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Manager

Financial System Division

Markets Group

The Treasury

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To the Manager

RE: Extending unfair contract terms to insurance contracts

Closing the unfair contract terms loophole for insurance contracts is long overdue.

As it stands, consumers are currently protected from unfair contract terms in a gym contract but not in a life insurance contract. There is no justification for this.

In many respects, insurance is the ideal case study for why a prohibition on unfair contract terms should exist. Insurance contracts are often so complex that people need an additional layer of protection against harmful terms. Contracts extend over hundreds of pages, few people read or understand them, and they contain complex terms which most people are unlikely to understand. People are regularly being exploited by fine print terms hidden away more than one hundred pages deep into a Product Disclosure Statement (PDS). As a consequence, people suffer serious financial harm by having claims denied due to the mismatch between what they thought the policy covered and what was actually covered.

The government is presented with an opportunity to finally close the loophole for unfair contract terms for insurance products. However, the current proposal fails to achieve this. People who hold group insurance in superannuation will continue to remain unprotected from unfair contract terms.

Strong support of narrow statutory definition for 'main subject matter'

We strongly support the proposed narrow statutory definition of main subject matter to be limited "only to the extent that it describes what is being insured". A narrow statutory definition will ensure that the spirit of the prohibition of unfair contract terms is upheld. The narrower the definition of main subject matter, the greater amount of the contract is subject to the protections of the unfair contract terms prohibition. This will protect consumers and will prevent industry from profiting from an inclusion of

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unfair contract terms in a broader and less protective definition. We also support and acknowledge this proposal as aligning with the Banking Royal Commission's proposed recommendation.

Stamping out unfair contract terms in insurance contracts

CHOICE experts review general insurance products and regularly find policies that have unfair contract terms. One problematic industry is the pet insurance industry. CHOICE is currently unable to recommend a single pet insurance product due to the products being incredibly poor value and having restrictive and often unfair terms.

Below are two examples of unfair contract terms that CHOICE experts have found in reviewing pet insurance products. These two examples are emblematic of how currently insurance companies are using unfair contract terms to take advantage of people.

Example 1 - BUPA's draconian policy on vaccinated illnesses

BUPA Pet Insurance will not pay for treatment if your cat or dog gets certain illnesses for which a vaccine exists, even if they are vaccinated.¹ This is buried within a complex and difficult to understand 52 page PDS.

Example 2: PetSecure's extremely restrictive definition of accidental injury

PetSecure defines an 'Accidental Injury' as being a:

(a) *direct consequence of at least one of the following:*

1. *a motor vehicle incident;*
2. *a burn or electrocution; or*
3. *an allergic reaction to an insect or spider bite other than tick or flea bites; or*

(b) *result in:*

4. *a bone fracture;*
5. *snake bite toxicity;*
6. *a traumatic ligament or tendon injury;*
7. *a bite wound or fight wound abscesses; or*
8. *laceration or abrasion of tissue, skin or mucous membrane due to external violence.*²

This extremely restrictive definition is buried halfway through a complex 45 page PDS. It leaves many people uninsured in the event of their pet having a genuine accident. For example, if an insured pet gets poisoned by eating unknown food in the park or falls out of a tree and has internal injuries - both of which are likely and reasonable accidents - they are not covered by PetSecure's policy.

¹ BUPA Pet Insurance Product Disclosure Statement, 8 August 2018, accessed 20 August 2019, <https://www.bupa.com.au/staticfiles/BupaP3/pdfs/pet-insurance-pds.pdf>

² Petsecure Pet Insurance Product Disclosure Statement, 1 December, accessed 20 August 2019, <https://petsecure.com.au/wp-content/uploads/2014/10/Product-Disclosure-Statement-and-FSG-Dec-15.pdf>

Ensuring fair deductible and excesses for insurance products

We acknowledge that excesses or deductibles that are ‘transparent terms’ will not be subject to unfair contract terms protections. Many general insurance contracts, especially pet insurance contracts, frequently hide excesses and deductibles deep in their PDS. As a result of this legislation, insurance companies will be forced either to significantly improve their disclosure of deductibles and excesses or instead have those terms subject to unfair contract term protections.

One common example of arguably unfair excesses or deductibles are ‘variable excesses’ for pet insurance, where coverage decreases as a pet ages. Variable excesses are common to the pet insurance industry and are often hidden in the fine-print of contracts. In 2016, ASIC prosecuted Allianz Australia Insurance Limited for misleading advertising that their pet insurance product Petplan would provide 100% rebate on claims for veterinary bills.³ However, in a fine-print disclaimer, the policy mentioned that coverage dropped to 65% of veterinary bills when the pet turned eight.

Extending protections to insurance in superannuation

The unfair contract terms protections must be extended to include group insurance in superannuation. A failure to do so will continue to leave the 12 million people who hold group insurance in superannuation exposed to unfair terms. This goes against the guiding spirit of the Banking Royal Commission’s Final Report which seeks to eliminate any “exceptions or qualifications” from norms of conduct guiding financial services law.⁴ We urge the Treasury to protect people with group insurance through superannuation and include them within the scope of eligible third party beneficiaries of the legislation.

As the Banking Royal Commission and the Productivity Commission revealed, superannuation trustees have consistently failed to act in their members best interests. Many trustees fail to use their bargaining power to provide members with appropriate or suitable insurance products. As a result, Australians are routinely sold into insurance that is unnecessary, unsuitable and extremely complex to compare. Given superannuation trustees’ inertia in ensuring members have appropriate insurance, we maintain deep scepticism that trustees have sufficient incentives to bargain away unfair contract terms in agreements they sign with insurance companies. At the very least, giving a green light for trustees to sign their member’s up to contracts that would otherwise be considered unfair sends the wrong message.

This is particularly stark when a trustee owns the insurance company that provides insurance to members. For example, AMP Super engages with AMP Life for their insurance contracts in superannuation. This arrangement was last reviewed by AMP Super in 1995, some 24 years ago.⁵ There is very limited incentive for AMP to ensure there are no unfair contract terms in their insurance policies. This leaves people exposed in situations where they think they are protected with life

³ 16-191MR, 2016, ASIC curbs misleading pet insurance advertising

⁴ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, 2019 p.496

⁵ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, transcript, P-5863

insurance or income protection insurance, but are unable to make a claim due to the inclusion of an unfair contract term.

Increasing penalties for unfair contract terms

It is imperative that strong penalties exist when a business breaks the law. As it stands, there are no penalties for a business who includes an unfair term in their standard form contracts - instead, the terms are 'voidable'.

We support the ACCC's call to strengthen penalties for unfair contract terms to empower regulators to provide penalties and infringement notices for companies who include unfair contract terms.⁶ Stronger penalties will deter businesses from including unfair contract terms in the first instance. Importantly, this will also punish companies who use egregious unfair contract terms that take advantage of people. Increasing penalties is especially important given the widespread harm that an unfair contract term can have on the financial and emotional wellbeing of an individual.

For further information please contact CHOICE on pveyret@choice.com.au

Yours sincerely,



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⁶ ACCC 2018, 'Major changes needed to get rid of unfair contract terms', via <https://www.accc.gov.au/media-release/major-changes-needed-to-get-rid-of-unfair-contract-terms>