusion of insurance contracts from the provisions of the bill.

> The Consumer Action Law Centre described the total exclusion of insurance contracts from the provisions of the bill as 'excessive', 'unreasonable' and a 'significant flaw' in the legislation. It argued that there is no reason why any industry should be exempt from the unfair contract terms provisions, and no reason why insurance contracts with consumers should be treated any differently to other consumer contracts. Indeed:
>
> …many other industries that, like insurance, are subject to industry-specific regulation to address industry-specific matters in addition to being subject to general consumer protection laws…None of these industries are excluded from the UCT provisions because no existing general or industry-specific regulation addresses the problem of unfair contract terms, thus the existence of industry-specific laws in a particular field of commerce is largely irrelevant to whether or not UCT laws should apply to contracts in that field.[2]

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1 *Explanatory Memorandum*, pp. 31–32.

2 Consumer Action Law Centre, *Submission 19*, p. 11.

8.5 The Centre claimed that insurance is 'arguably' one of the areas in which consumers most need unfair contract terms regulation. The ICA, however, does not address the issue of unfair terms in insurance contracts. The Centre recommended inserting a provision:

> …either expressly providing for the provisions in Schedule 3 Part 1 (once enacted) to apply to insurance contracts despite anything to the contrary in section 15 of the Insurance Contracts Act, or amending section 15 of the Insurance Contracts Act to provide that it does not exclude the provisions in Schedule 3 Part 1 (once enacted).[3]

8.6 National Legal Aid Australia (NLA) also urged the committee to reconsider the exclusion of insurance contracts from the bill. It told the committee that it was first aware of this exclusion from the brief reference in the Explanatory Memorandum (EM), adding:

> As far as we are aware no research has been undertaken to date at any level of government on what effect excluding insurance contracts from unfair terms regulation will have on the overall effectiveness of a national consumer law, such as the one envisaged in the bill.[4]

8.7 Ms Elizabeth Shearer, representing the NLA, argued that the duty of utmost good faith in the ICA was not preventing the use of unfair contract terms. She told the committee that:

> Based on our collective casework experience…the requirement to act in utmost good faith and other provisions in the Insurance Contracts Act have not prevented the proliferation of unfair terms in insurance contracts being put into policies or given the courts the real power needed to strike down unfair terms. An example is the case of a third party property motor vehicle claim, where the insurer sought to rely on a clause which said, 'If the car is involved in a no fault accident with an uninsured vehicle, we will cover your damage up to $3,000 but only if you report the accident to the police and provide evidence that the other vehicle is uninsured.' The objective unfairness of this clause is that in order to successfully claim against the policy, our client needed to (1) know about this particular clause, (2) convince the police to take the report despite there being no major property damage or personal injury or (3) provide proof that the other driver was uninsured which, as you could imagine, is a very difficult task. In our view there are sound reasons to expect that the exclusion of insurance contracts from unfair terms regulation, will mean that unfair terms such as those cited in case examples provided to this inquiry will continue to exist in insurance contracts to the detriment of consumers.[5]

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3 Consumer Action Law Centre, *Submission 19*, p. 14.

4 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

5 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

8.8 The NLA rejected the idea that the Insurance Contracts Act is a 'self-contained', 'self-complete' code. Mr David Coorey, a solicitor with Legal Aid New South Wales, quoted from the notes of an annotated version of the ICA which stated: 'The Insurance Contracts Act is not a code of insurance contract law. It only relates to certain aspects of the law relating to insurance contracts'. He argued that if parliament had wanted to enact the ICA as a self-contained code, 'it could have done so and would have done so'.[6]

8.9 The NLA suggested a consequential amendment to section 15 of the Insurance Contracts Act to enable unfair terms in insurance contracts to be dealt with under the Australian Consumer Law.[7]

8.10 The Consumer Credit Legal Centre (CCLC), which runs a process called Insurance Law Service, also argued that the bill's provisions must apply to general insurance contracts. Ms Katherine Lane, a principal solicitor with the service, told the committee that the 'elegance and vision' of the legislation is that it covers a wide range of industries and contracts, 'so to exclude one type is very worrying'.[8]

8.11 The Insurance Law Service argued that while the ICA does have a duty of utmost good faith, it does not provide a consumer with a remedy who has been affected by an unfair term. [9] Ms Lane told the committee that:

> The duty of utmost good faith has failed to make any improvements in decreasing the use of unfair terms in insurance contracts and to provide consumers with a remedy when unfair terms have been used. The industry dispute resolution scheme, which is the financial ombudsman's service, has repeatedly stated in many annual reports and in case decisions that they cannot deal with unfair terms as the duty of utmost good faith does not cover this area.[10]

8.12 The Insurance Law Service recommended that a provision be inserted into the bill either:

- expressly providing for the provisions in Schedule 3 Part 1 (amending the ASIC Act) to apply insurance contracts despite anything to the contrary in section 15 of the *Insurance Contracts Act 1984*; or
- amending section 15 of the *Insurance Contracts Act 1984* to provide that the bill is not excluded and can regulate insurance contracts.[11]

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6 Mr David Coorey, *Proof Committee Hansard*, 21 August 2009, p. 47.

7 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

8 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 43.

9 Insurance Law Service, *Submission 36*, p. 2.

10 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 43.

11 Insurance Law Service, *Submission 36*, p. 5.

Support for the exemption of insurance contracts

8.13 Other submitters strongly supported the exemption of insurance contracts from the unfair contract term provisions. The Insurance Council of Australia, notably, argued that the ICA, the *Corporations Act 2001* and the ASIC Act all 'guard against unfair or unconscionable conduct'.[12] Mr John Anning of the Insurance Council told the committee:

> The evidence does not support the need for the application of the proposed unfair contracts terms of the legislation to general insurance. To do so would result in unwarranted layering of regulatory requirements on insurers and would lead to operating inefficiencies, the cost of which ultimately will be passed on to the consumer. The proposed unfair contract terms legislation, rather than assisting insurers will create uncertainty in the application of insurance terms to claims, which is likely to lead to further disputes thereby increasing inconvenience and delay for consumers in the settlement of claims. The existing exemption under section 15 of the Insurance Contracts Act for insurance contracts from the operation of unfair contract terms legislation should be retained.[13]

8.14 Mr Anning sought to give the committee an historical perspective as to why the existing legal framework for insurance contracts is adequate. He noted that insurance is a 'rare but important example' where the parliament's intent in the 1980s was to establish a comprehensive set of rights and obligations around the insurance contract. He also argued that this framework was working well, citing data from the Financial Ombudsman Service's 2008 annual report showing very few disputes.[14]

8.15 Mr Anning did concede that there was no statutory definition of the ICA's section 13 requirement on the duty of utmost good faith. However, he did cite a 2007 ruling in the High Court where the principle was discussed 'in detail'.[15] He also rejected the claim that the ICA does not address the issue of unfair contract terms citing the findings of a 2004 review (see below).[16]

8.16 Minter Ellison has expressed concern at the potential application of the unfair contract terms provisions to insurance contracts. It notes the clause in section 15 of the ICA that 'relief' 'does not include relief in the form of compensatory damages'. The firm argued that compensatory damages could be claimed by a consumer if a provision of an insurance contract was found to be void under section 12BF.

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12 Insurance Council of Australia, *Submission 43*, p. 2.

13 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 2.

14 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 2.

15 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, pp. 2–3. The case is CGU Limited v AMP Financial Planning Pty Ltd. Mr Anning noted the statements of Justices Gleeson, Crennan and Kirby.

16 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 6.

Accordingly, 'there is a real risk' that the unfair contract terms provisions will apply to insurance contracts unless an express exclusion is inserted into clause 12BL.[17]

The 2004 review of the ICA

8.17 In June 2004, a government-commissioned review of the *Insurance Contracts Act* was made public.[18] The review noted that the Standing Committee of Officials of Consumer Affairs (SCOCA) had appointed a Working Party to review the issue of unfair contract terms generally and including insurance contracts in the national model. The review stated that while the exclusion provided by section 15 was still valid:

> If a nationally consistent model for review of consumer unfair contracts is developed, the balance of consideration may shift and the issue should be revisited.[19]

8.18 The Insurance Council of Australia told the committee that the recommendations of the 2004 panel were the basis for a draft bill which was released for comment in February 2007.[20] It added:

> After a very significant amount of work by all stakeholders, agreement was reached in late 2007 on the broad matters to be addressed in the amending legislation. The Insurance Council is currently hopeful that a bill will be introduced in the current session of parliament. Any consideration of section 15 should therefore take account of the proposed amendments to make the operation of the act more effective, including the introduction of powers to enable ASIC to intervene in any proceeding under the act.[21]

8.19 The committee believes it is important that section 15 of the ICA is now addressed in light of this legislation to introduce national unfair contract law provisions. This is in line with the recommendation of the 2004 review of the ICA.

Views on the inclusion of financial services

8.20 The Investment and Financial Services Association (IFSA) has argued that given the existing regulatory framework of the financial services industry, the bill is 'unwarranted and in fact creates an additional burden that stymies the ability of

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17 Minter Ellison, *Submission 45*, p. 7.

18 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act*, June 2004, http://icareview.treasury.gov.au/content/Reports/FinalReport/_downloads/ICAFinalReport.pdf The review was announced on 10 September 2003 by the Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan and the then Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell.

19 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act*, June 2004, p. 53 http://icareview.treasury.gov.au/content/Reports/FinalReport/_downloads/ICAFinalReport.pdf

20 http://icareview.treasury.gov.au/content/_download/draft_legislation/draft_Bill.pdf

21 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 3.

organisations to provide products and services in a competitive environment'.[22] It highlighted the possibility that investments in managed investment schemes, brokered through Product Disclosure Statements, may constitute a standard form contract. Despite the bill's section 12BL(3) exemption, IFSA feared that these investments 'fall within the ambit of the regime'.[23]

8.21 Minter Ellison has also argued that there is no need for the provisions of the bill to apply to financial services. The firm claimed that there is already 'comprehensive regulation of financial services' in Australia and that a broad ban on unfair terms will create uncertainty and additional compliance costs.

8.22 Minter Ellison noted that regulation of the consumer credit industry 'is about to be significantly increased' if the *National Consumer Credit Protection Bill 2009* is passed in its current form. In this context, 'it would be appropriate' to allow industry to implement the Credit Bill and assess its impact before proceeding with the unfair contract terms legislation.

8.23 In relation to the bill's exemption for constitutions of companies and managed investment schemes, Minter Ellison expressed concern that other conduct relating to a company or investment scheme may give rise to a contract between the member and the issuer. It also queried whether a product disclosure statement for a managed investment scheme is a contract and if so, whether the bill's provisions would apply to product issuers.[24]

Views on the inclusion of building and building services contracts

8.24 The committee received a submission from Master Builders Australia (MBA), which argued there should be an exemption for standard form contracts that are subject to domestic building contract legislation. MBA noted paragraph 4(f) of the bill, which gives the example of a term that permits a unilateral variation in the upfront price payable under the contract without the right of another party to terminate the contract. It claimed that this circumstance will apply to 'the vast majority of building contracts' which are frequently varied 'as consumer's choices are clarified or changed or a builder is required to meet conditions that may be externally imposed'.[25]

8.25 MBA argued that building contracts and building services contracts are already 'more appropriately and highly regulated through specific sector legislation'. For example, sections 79–84 comprising Part 7 of the *Domestic Building Contracts Act 2000 (Qld)* contain provisions that protect consumers by requiring variations in

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22 IFSA, *Submission 39*, p. 3.

23 IFSA, *Submission 39*, p. 3.

24 Minter Ellison, *Submission 45*, p. 4. Product disclosure statements are currently regulated under Division 3, Part 7.9 of the *Corporations Act 2001*.

25 *Submission 1*, p. 7.

writing and setting out the change in the contract price.[26] The MBA warned against adding another 'inappropriate' regulatory layer on this sector specific legislation.

8.26 Master Builders Australia recommended that domestic building contracts be excluded from the scope of the bill by adding that class of contract to the list of excluded contracts in the proposed section 8 of the bill.[27]

26 *Submission 1*, p. 8.

27 *Submission 1*, p. 9.