

Exposure Draft Insurance Contracts Bill

Submitted to:

Ministry of Business, Innovation and Employment

9 May 2022



Commerce Commission submission on the Consultation Paper – Exposure Draft Insurance Contracts Bill

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the *Consultation Paper – Exposure Draft Insurance Contracts Bill* (the Paper) and the *Exposure Draft Insurance Contracts Bill* (the Bill).
2. We have provided input to the Ministry of Business, Innovation and Employment (MBIE) during policy development for the exposure draft Bill including to MBIE’s Options Paper *Insurance Contract Law Review* in April 2019.¹ Given our experience enforcing provisions of the Fair Trading Act 1986 (FTA), our input has focused on matters of practical implementation, with particular regard to the prohibition on the use of Unfair Contract Terms (UCTs).
3. Our previous submissions to MBIE have highlighted our preference that the generic UCT regime under the FTA should apply to insurance contracts, without the need for insurance-specific exemptions. This position aligns with the stated policy intent in the Paper to provide extra protection for consumers regarding insurance contracts.
4. We consider UCT law under the FTA is capable of accommodating the business needs of the insurance industry and therefore, sector-specific exceptions to general legal requirements or prohibitions are not necessary.
5. However, if the government wishes to clarify how the generic exemptions apply to insurance contracts and in particular, the definition of “main subject matter”, the Commission supports the option that provides the greatest protection for consumers ie a narrow interpretation of “the main subject matter”.
6. We consider a broad definition of “main subject matter” will not achieve the policy objective. This is because it would potentially allow a range of policy limitations and exclusions to be captured, which would then not be open to challenge for unfairness. In our view, this broader option would not result in any greater level of protection for consumers than currently exists.
7. Regarding disclosure of information, we support establishing clear requirements that enable consumers to better understand and compare insurance policies.
8. Further, we would like to see consumers and business consumers given the right to take private action under the UCT provisions without first requiring a Court declaration that the term is a UCT. This would more effectively deter the use of UCTs and encourage greater compliance.

¹ *Insurance Contract Law Review Options Paper: Submission by Commerce Commission*, June 2019; and *Protecting Business and Consumers from Unfair Commercial Practices: Submission by Commerce Commission*, February 2019.

Background to the Commission and our role in fair trading

9. The Commission is an independent Crown entity and is New Zealand's competition, fair trading, consumer credit and economic regulatory agency. We play a crucial role in ensuring New Zealand's markets are competitive, consumers are well informed and protected, and sectors with little or no competition are appropriately regulated.
10. The Commerce Commission is responsible for enforcing the Fair Trading Act 1986 (FTA) which includes the UCT provisions.
11. Our views have been informed by our practical experience enforcing the UCT provisions of the FTA, and by feedback we receive from stakeholders. Our interest lies in making markets work well for New Zealand consumers and businesses and the role that clear and consistent laws play in enabling this.

Feedback on the *Consultation Paper and Exposure Draft Bill*

12. We support the intent of the Bill to:
 - 12.1 promote the confident and informed participation of insurers, policy-holders, and other participants in the New Zealand insurance market; and
 - 12.2 ensure that the provisions included in contracts of insurance, and the practices of insurers in relation to those contracts, operate fairly.
13. We comment substantively on two areas: UCTs and plain language requirements.

Unfair Contract Terms

14. We support consumers having the same level of protection from unfair terms in insurance contracts as they do for other types of contracts. The general UCT provisions under the FTA can accommodate the business needs of the insurance industry, and no exceptions are required. Section 46L(1)(b) allows consideration of the legitimate interests of the party within the context of the industry, when assessing whether a term is "reasonably necessary". As such, we maintain that the exceptions for insurance contracts are unnecessary and the generic UCT regime of the FTA should apply to all insurance contracts.
15. The Paper and the Bill outline two options to extend UCT provisions to insurance contracts:
 - 15.1 Option A – a narrow approach that confines the "main subject matter" of insurance contracts to the thing being insured, the sum insured and the excesses and other deductibles.
 - 15.2 Option B – a broader approach that defines the "main subject matter" of insurance contracts in terms of the risk accepted by the insurer and the insurer's liability. This would include the thing being insured, the sum insured, excesses or deductibles, and limitations and exclusions that affect the scope of insurance cover.

16. If MBIE wishes to clarify the generic exemption for the “main subject matter” specifically for insurance contracts, of the two options we strongly support Option A. Option A provides more certainty and clarity for both policyholders and insurers compared with Option B. It appropriately confines the main subject matter of an insurance contract to what is being insured, such as the particular property or person’s life being insured.
17. In practice, we consider Option B is so broad that it defeats the purpose of providing extra protection for consumers. Option B is not likely to support the policy intent to provide consumers with the same level of protection from genuinely unfair terms in insurance contracts as exist for other types of contracts.
18. We do not consider that the terms proposed to be included at s 46KA(2)(a) and (d) of Option B appropriately define the “main subject matter of the contract”. These terms, particularly those that identify uncertain events or limit the liability of the insurer, could foreseeably cover a large number of terms in an insurance contract and would not necessarily be clear to the policyholder. It is also unlikely that these terms would be subject to genuine negotiation or choice by the policyholder.
19. In our view, the main subject matter should be limited in scope and should be plain to the consumer on the face of the contract. In our current published guidance on UCTs, we note that terms defining the main subject matter are often subject to genuine negotiation or the consumer is provided with a clear choice among several options, and the consumer is unlikely to misunderstand what they are acquiring.
20. If Option B is implemented, then we would suggest that a transparency element is added to s 46KA(2) such that s 46KA(2)(a) to (d) only defines the main subject matter of the contract to the extent that they are transparent terms.
21. While out of scope for this consultation, we reiterate our previous views regarding strengthening the enforcement of UCTs. Currently, only the Commission can apply to a court to have a UCT declared to be unfair. Unless a court has previously declared a term to be unfair, businesses that include UCTs in their standard form contracts are not civilly or criminally liable for doing so. Any decision the Commission makes to pursue such an action is taken in accordance with our Enforcement Response Guidelines.²
22. Private enforcement and immediate access to a financial sanction of some sort would allow greater enforcement of the UCT provisions, more effectively deter the use of UCTs, and encourage greater compliance.

² The Commission prioritises limited enforcement resources to focus on matters where the greatest harm exists or may occur, refer https://comcom.govt.nz/__data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf.

Plain language requirements

23. As previously advised, we generally support clear requirements relating to the disclosure of information to enable consumers to better understand contracts.³
24. In the Commission's experience, in the context of its enforcement of the Credit Contracts and Consumer Finance Act 2003 (CCCFA), the requirement to use plain language in credit contracts is an important feature to assist consumers. The provisions in the CCCFA:⁴
- 24.1 ensure the terms of an agreement are expressed in plain language in a clear, concise and intelligible manner; and
- 24.2 support borrowers to make informed decisions and understand the agreement they are entering.
25. Since 2016 the Commission has successfully challenged several companies' contract terms relating to issues including plain language provisions under the CCCFA.⁵

Conclusion

26. We would be happy to further discuss the points raised in this submission. In the first instance please contact Yvette Popovic, Privacy of natural persons
27. We thank MBIE for the opportunity to provide comment.

³ Refer Insurance Contract Law Review Options Paper: Submission by Commerce Commission, June 2019 at [19].

⁴ Section 9C(3)(b)(ii) of the CCCFA and paragraph 7.24 of Part 7 of the Responsible Lending Code (issued by the Minister of Commerce and Consumer Affairs under s 9G of the CCCFA).

⁵ Refer: *Commerce Commission v Ferratum NZ Ltd* [2020] NZHC 1607; *Commerce Commission v Zee Shop Ltd* [2017] NZDC 18181; *Commerce Commission v Flexibuy Ltd* [2016] NZDC 2990; *Commerce Commission v Betterlife Corporation Ltd and Goodring Company Ltd* [2016] NZDC 10579.