



10 February 2017

Committee Secretariat
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

Submission: Senate Standing Committee on Economics inquiry into Australia's general insurance industry

Thank you for the opportunity to comment on the Committee's inquiry into the general insurance industry.

This submission examines home and car insurance from the consumer's perspective. It focuses on transparency in Australia's home and car insurance industries, the benefits of establishing an independent insurance comparison service in Australia; and the law reform needed to facilitate an effective comparator site (terms of reference (c), (e) and (f)).

In our view, a new independent comparator site would face significant limitations due to the complexity, variation and lack of transparency in general insurance policies. This leaves people facing uncertainty, delays and hardship when they make claims.

The consumer harm we see in the general insurance industry would best be addressed by law reform to bring insurance contracts under the unfair contract terms regime, revive the standard cover regime so that it better fulfils its original purpose, and place the onus on insurers to not sell unsuitable insurance.

Our comments are detailed more fully below.

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About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Recommendations

1. An evaluation of existing comparator sites should inform the assessment of whether and how to establish a new general insurance comparator website. This evaluation should involve consumers and consumer advocacy organisations.
2. Consideration should be given to the ACCC good practice guidelines for comparison websites becoming mandatory.
3. The Committee should explore reforms to the standard cover regime for general insurance to bring it into line with its intended purpose. These would include more effective disclosure requirements and making standard cover a form of 'default' cover.
4. The effectiveness of the proposed Product Design and Distribution Obligations should be monitored and measured through real consumer outcomes, that is, reductions in sales of unsuitable insurance.
5. The Insurance Contracts Act should be amended to mirror the unfair contract terms regime under the *Australian Securities and Investments Commission Act 2011* (Cth) (**ASIC Act**) or the provisions proposed by the *Insurance Contracts Amendment (Unfair Terms) Bill 2013* (Cth).

Insurance transparency for consumers

The general insurance industry in Australia is characterised by a vast range of policies which include varied conditions, inclusions, exclusions and definitions. Policies are not consistent and do not conform to a minimum standard. Choosing a product can be a complicated attempt at guesswork. This is largely due to the lack of transparency in insurance products.

General insurance lacks transparency from a consumer perspective in three main ways:

- Different comparator websites cover different selections of policies, and some are closely connected with insurers, through direct ownership or commission/fee arrangements on sales.
- Insurance contracts do not have to comply with the unfair contract terms regime, unlike virtually every other consumer contract in the economy. This special treatment creates a significant gap in consumer protections.

- The standard cover regime for general insurance is not operating in line with its intended purpose, which means that there are no minimum standards that a consumer can rely on in an insurance policy.

A 2014 report from the Victorian Office of the Fire Services Levy Monitor also found that the Australian home insurance market suffers from poor product and price disclosure, a severe lack of competition, and high profits. This report concluded that ‘regulatory failure’ was a contributing factor to the problems on the demand side of the market.¹

These problems and complexities lead people to poor outcomes, such as:

- not shopping around and instead buying the first policy they see,
- comparing products on price or brand recognition, rather than comparing features and what is suitable for their needs,
- not reviewing or switching their existing insurance policies, and
- having claims denied unexpectedly.

The lack of transparency leads to distortions in the insurance market. In particular, we see insurers competing on product price rather than features, people underinsuring themselves and people experiencing severe financial and personal stress when their claims are unexpectedly denied. This harm to consumers persists despite numerous comparison websites and a legal regime which was introduced more than three decades ago to improve transparency in the market.

Comparator websites

Government comparison websites

We are aware of two federal government-run general insurance comparator websites, which cover home, strata and health insurance. While this inquiry is not considering health insurance, we note that the most significant government-run insurance comparator service covers health insurance.

We are also aware of a site run by the Swedish consumer affairs agency.² This site compares policy features and gives each insurer’s policy a rating out of five. It also gives insurers a ‘quality index’ rating out of 100. For a site such as the Swedish one to operate effectively, there must be broad consumer awareness and use of the site, and insurers must be invested in obtaining a strong rating. In that way, a government comparator site could positively influence product design. It does not appear that existing Australian government comparator sites fulfil this purpose in the market.

¹ Victorian Fire Services Levy Monitor, *Discussion Paper: Enhancing the consumer experience of home insurance: Shining a light into the black box*, July 2014.

² See <http://www.konsumenternas.se/forsakring/olika-forsakringar/om-hemforsakringar/jamfor-hemforsakringar>.

North Queensland home insurance

The North Queensland home insurance (**NQHI**) comparison website was established in March 2015 and is administered by the Australian Securities and Investments Commission (**ASIC**). The NQHI site was established in response to the high cost of home and strata insurance in northern Queensland.³ In some cases, people in the region cannot insure their properties at all.⁴

We are unaware of any data or evaluation on the NQHI website. The final report of Treasury's Northern Australian Insurance Premiums Taskforce in November 2015 did not comment on the impact or any future expectations of the site.⁵

Private health insurance

The privatehealth.gov.au website, established in 2007, allows people to enter some basic details and obtain a list of health insurance policies which may match their needs. It provides a Standard Information Sheet on the features of every policy. It also compares the performance, coverage and complaints of each insurer to the industry average.

In 2014-15 there were more than one million unique visitors to the site.⁶ However, according to the Commonwealth Ombudsman's latest report, the complexity and lack of meaningful description in policies, and the inconsistent terminology used by insurers, means that 'consumers still find health insurance difficult to understand'. The Ombudsman stated that a review of Standard Information Statements would be unlikely to 'address the cause of consumer confusion as identified by the ACCC, which is the lack of consistency in the industry itself'. The Ombudsman recommended 'broad reform of health insurance information'.⁷

In short, despite the government's health insurance comparator site being well-established, the underlying complexity and inconsistency in policies means that the site does not enable people to easily and accurately choose the right policies for their needs.

We understand that the government is currently considering streamlining health insurance into simple categories and mandating minimum standards.⁸ Similar considerations would be useful in other areas of general insurance.

Commercial comparison websites

In addition to the government-run sites, a plethora of commercially owned and operated insurance comparison websites are currently operating.

³ See Treasury, [Discussion Paper: Addressing the high cost of home and strata title insurance in North Queensland](#), 9 May 2014; Senator the Hon Mathias Cormann, [Media Release: Initiatives to help address insurance affordability for North Queensland](#), 23 October 2014.

⁴ Financial Rights Legal Centre, [Submission: Addressing the high cost of home and strata title insurance in North Queensland](#), June 2014, p 1.

⁵ Treasury, [Northern Australia Insurance Premiums Taskforce: Final Report](#), November 2015.

⁶ Commonwealth Ombudsman, [State of the Health Funds Report 2015](#), March 2015, p 7.

⁷ Commonwealth Ombudsman, p 6.

⁸ Sean Parnell, [Coalition to simplify private health policies](#), *The Australian*, 2 January 2017.

A CHOICE review of four of the biggest commercial insurance comparator websites found that:

- the site operators can earn exorbitant fees from insurers on sales through the sites, which can inflate the premiums people pay. For example, on one site, upfront commissions are up to 50% of the first years' premium, and trailing commissions are up to 6.5% of premiums over the life of the insurance policy,
- some sites mislead people as to what proportion of policies on the market they compare, and
- some sites are owned by the insurance companies which are selling the policies the site compares.⁹

The extent of analysis and evaluation that insurance comparison sites undertake is varied. Some are heavily based on price and provide scant value to consumers. Others have more detailed rating methodologies. For example, CANSTAR rates car insurance on price (70% - 80%) and features including benefits and options, exclusions, excesses, claims processes and customer satisfaction.¹⁰

In 2011, the UK's Financial Services Authority—now Financial Conduct Authority (**FCA**)—reported concerns that commercial insurance comparison site operators were not complying with the restriction on financial promotion under the *Financial Services and Markets Act 2000* (UK) and were not complying with FCA regulations on insurance businesses and management systems.¹¹ The FCA stated that this meant consumers may be misled about prices, policy features and how to resolve claims and disputes under the policy, and were at risk of buying unsuitable insurance.

A 2014 Australian Competition and Consumer Commission (**ACCC**) report on comparison websites more broadly found that the sites are 'are generally a sales and marketing platform' and could potentially mislead or deceive consumers. The ACCC found that, while comparison sites can simplify product information and purchasing, they may misrepresent their market coverage and the savings offered by purchasing through the sites. The ACCC was concerned about commercial relationships that are undisclosed to consumers and the quality of product information.¹²

At worst, commercial comparison sites are simply sales channels which mislead people and generate high commissions for the site operators.

Good principles for comparison websites

Our criticism of existing comparison websites does not imply that such sites, if effective, do not have an important role to play to help consumers activate competition and make good decisions. In complex markets, such as insurance and financial services, they can help guide

⁹ CHOICE, [Insurance comparison sites: Where do you go for independent advice?](#), 19 August 2014. The review looked at iSelect, Compare the Market, Choosi and CANSTAR.

¹⁰ See <https://cdn.canstar.com.au/wp-content/uploads/2016/05/Methodology-May-2016.pdf>.

¹¹ Financial Services Authority (now FCA), [Guidance on the Selling of General Insurance Policies Through Price Comparison Websites](#), October 2011.

¹² ACCC, *The comparator website industry in Australia: An Australian Competition and Consumer Commission report*, November 2014, pp 1-2.

consumers through product comparison, highlight key product features and pitfalls and explain the range of options available.

The ACCC has published good practice guidelines for comparison websites,¹³ which we support. These guidelines cover issues such as:

- facilitating honest, like-for-like comparisons,
- transparency about commercial relationships,
- clear disclosure of who and what is being compared,
- independence of operators,
- fairness of algorithm results, and
- savings representations.

It is not clear to us, however, that commercial comparison sites comply with these guidelines. Consideration should be given to these guidelines becoming mandatory.

Recommendation 1

An evaluation of existing comparator sites should inform the assessment of whether and how to establish a new general insurance comparator website. This evaluation should involve consumers and consumer advocacy organisations.

Recommendation 2

Consideration should be given to the ACCC good practice guidelines for comparison websites becoming mandatory.

'Minimum standards' for insurance

One of the major barriers to people being able to effectively compare insurance policies is the lack of minimum standards in insurance policies. This is despite the existence of a standard cover regime for general insurance for more than 30 years.

Background

In 1982, the Australian Law Reform Commission (**ALRC**) reported on insurance law, focusing on the need for fair competition and informed choice by consumers. The report recommended a system of standard cover for certain types of domestic insurance, 'to prevent insureds being surprised by unusual terms in major fields of domestic insurance'.¹⁴ The ALRC reasoned that:

Policies contain numerous terms which affect in unexpected ways the cover offered. In a few cases, the insured's attention is drawn to the relevant limitation at the time when

¹³ ACCC, *Comparator websites: A guide for comparator website operators and suppliers*, August 2015.

¹⁴ ALRC, *Report No 20: Insurance Contracts*, 1982, p xxii.

*the cover is arranged. In the vast majority of cases, however, nothing is said. The insured's ignorance remains undisturbed until he (sic) makes a claim.*¹⁵

The ALRC characterised the problem as a distortion in the insurance market:

*The market at present is distorted by the fact that purchaser discrimination is limited to matters like price, little or no account being able to be taken of differences in the nature of the products being sold. Mandatory provision of information relevant to this matter would resolve the distortion and facilitate the more effective operation of market forces.*¹⁶

A key element of standard cover is that an insurer must bring a consumer's attention to any deviation from standard cover in a policy. The ALRC described this as:

*An insurer should be free to market policies which offer less than the standard cover. If it chooses to do so, it should have to draw the insured's attention to that fact and to the nature of the relevant diminution in cover. If it fails to do so, the contractual terms should be overridden to the extent to which they provide cover which is less than the standard.*¹⁷

Standard cover regime

The standard cover regime we have today prescribes certain insurance contracts, including home and motor vehicle insurance, and specifies the standard cover, events, exclusions and minimum benefits under those contracts.¹⁸

An insurance policy can provide less than standard cover if:

- the insurer 'clearly informed the insured in writing (*whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise*)', (emphasis added) or
- 'the insured knew, or a reasonable person in the circumstances could be expected to have known' that the insurance contract provided less than the standard cover, or no cover.¹⁹

The requirement for how an insurer must inform a consumer (emphasis above) was clarified after the original Bill passed Parliament. The amendment made it clear that the information could be provided in various ways, including in the insurance policy, without drawing attention to the terms which provide less than standard cover.²⁰

¹⁵ ALRC, Report 20, p 44, para 69.

¹⁶ ALRC, Report 20, p 44, para 70.

¹⁷ ALRC, Report 20, p 44, para 69.

¹⁸ The prescribed contracts under the standard cover regime are motor vehicle insurance, home building and home contents insurance, sickness and accident insurance, Consumer Credit Insurance and travel insurance: Pt 5 of the *Insurance Contracts Regulations 1985* (Cth). For other types of insurance which sit outside the standard cover regime, insurers must disclose any 'unusual' terms in a similar way to the standard cover requirement: s 37 of the Insurance Contracts Act.

¹⁹ Insurance Contracts Act s 35(2).

²⁰ Amended by Act 65 of 1985 and Act 193 of 1985: see Peter Mann, *Mann's Annotated Insurance Contracts Act*, 6th edn, 2014, Lawbook Co., para 35.30.

Problems with standard cover

The way the standard cover regime has been formulated makes genuine comparison of insurance products nigh on impossible. The problems with the standard cover regime as it stands are threefold.

Standard cover has low requirements

Today, the requirement to 'clearly inform' a consumer of the lesser cover under a policy only requires the insurer to give the consumer a product disclosure statement (PDS). These are typically lengthy and the insurer does not need to highlight any cover, exclusions or benefit amounts which fall short of the prescribed standard.²¹ The last minute change to standard cover laws did not just 'clarify' things for insurers—it removed the obligation for them to comply with the regime at all. It is ineffective in ensuring that consumers know what terms in their insurance policies are better or worse than or equal to the standard cover.

It is no surprise then that policies offering less than standard cover are widespread today.

Standard cover on the market

A Consumer Action review of home building, home contents and comprehensive car insurance offered by five major Australian insurance brands found:

- none of the home building or home contents policies provided standard cover,²²
- one of the comprehensive car insurance providers appears to offer standard cover (however this analysis is complex and uncertain).²³

Disclosure is outdated

In addition to the problems specific to the standard cover regime, mandatory disclosure is a dated consumer protection which has been acknowledged to be ineffective in the financial services market. As ASIC stated in its submission to the 2014 Financial System Inquiry (**FSI**):

*Economic research in behavioural economics, as well as the experience of regulating retail financial markets, indicates that investors and consumers are prone to behavioural biases that mean decision making is often not instrumentally rational. This undermines the effectiveness of disclosure as a regulatory tool. Importantly, these behavioural biases are significant and systematic, rather than random and trivial.*²⁴

²¹ See Mann, para 35.50.

²² All home building and contents policies reviewed excluded actions of the sea. Landslide, subsidence and erosion were excluded except in certain circumstances. Flood was often optional. Standard cover for home building and home contents would insure all of these risks.

²³ Four policies appeared to offer a narrower range of cover where a person other than the insured was driving the car, with the insured's permission, and incurred liability to a third party. Others excluded damage or loss to standard accessories, which are covered under standard cover.

²⁴ ASIC, *Financial System Inquiry: Submission by the Australian Securities and Investments Commission*, April 2014, para 40.

The FSI Final Report found that disclosure ‘plays an important part in establishing the contract between issuers and consumers’ however ‘in itself, mandated disclosure is not sufficient to allow consumers to make informed financial decisions’.²⁵

Despite the recommendations of the FSI, consumer protection in insurance is still based on mandated disclosure. In 2015, Consumer Action was involved in the Insurance Council of Australia’s (ICA’s) Effective Disclosure Taskforce. The Taskforce reported that ‘the disclosure regime is not meeting its primary objective of helping consumers buy insurance that meets their needs’.²⁶

The standard cover regime is therefore not only ineffective because of the way it has been formulated, but because it is based on an outdated concept of consumer protection. The inadequacy of mandated disclosure is exacerbated by the fact that the policies themselves are complex and varied.

Standard cover is low-profile

The standard cover regime relies on consumers knowing what standard cover looks like, and what they should expect from their insurance. This is a core failure. There is extremely low public awareness that standard cover exists, let alone what levels of cover it supposedly mandates. There are no accessible, consumer-focused resources on standard cover.²⁷

The standard cover regime also appears to provide little recourse for consumers when it is raised.

Standard cover—Financial Ombudsman Service determinations

Consumer Action’s research has found that, of the thousands of Financial Ombudsman Service (FOS) domestic insurance dispute determinations from 1 July 2013 to date:

- just 16 considered standard cover in home and car insurance,
- six determinations found that standard cover applied because a PDS was not provided, and
- the majority related to home building and contents insurance claims.

The key issue in standard cover disputes has been whether or not the insurer can prove that it provided a PDS to the consumer. If so, the policy reverts to standard cover, to the consumer’s benefit. The fact that provision of a PDS is the primary factor in whether standard cover applies highlights to us that mandated disclosure is a low threshold for insurers to meet, and that it does not effectively ensure consumer awareness or comprehension.

More than 30 years after it was established, the standard cover regime has clearly not had the impact on the market that the ALRC intended. In practice, it appears to be operating contrary to its original purpose.

²⁵ Treasury, *Financial System Inquiry: Final Report*, November 2014, p 193.

²⁶ ICA Effective Disclosure Taskforce, [Too Long; Didn’t Read: Enhancing General Insurance Disclosure](#), October 2015.

²⁷ We could not find reference to standard cover on ASIC’s MoneySmart website ([moneysmart.gov.au](#)) or the Insurance Council of Australia’s Understand Insurance site ([understandinsurance.com.au](#)), both accessed 6 February 2017.

Standard cover has failed to address the significant problems people face when buying insurance. The core problems which persist include:

- comprehension—the complexity of insurance policies means that people without insurance expertise are unlikely to comprehend their policy in full,
- comparison—differences in terms, conditions and definitions make it difficult to compare policies, even where a person knows what features they want, and
- suitability—the comprehension and comparison problems mean that people end up with unsuitable insurance, for example, by underinsuring their home and contents.

Effective reforms

Two key changes to the standard cover regime could, in combination, make it a more effective consumer protection mechanism.

First, the Committee could consider the possibility of making standard cover a form of ‘default’ cover. This would mean a consumer could opt for lesser or higher cover, but standard cover would act as a safety net. Consideration would need to be given to pricing of a default product and regulation of sales processes.

Second, disclosure requirements should be reformed to reflect the intended purpose of the standard cover regime. Where a policy does not meet standard cover, it should be mandatory for insurers to make it clear in the PDS and marketing material, and to expressly identify in the PDS the policy features which fall short of the standard.

While reforms to the standard cover regime would not in themselves amount to an effective consumer protection regime for the insurance market, they could, in tandem with other reforms, better enable people to choose suitable insurance cover.

Recommendation 3

The Committee should explore reforms to the standard cover regime for general insurance to bring it into line with its intended purpose. These would include more effective disclosure requirements and making standard cover a form of ‘default’ cover.

From disclosure to suitability

Disclosure-based consumer protections are widespread but systemically ineffective per se. The ICA itself has cited research showing that one in three people never look at their PDS and approximately half find their PDS difficult to understand.²⁸

The FSI recommended ‘a targeted and principles-based product design and distribution obligation’ on financial product issuers and distributors, similar to the responsible lending

²⁸ Insurance Council of Australia, *Submission to Financial System Inquiry Interim report*, August 2014, p 7.

obligations on credit providers.²⁹ This approach is essentially product safety regulation. Unsuitable financial products, including insurance, can have devastating impacts on people's lives. For some people, unsuitable insurance can lead to severe financial stress and even loss of the family home. A product safety or suitability-based approach aims to mitigate these risks.

The move away from disclosure-based consumer protection towards an onus on insurers to sell suitable products is inevitable and overdue for Australia.

UK regulation has already taken this direction. Insurers, arrangers and adviser in the UK must 'take reasonable steps to ensure that a customer only buys a policy under which he (sic) is eligible to claim benefits'.³⁰ Further, if a firm sells insurance with advice in the UK, it should 'take reasonable care to ensure that a policy is suitable for the customer's demands and needs, taking into account its level of cover and cost, and relevant exclusions, excesses, limitations and conditions'.³¹

We note that Treasury is currently consulting on the proposed Product Design and Disclosure Obligations for Australia.³² These proposals will require providers of financial products, including insurers, to:

- identify appropriate target and non-target markets of consumers,
- take into account whether the insurance product satisfies the target market's risk management needs and their ability to understand the key product features, and
- use appropriate marketing and distribution channels.

Insurance distributors must have in place reasonable controls to ensure that products are sold in line with insurers' expectation.

Insurers will have to review products regularly to assess whether any changes are needed to design and distribution. In our view, it is critical that this is a thorough and transparent process, to improve consumer trust in the insurance sector.

In general insurance, we would expect the new obligations to have real impacts for consumers, for example:

- the insurance sales process includes 'knock out' questions which prevent a person buying inappropriate insurance, for example, a person living in a flood zone is not sold home building insurance with a flood exclusion,
- home building underinsurance is reduced, for example, insurers provide total replacement rather than sum-insured cover, and
- add-on 'GAP' insurance is not sold to people who have comprehensive car insurance with an agreed value.³³

²⁹ FSI Final Report, recommendation 21. Responsible lending is regulated under Ch 3 of the *National Consumer Credit Protection Act 2009* (Cth).

³⁰ FCA, *Insurance Conduct of Business Sourcebook*, 2016, para ICOBS 5.1.1G.

³¹ FCA, 2016, para ICOBS 5.3.2G,

³² Treasury, *Design and Distribution Obligations and Product Intervention Power Proposals Paper*, December 2016.

³³ For more information on GAP insurance, see demandarefund.com.

In short, the forthcoming Product Design and Distribution Obligations should ensure that consumers can buy safe and suitable insurance products.

Recommendation 4

The effectiveness of the proposed Product Design and Distribution Obligations should be monitored and measured through real consumer outcomes, that is, reductions in sales of unsuitable insurance.

Unfair contract terms

Another area of insurance regulation which is failing consumers is the insurers' exemption from the unfair contract terms (UCT) regime under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).³⁴ Virtually every other consumer contract in the economy is bound by the UCT laws. The UCT regime was recently expanded to cover contracts entered into by small businesses.³⁵

The exemption that insurers enjoy means that consumers do not have the usual protections from contract terms which unfairly advantage a trader over a consumer, and which cause the consumer detriment. Instead, the more complex 'duty of utmost good faith' applies to insurance contracts.³⁶

The 2004 review of the *Insurance Contracts Act 1984* (Cth) (Insurance Contracts Act) found that the duty of utmost good faith had the 'potential to be utilised by insureds in connection with insurer conduct that might otherwise be dealt with under statutes dealing with unfair contracts or unconscionable conduct'.³⁷

However, analysis by National Legal Aid in 2009 found that the duty of good faith is in fact rarely invoked by either consumers or ASIC.³⁸ This mechanism has proved inaccessible, ineffective, or both. It does not protect consumers from broad exclusions or other clauses in insurance contracts that would likely be 'unfair'.

Consumer Action has identified numerous terms in home and car insurance policies which would potentially be 'unfair' if the UCT regime covered insurance contracts.

³⁴ ASIC Act Pt 2 Div 2 Subdiv BA. These provisions mirror the Australian Consumer Law Ch 2 Pt 2-3.

³⁵ From 12 November 2016 under the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

³⁶ Insurance Contracts Act ss 13 and 14.

³⁷ Treasury, *Review of the Insurance Contract Act 1984 (Cth), Final Report on second stage: Provisions other than section 54*, June 2004, para 6.16, p 54.

³⁸ National Legal Aid, [Submission to Senate Economics Legislation Committee Inquiry into the Trade Practices Amendment \(Australian Consumer Law\) Bill](#), 14 August 2009, p 4.

Example: Home Building Insurance³⁹

How to pay your excess

When you make a claim we will choose whether to deduct the applicable excesses from the amount we pay you or direct you to pay the excesses to us or to the appointed repairer or supplier. We may require you to pay the excesses in full before we pay your claim or provide any benefits under your policy. The fact we have asked for payment of your excess does not of itself mean that your claim has or will be accepted by us either in whole or in part.

In our view, this and similar clauses are unfair because:

- The requirement to pay the excess before the claim is paid causes a significant imbalance between the consumer and insurer. Someone in financial distress, whose home has been damaged or completely destroyed, may not be able to afford to pay the excess. They will then not be able to claim the benefit they are entitled to.
- This requirement is also not commercially necessary. An insurer could instead deduct the excess from the benefit paid or, if the insurer pays to rebuild or repair the home, they could bill the consumer and/or allow the excess to be paid in instalments.
- This clause is also misleading for consumers. The Insurance Contracts Act does not allow an insurer to deny a claim based on what the consumer does after the contract is entered into, unless the consumer's actions cause or contribute to the loss.⁴⁰ The General Insurance Code of Practice also entitles consumers to apply for financial hardship when making claims.⁴¹

Example: Motor Vehicle Insurance—Uninsured Motorist Extension⁴²

[The insurer will cover you if] Your vehicle is damaged in a collision with another vehicle driven by an uninsured driver, but only if:

- we agree you are not at fault and
- you give us the name and address of the uninsured driver and
- registration details of the vehicle.

Clauses like this are common in comprehensive car insurance policies and can give an insurer complete discretion to decide whether the third party driver is at fault, seemingly without regard to facts or evidence before them.

We have seen consumers face significant hurdles when they claim under Uninsured Motorist Extension clauses with various insurers. Often claims are not paid unless the not-at-fault driver

³⁹ AAMI, [Home Building Insurance: Product Disclosure Statement](#), 1 October 2013.

⁴⁰ Insurance Contracts Act s 54.

⁴¹ ICA, *General Insurance Code of Practice*, '8. Financial Hardship'.

⁴² Suncorp, [Motor Vehicle Insurance Product Disclosure Statement](#), 28 May 2010.

proves that the other driver is uninsured and provides their name, registration and other details to the insurer. This will be impossible if the at-fault driver is uncooperative or threatening, or flees the scene of the accident.

Ruby's story

Ruby was hit by a car while riding her motorcycle. The car driver fled the scene.

Ruby's insurance policy said the insurer would pay up to \$3,000 for damage to the bike if the insurer thought the accident was caused by an uninsured driver or rider.

The insurer declined Ruby's claim because she did not have the details of the other driver. Consumer Action assisted Ruby to lodge a dispute through FOS. The insurer then agreed to pay Ruby's claim.

As stated in our recent submissions to the current Australian Consumer Law Review and Parliamentary Joint Committee life insurance industry inquiry,⁴³ there is no justification for excluding insurance contracts from the unfair contract terms regime.

Applying the unfair contract terms regime to standard form insurance contracts would:

- compel insurers to remove the perverse imbalances in insurance contracts,
- improve outcomes for people who make insurance claims, including by reducing disputes, and
- improve public trust in the insurance industry, which is currently at rock bottom.

The lapsed *Insurance Contracts Amendment (Unfair Terms) Bill 2013* (Cth) may have been a false start in extending full UCT protections to general insurance consumers. However, it is a solid blueprint for reform, developed with industry and consumer representatives.

Consumer Action strongly supports the extension of the unfair contract terms regime to insurance contracts.

Recommendation 5

The Insurance Contracts Act should be amended to mirror the unfair contract terms regime under the ASIC Act or the provisions proposed by the *Insurance Contract Amendment (Unfair terms) Bill 2013* (Cth).

⁴³ Consumer Action Law Centre, [Australian Consumer Law Review—Submission](#), 30 May 2016; [Submission: Australian Consumer Law Review: Interim Report](#), 9 December 2016; [Submission: Life insurance industry inquiry, 25 November 2016](#).

Please contact Susan Quinn on 03 9670 5088 or at susan@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chief Executive Officer

A handwritten signature in black ink that reads "Susan Quinn". The signature is written in a cursive, flowing style.

Susan Quinn
Senior Policy Officer