30 May 2016

Mr Aidan Storer, Manager
ACL Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Storer

Australian Consumer Law Review Issues Paper

IAG welcomes the opportunity to provide a submission on the Australian Consumer Law Review Issues Paper (March 2016).

About IAG

IAG is a general insurance group with controlled operations in Australia, New Zealand, Thailand, Vietnam and Indonesia, employing more than 15,000 people. Our businesses underwrite over $11.4 billion of premium per annum, selling insurance under many leading brands including NRMA Insurance, CGU, SGIO, SGIC, Swann Insurance and WFI (Australia); NZI, State, AMI and Lumley (New Zealand); Safety and NZI (Thailand); AAA Assurance (Vietnam); and Asuransi Parolamas (Indonesia). IAG also has interests in general insurance joint ventures in Malaysia and India.

Consumer Law

Consumer protection is of fundamental importance to the Australian economy. As noted in the Issues Paper "*Consumers benefit when they can confidently participate in markets where businesses trade fairly*".[1] Consumer protection laws can assist in providing that confidence, particularly where they operate in a manner which balances the interests of consumers, business and regulators, in addition to supporting competition and innovation.

Where a change in consumer protection laws is contemplated, there should be evidence that supports the need for change, and confidence that the proposed change in the law will achieve the right outcomes from the perspective of all relevant stakeholders.

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[1] Australian Consumer Law Review, *Issues Paper* (March 2016), page 4.

The Productivity Commission Inquiry Report, Review of Australia's Consumer Policy Framework (30 April 1998) noted:

"[The Consumer Policy] framework has been evolving in response to the changing market environment in which consumers operate...and to the growing recognition that:

- *some regulatory measures to protect and empower consumers can have significant, and often unintended, costs for businesses and consumers alike; and*
- *consumer policies should be evidence-based and take account of how consumers, businesses and regulators actually behave."*[2]

While the Productivity Commission was commenting on the framework that existed in 1998, the points made are equally relevant today when considering whether changes in the law are warranted.

It is also important that national consumer protection laws do not overlap or operate inconsistently with industry-specific and jurisdiction-specific laws relating to the same or similar conduct.

Our submission

Our submission on specific matters is attached.

If you have any questions or comments in relation to our submission, please contact Andrew Yeend, Manager, Public Policy & Industry Affairs on (02) 9292 8051.

Yours sincerely

David Wellfare
Senior Manager, Public Policy & Industry Affairs
IAG

[2] Productivity Commission Inquiry Report, Review of Australia's Consumer Policy Framework, 30 April 1998, Volume 1, pages 4-5

IAG'S SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW

CONSUMER LAW IN THE GENERAL INSURANCE INDUSTRY

Existing laws in the general insurance industry have a strong consumer protection focus and insurers are subject to the duty of utmost good faith in dealings with consumers. We consider that the existing legal and regulatory framework of protections for general insurance consumers are adequate and strike the right balance between protecting consumer and business interests.

Any changes that are made to the Australian Consumer Law (**ACL**) arising from the current review should not overlap or conflict with existing, particularly general insurance industry-specific, laws. For example, where there is a provision in the *Insurance Contracts Act 1984* (Cth) (**IC Act**) or *Corporations Act 2001* (Cth) (**Corporations Act**) that protects consumers' rights in a particular respect, then there should not be an equivalent provision in the ACL or the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). Overlapping only leads to confusion as to the application of each provision and potential conflict between provisions.

We have set out in this submission our views on various issues identified in the Australian Consumer Law Review Issues Paper (**Issues Paper**), focussing particularly on those of most relevance to us as participants in the general insurance industry. While we are an insurer we also have relationships with and enter into agreements with parties beyond those seeking insurance. These parties include the suppliers of goods and services including small businesses.

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UNFAIR CONTRACT TERMS

Should the unfair contract terms provisions in the ACL or ASIC Act apply to insurance contracts regulated under the IC Act?

Unfair contract terms provisions should not apply to insurance contracts regulated under the IC Act. We have had the benefit of reading the Insurance Council of Australia (**ICA**) submission and agree with its views that extensive protections already exist under other laws including the IC Act and the Corporations Act.

Should regulators have the power to seek penalties for breaches of the unfair contract terms provisions?

Given the subjective nature of the unfair terms test, we consider it would be too harsh to provide regulators with the power to seek monetary penalties. For contracts covered by the provisions the current consequence of having an unfair term deemed void is sufficient to address a consumer's concerns and would deter the business from using the term going forward.

Should the unfair terms provisions extend to allow contracts that are unfair as a whole to be void?

The power to declare individual terms unfair is sufficiently effective to deal with any potentially problematic clauses in a contract covered by the provisions. If key terms were determined to be unfair, then the effect of this may be to limit or negate the substantive application of the contract in any event.

In respect of protections relevant to redress 'overarching concerns', we consider that existing protections, including those in relation to unconscionable conduct are adequate.

Further, a law which allowed contracts as a whole to be declared void for unfairness could create uncertainty between contracting parties. Contracts are a necessary part of business to business and consumer to business relationships. Both New Zealand and the United Kingdom have consumer unfair contract terms regimes and neither extend to making a contract unfair as a whole.

Should regulators be able to bring representative actions for systemic unfair contract terms?

It may be problematic to define unfair terms as 'systemic'. Terms could be unfair in one context but fair in another, and accordingly, terms should be looked at on a case by case basis.

Further, as contract terms may impact individual consumers in different ways, we do not agree with regulators being able to take representative action for unfair contract terms.

CONTRACTUAL TRANSPARENCY AND CLARITY

Education has an important role to play in terms of contracts and consumers' understanding of them. Regulators, government and industry bodies have a role to play in education. Consumers must be educated to understand the importance of reading contracts before entering into them. Contracts can be written with great transparency, simplicity and clarity, however if they are not read by the consumer then transparency will not assist the consumer.

In the general insurance industry there are already a number of laws dealing with insurance contract transparency and clarity particularly in relation to retail clients, including sections 35 and 37 of the IC Act and section 1013C of the Corporations Act, we do not consider it necessary for the ACL or ASIC Act to further address insurance contracts in this respect.

CONSUMER GUARANTEES

Should consumer guarantees apply to insurance contracts?

Currently the ACL provides guarantees in relation to the supply of services (see sections 60 to 62 of the ACL) however these sections do not apply to services that are, or are to be, supplied under a contract of insurance (see section 63 of the ACL). Further currently section 12ED of the ASIC Act provides certain warranties in relation to the supply of financial services. However section 12ED(3) states a reference in section12ED to financial services does not include a reference to services that are, or are to be, provided, granted or conferred under a contract of insurance.

There is currently sufficient protection provided under the IC Act and the Corporations Act with respect to consumers who enter into insurance contracts. In particular the duty of utmost good faith imposed under the IC Act requires, in our opinion, insurers to adhere to a higher standard than what is currently required under the consumer guarantees regime. We refer to the ICA's submission in relation to this issue agree with its views.

As such we do not consider that the consumer guarantees under the ACL should be extended to apply to insurance contracts.

Should greater guidance be given to consumer guarantee concepts like 'major failure'?

We do not consider that the law should be too prescriptive in defining concepts such as what constitutes 'major failure' and 'the length of time a good should be expected to last', given the significant range and the ever evolving nature of goods and services to which such guarantees would apply. The current approach of providing examples and guidance on what would fall into these definitions is sufficient.

STRUCTURE AND CLARITY OF THE AUSTRALIAN CONSUMER LAW

On the whole the ACL is clear and can be understood, its structure makes sense and the legislation can be navigated.

The ACL's treatment of 'consumer' is appropriate. It is appropriate that the person or type of business protected under the ACL varies depending on the provision in question, as some provisions should apply more broadly than others. Unless there is evidence that the $40,000 threshold for consumer purchases is inadequate then there should be no reason to change this provision.

MISLEADING OR DECEPTIVE CONDUCT

A misleading or deceptive conduct provision has been a fundamental part of Australian law since 1974. That provision, now in section 18 of the ACL (and section 12DA of the ASIC Act), establishes a norm of business conduct and generally the provision has worked well.

Should the 'reasonable expectations' test for silences or omissions be maintained?

Currently, silences or omissions are not misleading unless there is a 'reasonable expectation', that a consumer would be informed of the omitted fact. In applying this test, the courts have considered matters such as the sophistication of the parties involved and the expectation that the parties would make reasonable enquires before entering into a transaction. As noted by French CJ and Kiefel J in *Costa Vraca*, in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) HCA 31 (29 September 2010) at para 19 to 20:

"*The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of s 52 [now section 18 of ACL], of conduct consisting of, or including, non-disclosure of information. That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations. An example in the former category is non-disclosure of material facts in a prospectus.*

In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant ... may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52 [now section 18 of ACL]."

We consider that the reasonable expectations test, as articulated above, is an appropriate test for determining whether silence or omissions are misleading as it enables the particular circumstances of the parties to be taken into account. Therefore, in our view, no change to the law is warranted.

Should the financial penalties and criminal sanctions for false or misleading representations extend to the general prohibition of misleading or deceptive conduct?

We are of the view that the penalties and criminal sanctions for false or misleading representations in contravention of section 29 of the ACL should not be extended to apply to contraventions of the general prohibition on misleading or deceptive conduct under section 18 of the ACL (or section 12DA of the ASIC Act).

Section 29 prohibits conduct of a more serious nature than section 18 is aimed to remedy. Accordingly in our view, it is appropriate that significant fines and penalties be available in respect of breaches of section 29, as distinct from those which are appropriate to remedy breaches of section 18.

Further, because the potential scope of conduct which is captured by the prohibition on misleading and deceptive conduct is much broader than that subject to the section 29 prohibition, it is appropriate for a different suite of remedies to be available. Such remedies for breaches of section 18 already include compensatory and non-compensatory awards, such as requiring corrective advertising and compliance program implementation and monitoring.

UNCONSCIONABLE CONDUCT

Should the unconscionable conduct provisions provide more guidance?

We agree with the statement in the Issues Paper that the recent decision in *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 has provided greater clarity around the meaning of unconscionable conduct.

"*The word "unconscionability" means something not done in good conscience... Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.*"[1]

We note the unconscionable conduct provisions in the ACL (and ASIC Act) already provide a non-exhaustive list of matters a court may take into account. Further guidance to the courts could have a negative impact as it is necessary to look at the facts and circumstances of each case to determine whether there is truly unconscionable conduct. To attempt to provide definitional certainty regarding the 'norms of society' in statute is inherently problematic as norms change and as noted in the quote above "*must be understood and applied in the context in which circumstances arise.*"

In our view, no further guidance to the courts is required. Any proposal to stipulate 'norms of society' may in fact create more uncertainty around the concept of 'unconscionable conduct'. Whether conduct in any given case is 'unconscionable'

[1] *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at paragraph 41]

should be left to courts to interpret, taking due consideration of all of the relevant facts and circumstances.

UNFAIR COMMERCIAL PRACTICES

Should the ACL prohibit unfair commercial practices or business models?

The Issues Paper seeks comment on whether existing laws (such as misleading and deceptive conduct, unconscionable conduct and unfair contract terms provisions) are adequate to prohibit unfair commercial practices or business models.

We consider that having a general prohibition against unfair practices would create uncertainty for business and would overlap with established concepts such as 'misleading or deceptive conduct', 'unconscionable conduct' and 'unfair contract terms'.

In the general insurance industry we consider the existing framework of general and industry specific laws are sufficient to capture any unfair business practices or business models.

ADMINISTERING AND ENFORCING THE AUSTRALIAN CONSUMER LAW

The 'single-law, multiple regular' model

On 29 April 2016 the Productivity Commission was asked to undertake a study of the enforcement and administration arrangements underpinning the ACL. The study will focus on the effectiveness of the 'single-law, multiple regulator' model – a model where the national consumer law is jointly enforced and administered by the Australian Competition and Consumer Commission (**ACCC**) and state and territory consumer agencies, with the Australian Securities and Investments Commission (**ASIC**) enforcing similar consumer protections under the ASIC Act for financial products and services.[2] The Productivity Commission is required to report back to government by March 2017.

We believe any proposals to change the 'single-law, multiple regulator' model should await the outcome of the Productivity Commission's review.

Effectiveness of remedy and offence provisions

The current maximum financial penalties available under the ACL are adequate to deter future breaches by companies. In many cases, the reputational damage caused by the breach, when it becomes public knowledge and other measures taken by a regulator and/or court, such as orders instituting compliance programs etc, are already a significant deterrent.

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[2] Joint Media Release, of Treasurer Hon Scott Morrison and Minister for Small business and Assistant Treasurer, Hon Kelly O'Dwyer, *Productivity Commission to examine arrangements supporting Australian Consumer Law*, 29 April 2016

Regulatory powers to impose penalties and seek remedies are, and should be, thoughtfully exercised. A proactive approach to regulation is appropriate and supports better business and consumer outcomes. We advocate for upfront engagement with businesses and their industry bodies, including the provision by regulators of guidance and assistance in compliance, education, and policy advice to support a positive culture of compliance within businesses.

Access to remedies and scope for private action

We agree with the Issues Paper that "*(a)ccess to remedies begins with a consumer's ability to understand their problem, the rights and protections that are available under the law, the actions they can take, and the services available to help resolve their problem efficiently and effectively*"[3]. Resolving disputes early can prevent legal problems occurring and escalating.

General insurers that deal with retail clients are required to maintain an effective internal dispute resolution (**IDR**) process to assist in resolving disputes.

We agree with ASIC's views in its Regulatory Guide165 (Licensing: Internal and external dispute resolution) that:

"IDR procedures can be used to deal effectively with, and monitor, all forms of consumer inquiry, complaint or dispute. The benefits of effective IDR procedures with broad coverage include:

(a) the opportunity to resolve complaints or disputes quickly and directly;

(b) the ability to identify and address recurring or systemic problems (which can then lead to product or service improvements);

(c) the capacity to provide solutions to problems rather than have remedies imposed by an external body; and

(d) the chance to improve levels of customer and investor confidence and satisfaction."[4]

Further, general insurers that deal with retail clients are required to be members of an external dispute resolution (**EDR**) scheme. This means if disputes cannot be resolved internally, these clients can have access to the external dispute resolution (**EDR**) scheme. . In this regard we also agree with the ASIC Regulatory Guide:

"...that industry-supported EDR schemes play a vital role in the broader financial services regulatory system. The existence of these schemes provides:

(a) a forum for consumers and investors to resolve complaints or disputes that is quicker and cheaper than the formal legal system; and

(b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers."[5]

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[3] Issues Paper, page 46

[4] ASIC Regulatory Guide 165 *Licensing: Internal and external dispute resolution,* [165.70]

[5] ASIC Regulatory Guide 165 *Licensing: Internal and external dispute resolution,* [165.47]

We consider that industry specific EDR schemes are preferable to overarching scheme(s) covering a variety of sectors. This is because specialisation enables expertise to be developed and consistency in approach appropriately maintained in the scheme that covers a particular sector. This benefits both consumers and businesses involved in that sector. The Financial Ombudsman Service (**FOS**) provides this function in the general insurance industry and generally, works effectively and efficiently in resolving disputes.

EMERGING CONSUMER POLICY ISSUES

Selling away from business premises

We consider there to be an important difference between a business seeking out a consumer and a consumer entering a business premises or contacting a business requesting information about goods or services. Accordingly, we agree with the concept of having separate rules that apply to unsolicited transactions.

In the general insurance industry the distribution of general insurance products to retail clients is already subject to certain rules in relation to unsolicited contact with clients (see section 992A of the Corporations Act dealing with hawking).

For certain insurance products, there are also mandatory cooling-off periods (see sections 1019A and 1019B of the Corporations Act), the details of which must be included in the Product Disclosure Statement provided to the client (see section 1013D(1)(i) of the Corporations Act).

In addition, the *Do Not Call Register Act 2006* (Cth) sets up a scheme to enable individuals to opt out of receiving unsolicited telemarketing calls.

In our view, unsolicited sales of general insurance products to retail clients are already specifically and adequately regulated.

Selling online

In the general insurance industry we consider there are already adequate disclosure obligations for online transactions in relation to retail clients. In particular there are obligations under Chapter 7 of the Corporations Act 2001 that would apply to such transactions.

Comparator websites

For some general insurance products, comparator websites can be problematic. This is particularly the case where it is not as simple as comparing the price of one type of policy with another similar policy. Due to variations in insurer business models, available coverages and pricing, it can be difficult for comparator websites to accurately and fairly make "like with like" product comparisons. If these websites provide simplistic comparisons, they can be inaccurate. Consumers can miss out on coverage options that suit their personal needs. Consumers also risk missing out on relevant discounts available to them, along with the ability to choose the level of excess suitable to their personal circumstances.

However, we believe existing laws are sufficient to deal with issues in relation to comparator websites as they arise. We believe the *ACCC Comparator Websites: A guide for comparator website operators and suppliers* (August 2015) provides useful guidance in this respect.

In relation to online reviews and testimonials, we similarly believe existing laws are sufficiently robust to deal with issues as they arise.

Emerging business models and the Australian Consumer Law

As noted in the Issues Paper the 'sharing' economy is subject to the ACL although some exceptions may apply. We support regulation that creates a level playing field for sharing and traditional (non) sharing businesses across Australia while not stifling competition and innovation. Competition and innovation can generate better outcomes for consumers and the economy generally.

We have had the benefit of reading the ICA's submission in response to the Issues Paper and agree with the matters raised by it in relation to the sharing economy. The unique nature of sharing economy businesses may require a more agile regulatory structure. For example some new or emerging sectors of the sharing economy may require laws specific to those sectors. However any laws implemented should be uniform across Australia to prevent the problems that arise when different laws apply across State and Territory borders.

The effective regulation of the sharing economy is an area that needs to be carefully monitored in the coming years.

Promoting competition through empowering consumers

Consumer Access to data

We acknowledge that consumers' access to data could benefit consumers. However, there are a range of issues to consider in this space including which data should be disclosed, who owns the data, privacy implications, the cost of provision of data, the form in which data would be useful and that providing too much data to consumers could have detrimental outcomes and lead to poor outcomes.

The Productivity Commission is currently undertaking an inquiry into the benefits and costs of options for increasing availability of and improving the use of public and private sector data by individuals and organisations. The Productivity Commission's Issues Paper was released on 18 April 2016 and covers a broad range of matters. The Terms of Reference to the Productivity Commission inquiry specifically ask the Commission to:

> *" a) balance the benefits of greater disclosure and use of data with protecting the privacy of the individual and providing sufficient control to individuals as to who has their information and how it can be used;*
>
> *b) benchmark Australia's data protection laws, privacy principles and protocols against leading jurisdictions;*
>
> *c) examine whether there is adequate understanding across government about what data can be made openly available given existing legislation;*

d) *consider the effectiveness and impacts of existing approaches to confidentialisation and data security in facilitating data sharing and linking while protecting privacy; and*

e) *consider the merits of codifying the treatment and classification of business data."*[6]

We consider that Productivity Commission's findings and recommendations from its inquiry should be considered first before any change to the existing regime (including the ACL) is contemplated.

Disclosure requirements

The insurance general industry is already subject to an extensive legal regime governing disclosure, particularly in respect of general insurance products which are or may be distributed to retail clients under Chapter 7 the Corporations Act and the IC Act.

Further, the general insurance industry is considering ways to further improve disclosure in the sector for retail general insurance products. In this regard the ICA Disclosure Taskforce last year released its report entitled "*Too long; Didn't Read-Enhancing General Insurance Disclosure*"[7] which makes recommendations in relation to disclosure. The ICA is currently commissioning research into disclosure arising from the report.

[6] Data Availability and Use, Productivity Commission Issues Paper(April 2016), page v

[7] Report of Effective Disclosure Taskforce to Insurance Council Board, "Too Long; Didn't Read Enhancing General Insurance Disclosure" (October 2015)