



FEBRUARY 2017

INQUIRY INTO AUSTRALIA'S GENERAL INSURANCE INDUSTRY

Submission to the Senate Standing Committees on
Economics

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns
and to support our campaigns, sign up at www.choice.com.au/campaignsupporter

WWW.CHOICE.COM.AU E CAMPAIGNS@CHOICE.COM.AU
57 CARRINGTON ROAD MARRICKVILLE NSW 2204 P 02 9577 3333 F 02 9577 3377

CONTENTS

INTRODUCTION	3
Summary of recommendations	4
Data availability and transparency	5
Cost data – home and contents	5
Cost data – assumptions	6
Claims data	8
Consumer decision making.....	9
Consumer journeys and the purchasing phase of insurance.....	10
Standard definitions.....	12
Increasing fairness: addressing the unfair contract terms prohibition	13
Why the duty to act in utmost good faith is an inadequate consumer protection	14
Comparison websites.....	15
Product suitability.....	16
Enforceable requirements to provide consumer information.....	17

INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Senate Standing Committee on Economics Australia's General Insurance Industry Inquiry.

According to CHOICE research, home and car insurance remain two of the biggest cost of living concerns for Australian consumers.¹ Industry reports are showing premiums are set to increase well above inflation and wage growth again in 2017.² Consumers are being squeezed as premiums increase and policies become more restrictive. This is not aided by the lack of publicly available comparison data which would allow consumers to find more competitive offers. There is a massive shortfall in the availability of comparison data and more could be done to improve guidance (including tools and calculators) and disclosure for general insurance.

Major players in the insurance industry rely on a huge disparity in available comparison data and the creation of misleading market comparison websites to stave off competitors. Regulators need to make cost data and claims ratios publicly available as an immediate first step to improve this disparity. There is also room for improvement in comparison services themselves, which would be aided by access to better data and improved transparency about commercial arrangements that affect results presented to consumers.

For any new approach to be effective, it also needs to pay proper regard to consumer decision making and how this is impacted by behavioural biases. For too long consumer protection has relied on lengthy product disclosure, without regard for how consumers actually access and understand information.

There is a growing body of evidence which shows consumers understand and use product comparison tools in two main ways, based on their level of engagement and caution in purchasing general insurance.³ Those with high levels of engagement tend to use comparison tools as one source of information to 'narrow the field' and are likely to ask follow-up questions of an insurer to ensure they offer the right level of cover. By contrast, those with lower levels of engagement and caution tend to be overly focussed on headline price, ignoring key differences in level of cover. This underlines the importance of making additional information available to

¹ CHOICE, 2016, 'Consumer Pulse', July 2016. The study found 68% of consumers are concerned about the cost of car insurance, while 57% of consumers are concerned about the cost of home insurance.

² SMH, 2017, 'Home and car insurance tipped to rise 4 per cent in 2017', available at: http://www.theage.com.au/business/banking-and-finance/home-and-car-insurance-tipped-to-rise-4-per-cent-in-2017-20170131-qu2tc6.html?utm_content=buffer29398&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer

³ Atticus, 2014, 'Price comparison website: consumer market research', prepared for the Financial Conduct Authority

the market, so that consumers and third-party information services they rely on can create a more comprehensive picture of policy value.

As the UK research shows there will be a portion of the population who will be attracted almost entirely to cost differences and give little consideration to other factors. Given the difficulty in shifting this human behavioural trait there may be a need to further explore placing a positive obligation on insurers, and where appropriate for comparison tools, to recommend 'suitable' insurance products in line with the proposed 'design and distribution obligations'. This will help prevent consumers from being signed up for inappropriate products which fall short of expectations at the time of a claim.

Summary of recommendations

1. That the efficacy of the North Queensland comparator website be user-tested to uncover potential refinements in information content and presentation and guide a broader approach to requiring the release of insurance data.
2. That insurers disclose, in a standardised manner, the factors that determine the price presented to the consumer.
3. That premium cost data be made available based on a basic set of assumptions (e.g. in home insurance those used for the North Queensland home insurance comparator website).
4. In the longer term basic assumptions need to be developed for other general insurance products to improve like-for-like comparability.
5. That insurers make available during the purchasing phase (perhaps in a Key Facts Sheet) general insurance scorecards, contextualised by industry best practice, including:
 - a. claims ratio as a stand-alone value measure
 - b. claims ratio plus claims acceptance rates
 - c. claims acceptance rates, claims frequencies and average claims payouts (the scorecard)
 - d. that claims rates be contextualised against claims rates of the best performing provider of the previous year.
6. Extend the use of KFSs beyond home and contents to other forms of general insurance, including car, travel, pet, and add-on insurance.
7. There should be enforceable obligations on insurers to prominently display a KFS alongside advertising material for a policy (e.g. on a website).
8. Enforcement of KFS disclosure obligations to ensure adequate information provision and staff training.
9. That details of previous year's premiums are provided on renewal notices, with any price rises indicated as both a percentage and dollar amount.

10. That an industry and consumer work stream be established to identify, prioritise and eventually standardise key terms across insurance products (for example, 'actions by the sea').
11. Remove the exemption insurance has from the prohibition on unfair contract terms. This could be achieved by amending section 15 of the *Insurance Contracts Act (1984)* so that the provision which currently excludes insurance contracts from the operation of any other Commonwealth, State or Territory Act applies the unfair contract terms provisions in the *Australian Securities and Investments Commission Act (2001)*.
12. That comparison sites have a positive obligation to inform consumers of the factors involved in how a product is presented and prominently disclose potential conflicts of interest.
13. That insurers have a positive obligation to sell insurance products which are suitable to a consumer's identified need.
14. That industry should seek to register the General Insurance Code of Practice with ASIC and include the proposed reforms. Alternatively these changes could be enacted through the *Insurance Contracts Act* and Regulations.
15. That the need to elevate the ACCC's 'Guide for comparator website operators and suppliers' to the status of industry code be reviewed.

Data availability and transparency

Cost data – home and contents

Insurers do not make cost data available in a format which allows third parties to compare services. The exception is the data insurers have been compelled to make available for the government-run North Queensland home insurance comparison website. This website, developed to improve affordability issues in the natural disaster prone North Queensland, provides a positive example of what is possible when cost data is made available. For example, a consumer living in Cairns can easily compare levels of home building cover across key features. According to the comparison service, the basic policies from RACQ and Westpac offer similar levels of cover, yet at significantly different price points. The Westpac indicative price point is almost \$400 per year, or about 10%, cheaper than the RACQ policy.⁴ A consumer is

⁴ Australian Government, 2017, 'North Queensland home insurance', available at: <http://nqhomeinsurance.gov.au/#intermediate> [The two policies were compared 7/2/2017]

able to quickly narrow the field and assess this difference in the simple pictorial display on the website and if appropriate save a sizable \$400 per year by selecting the cheaper policy.

Currently a consumer would have to submit quote requests with a battery of providers in order to get the same comparison data. This is a significant investment of effort for time poor consumers, leaving many to confine their comparisons to one or two providers – or simply be sluggish with ever increasing premiums from their existing insurer.

As a first step we believe there would be value in reviewing the efficacy of the North Queensland comparator website and use learnings to guide a broader approach to requiring the release of data to the market. Gaining a better understanding of how consumers understand information and use comparator services is likely to lead to refinements in presentation and ensure consumers are able to identify and compare the best-value policies that meet their needs.

Recommendation 1

- That the efficacy of the North Queensland comparator website be user tested to uncover potential refinements in information content and presentation and guide a broader approach to requiring the release of insurance data.

Cost data – assumptions

ASIC's 2016 review of home insurance found most insurers had some form of calculator available within the online quote process.⁵ These tools are vital in enabling consumers to assess the quantum of their home insurance needs. In some respects, home insurance is easier to compare like-for-like quotes because one of the major risk factors is location data. Therefore, useful indicative quotes can be gathered based on the address of the home.

Unfortunately, standardisation has not advanced this far in other types of general insurance. This complicates comparisons as consumers are unlikely to know the costs of various events and are therefore limited in their ability to compare quotes for policies on a like-for-like basis.

Insurance cost data should be made publically available, although we recognise that further work will need to be done to ensure this data is capable of comparison on a like-for-like basis.

⁵ ASIC, 2016, 'ASIC calls for further improvements from home insurers', available at: <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-053mr-asic-calls-for-further-improvements-from-home-insurers/>

Once again, the North Queensland comparator website provides a useful example of what can be achieved if indicative cost data is available and presented in a comprehensive context. The data presented is based on a series of well-grounded assumptions, which aim to give consumers an 'indicative' annual premium cost. As these are assumptions there are likely to be differences with a consumer's actual quote for a policy. However, if properly explained these 'indicative' costs can still be valuable for consumers in 'narrowing the field' for suitable policies.

Consumers would also benefit from further information about the specific factors behind pricing when comparing products. This will let them better compare tailored quotes but also adjust other factors that may contribute to insurance pricing. For example, a quote for car insurance can be affected by a range of factors such as whether a car is parked on-street or in a garage, the suburb it's kept in and even the colour of the car.⁶ If a consumer gets insurance from a company that uses data linked to a grocery rewards program, their car insurance price may be affected by the type of groceries they buy and when. Woolworths has explained how it is using data to target customers for insurance products, with shopping habits linked to insurance risk:

Because, you see, customers who drink lots of milk and eat lots of red meat are very, very good car insurance risks versus those who eat lots of pasta and rice, fill up their petrol at night, and drink spirits. What that means is we're able to tailor an insurance offer that targets those really good insurance risk customers.⁷

We expect the trend of pricing based on highly specific individual factors will increase as insurers continue to invest in data gathering and assessment technologies. Consumers should be able to easily see what data is being used to determine the prices they pay for insurance. Such an approach would align with the Productivity Commission's recommended consumer right to view and control information held about them.⁸

We would not expect insurers to provide commercial-in-confidence detail about how premiums are calculated, for example the weighting any factor is given, but they should provide the high-level information about the factors that affect an insurance premium. For example, a consumer getting a quote for car insurance should be able to see that Insurer A has based a quote on driving history, car age, where the car is stored and the colour of the car and that Insurer B has based a quote on driving history, car age, car storage and shopping habits (including what shopping habits). This information could help consumers with future decisions from buying a

⁶ Car insurer Youi, for example, offers different prices based on the risk associated with different car colours <http://www.smh.com.au/business/banking-and-finance/does-youi-owe-you-insurer-accused-of-billing-without-consent-20160818-gqvrmi.html>

⁷ <http://www.smh.com.au/digital-life/consumer-security/supermarket-spies-big-retail-has-you-in-its-sights-20130914-2trko.html>

⁸ <http://www.pc.gov.au/inquiries/current/data-access/draft>

different colour car to changing shopping habits or refusing to use supermarket rewards programs because of the impact on premiums.

CHOICE acknowledges that the average consumer is unlikely to trawl through this data and base purchasing decisions on it un-aided. There is likely to be a role for third parties, such as comparison websites, the media and consumer information services to translate this information into actionable decisions for consumers.

Recommendations 2, 3 and 4

- That insurers disclose, in a standardised manner, the factors that determine the price presented to the consumer.
- That premium cost data be made available based on a basic set of assumptions (e.g. in home insurance those used for the North Queensland home insurance comparator website).
- In the longer term basic assumptions need to be developed for other general insurance products to improve like-for-like comparability.

Claims data

For a consumer, the value of an insurance product is based on their ability to make a successful claim when an insured event occurs. According to Financial Ombudsman Service data 71% of the general insurance disputes it accepts are in relation to decisions made by Financial Service Providers.⁹ There are significant differences in the number of disputes individual services providers receive, with Hollard Insurance home insurance customers four times as likely to lodge a complaint with FOS compared to Youi customers.¹⁰ When ASIC last reviewed claims handling in 2011 it also found large variations, with the lowest rates of denied claims by a provider at approximately 0.07% compared to the highest at 8%.¹¹

The Financial Conduct Authority (FCA) in the UK has developed and tested the use of general insurance 'scorecards'.¹² The scorecards demonstrate how often consumers are likely to claim on a product, how likely those claims are to be accepted and the average claims payout.

⁹ FOS, 2016, 'Annual Review 2015-16', p.69

¹⁰ FOS, 2016, 'Comparative Tables, Home building insurance', available at <http://fos.org.au/comparativetables/2015-2016/>

¹¹ ASIC, 2011, 'Report 245: Review of general insurance claims handling and internal dispute resolution procedures', p.17, available at: <http://download.asic.gov.au/media/1343666/rep245-issued-10-August-2011.pdf>

¹² FCA, 2016, 'FCA to publish claims scorecards', available at: <https://www.fca.org.uk/news/press-releases/fca-publish-claims-scorecards>

Third party services, such as the media and comparison websites will be able to greatly enhance consumer decision making if they have access to claims denial rates contextualised by industry best performers. Consumers would be in a much better position to assess the value of a product if they had some idea of the likely claims outcome of a provider. Comparing a provider to best practice also helps drive competition and is likely to lead to insurers taking measures to decrease denial rates by paying closer attention to their causes. This may lead to refinements in staff training, information provision and policy simplification, so that expectations created during the sales process are more likely to be met when a claim is made.

In addition to its use by third party services, for this information to be adequately weighed in the purchasing decision it needs to be available up front, perhaps in a Key Fact Sheet (KFS).

Recommendation 5

- That insurers' make available during the purchasing phase (perhaps in a Key Facts Sheet) general insurance scorecards, contextualised by industry best practice. Including:
 - claims ratio as a stand-alone value measure
 - claims ratio plus claims acceptance rates
 - claims acceptance rates, claims frequencies and average claims payouts (the scorecard)
 - that claims rates be contextualised against claims rates of the best performing provider of the previous year.

Consumer decision making

Behavioural finance should be used to refine disclosure requirements to meet consumer needs. Traditionally the role of disclosure was based on a theory that consumers are rational agents who will make welfare maximising decisions if provided with full information.¹³ While this theory has long been questioned, policy and regulation has been slow to catch up. Traditional models assume economic agents, such as consumers, have an infinite capacity to take in and process information; are neutral to how it is presented; can anticipate and take the future into account; care only about self-maximising; and treat gains the same as losses.¹⁴ In contrast, behavioural economics recognises that consumers have limits on the amount of information they can take in; are affected by presentation; tend to be poor at anticipating the future; care about people and

¹³ Johnston, K., Tether, C., Tomlinson, A., 2015, 'Financial Product Disclosure: Insights from behavioural economics', Ministry of Business, Innovation & Employment, p.iii

¹⁴ Office of Fair Trading, 2010, 'What does Behavioural Economics mean for Competition Policy?', March 2010, p. 5

fairness; and are more concerned about losses than gains.¹⁵ These are known as 'behavioural biases'.

The impacts of these behavioural biases are compounded in general insurance because the nature of the product means it is usually only relied upon in the future, if at all. This makes it difficult for a consumer to adequately assess their needs against the product offering. In addition, the presentation of terms in the form of lengthy Product Disclosure Statements (PDSs) is not conducive to consumer reading and comprehension. This leaves many with poor knowledge of what a policy actually covers.

The Insurance Council of Australia developed an Effective Disclosure Taskforce and released a report in 2015 which considered many of these issues.¹⁶ We hope that industry continues to develop its understanding of consumer behavioural biases and develops disclosure approaches that further meet consumer needs. Outlined below is a series of priorities CHOICE has identified to create consumer-centric disclosure in general insurance.

Consumer journeys and the purchasing phase of insurance

Best practice consumer information disclosure attempts to marry the content and format of information being provided with a consumer's journey through buying, using and re-purchasing a good or service. For example, at purchase a consumer needs access to simple, key information in order to make easy comparisons across products.

Consumers can't adequately compare products because of differences in the way information and content are presented in PDSs and the inconsistent use of KFSs.

The problem of lengthy and complex information has been addressed in several markets, including home and contents insurance and home loans through KFS, and telecommunications through Critical Information Summaries (CIS). These are usually one-to-two page documents that contain key product information. For example, in home and contents insurance, the document contains a list of prescribed events for which the policy provides cover and any other key terms.

As these summaries and fact sheets are relatively new, there is limited evidence of their long-term impact in improving consumer decision making. However, the preliminary research indicates that consumers who use them benefit, although there are still problems with

¹⁵ Office of Fair Trading, 2010, 'What does Behavioural Economics mean for Competition Policy?', March 2010, p. 5

¹⁶ Insurance Council of Australia, 2015, 'Too Long; Didn't Read – Enhancing general insurance disclosure'.

awareness of their existence. A study into the use of KFS for home loan products found they effectively enhanced a consumer's ability to identify the cheapest loan package from among several alternatives.¹⁷ Although the study demonstrated low levels of awareness among consumers of the existence of KFS, it showed that this was likely due to poor levels of information provision and staff training by insurers. Shadow shopping exercises indicated consumers were unlikely to receive a KFS unless they specifically asked for a 'Key Fact Sheet', even where they requested information for the same purpose. This indicates that mandatory requirements for businesses to provide useful information at key points in consumer decision making are necessary for effective disclosure measures to make a difference.

In telecommunications, the findings of a knowledge test discovered that consumers with 'terms and conditions' (akin to a PDS) performed more poorly than those given a Critical Information Summary (akin to a KFS).¹⁸ This is despite the Terms and Conditions document containing much more information. The test was 'open book' in an attempt to re-create product understanding at purchase. This study shows that providing consumers with more information, rather than relevant targeted information, actually hinders their understanding of a product.

Making a KFS available should greatly increase the capacity of third party websites to compare multiple products without the significant investment in resources required to read, comprehend and synthesise potentially thousands of complex PDSs. KFSs also provide a useful 'checking' document for consumers who wish to verify if the information on the comparison website is correct, without having to wade in to a lengthy PDS.

Recommendations 6, 7 and 8

- Extend the use of KFSs beyond home and contents to other forms of general insurance, including car, travel, pet, and add-on insurance.
- There should be enforceable obligations on insurers to prominently display a KFS alongside advertising material for a policy (e.g. on a website).
- Enforcement of KFS disclosure obligations to ensure adequate information provision and staff training.

¹⁷ Skelton, R.A., 2015, 'The Impact of Home Loan Key Facts Sheets on Borrowers' Comparisons of Loan Costs', QUT, available at: http://eprints.qut.edu.au/91053/4/Ross_Skelton_Thesis.pdf

¹⁸ Harrison, P., Hill, L., and Gray, C., 2016, Confident, but Confounded: Consumer Comprehension of Telecommunications Agreements, Australian Communications Consumer Action Network, Sydney. P.44

Renewal phase

By contrast, at policy renewal time the key piece of information is likely to be a comparison of the previous years' premium to the new rate, this would allow a consumer to assess any increase and decide if they should seek alternative quotes. The UK FCA tested this theory on 300,000 consumers and found that when the previous year premiums were included on renewal notices, 11-18% more people opted to switch providers or negotiate a better deal.¹⁹

This is a simple, low cost regulatory step, which tests show has a tangible impact in driving consumer action and ultimately improving competitive tension in the market.

Recommendation 9

- That details of previous year's premiums are provided on renewal notices, with any price rises indicated as both a percentage and dollar amount.

Standard definitions

A good disclosure process can be defeated if key definitions are not standardised. This is particularly the case in insurance where a definition, potentially hidden 100 pages deep in a PDS, can radically alter the value of a policy. This weakness was recognised in the moves to standardise the definition of a 'flood' in insurance contracts. However, there remain a slew of terms which appear to have different definitions depending on the policy. For example, home insurers use different definitions for 'actions of the sea'. ANZ excludes loss or damage caused by "actions by the sea" however it does not define a tsunami as an action by the sea and will in fact cover loss or damage caused by a tsunami.²⁰ By contrast Coles considers a tsunami to be an act of the sea and excludes damage or loss "caused by high tide, tidal wave, tsunami or other actions of the sea."²¹ These kind of inconsistent definitions greatly increase the time taken to compare policies and in many cases consumers are likely to be misled in to thinking they have cover when in fact they do not.

We recognise the difficulty and length of time it took to achieve this outcome in developing a definition for 'flood'. However, if we are able to prevent the terrible loss consumers suffered due to inadequate insurance following the 2010 and 2011 summer floods then the benefits will be worth the effort. This could begin with a prioritisation of key terms requiring standardisation and

¹⁹ FCA, 2015, 'FCA to require insurance firms to publish details of last year's premium', available at: <https://www.fca.org.uk/news/press-releases/fca-require-insurance-firms-publish-details-last-year%E2%80%99s-premium>

²⁰ ANZ Home Insurance PDS, available at: <https://www.wealth.anz.com/content/dam/anzwealth/pdfs/insurance/ANZ-Home-Insurance-PDS.pdf>

²¹ Coles Home Insurance PDS, available at: <http://financialservices.coles.com.au/insurance/about-our-insurance/important-information#PDS>

the creation of a work stream, representing consumers and industry, to begin defining those terms.

Recommendation 10

- That an industry and consumer work stream be established to identify, prioritise and eventually standardise key terms across insurance products (for example, 'actions by the sea').

Increasing fairness: addressing the unfair contract terms prohibition

Making the market work for consumers is not just about allowing for product comparisons, but ensuring the underlying products are fair. All businesses selling to consumers are prohibited from including unfair contract terms (UCT) in a standard form contract, except insurance.²² There are sound policy grounds for the prohibition on UCT and these grounds apply equally to insurance. The UCT provisions were established to overcome consumer confusion in understanding complex contract terms in standard form contracts, where there was no possibility for a consumer to negotiate terms as part of the transaction.²³

Laws aimed at tackling UCT have been used around the world including the United Kingdom and European Union.²⁴ Australia has considered expanding them to insurance as recently as 2013; however, the Bill lapsed at the change of government. In light of recent evidence of practice in the insurance sector it is time to introduce a prohibition on UCT.

In many respects insurance is the ideal case study for why a prohibition on UCT should exist. General insurance contracts are often so complex that consumers need an additional layer of protection against harmful terms. Contracts extend over pages of information, few people read or understand them, and they contain complex terms which most consumers are unlikely to understand. As a consequence, consumers suffer detriment by having claims denied due to the mismatch between what they thought the policy covered and what was actually covered.

Allowing insurance contracts to include provisions that are unfair leaves consumers open to exploitation. In 2015 we also saw damaging terms and conditions in travel insurance contracts.

²² *Insurance Contracts Act 1984* section 15

²³ *Trade Practices Amendment (Australian Consumer law) Bill 2009* second reading

²⁴ *Insurance Contracts Amendment (Unfair terms) Bill 2013*, Explanatory memorandum

Victoria Legal Aid brought a significant case to the Victorian Civil and Administrative Tribunal on behalf of a consumer whose travel insurance claim was denied by her insurer after she was hospitalised with depression at age 17 and cancelled an overseas school trip on advice from her doctor.²⁵ The consumer had no pre-existing mental health conditions when she took out the insurance, but her \$4,292 claim for travel expenses was denied by the insurer on the grounds of its general exclusion for mental health-related claims. Victoria Legal Aid argues that blanket exclusions on mental illness claims are not justifiable – if the prohibition on unfair contract terms applied in this instance, the business may not have been able to include the exclusion in its contract.

Standard form contracts covered by the *Insurance Contracts Act 1984* should be subject to the same protections against unfair contract terms as apply under the ACL and the ASIC Act. This could be achieved by amending section 15 of the *Insurance Contracts Act 1984*.²⁶

This change would address two problems: the quality of insurance products sold and the poor treatment of consumers after sale. Insurance products are incredibly complex. It is extremely difficult for consumers to assess the quality of insurance products and fully understand at the point of sale exactly what is covered. Poor value products are common across multiple insurance categories, notably in consumer credit insurance.

Why the duty to act in utmost good faith is an inadequate consumer protection

The insurance industry has claimed that the duty to act in the utmost good faith under the *Insurance Contracts Act 1984* is sufficient protection for consumers and that an UCT prohibition is not required.²⁷ When compared to the UCT provisions the utmost good faith clause in the Insurance Contracts Act is unclear and jurisprudence is imprecise. This makes application of the law particularly difficult. Tellingly the leading High Court case on utmost good faith was a dispute between two large financial institutions, not an individual consumer attempting to enforce his/her rights.²⁸ This may at least in part be due to the lack of clarity around how the law should be applied and how far principles of fairness should be interpreted into contracts. To date, the utmost duty of good faith has not put an end to the types of clauses outlined above.

²⁵ CHOICE (26 October 2015), 'Are travel insurers discriminating illegally?', available at <https://www.choice.com.au/travel/money/travel-insurance/articles/mental-health-and-travel-insurance#legal-challenge>

²⁶ *Insurance Contracts Act 1984*, s15

²⁷ Insurance Council of Australia, 2016, 'Submission to the Australian consumer law review', available at: https://cdn.tspace.gov.au/uploads/sites/60/2016/07/Insurance_Council_of_Australia.pdf

²⁸ *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36

By contrast, one of the benefits of clear legislation, such as that contained in the UCT provisions, is that it can drive change without the need for costly litigation. The UCT obligations are very clear; the legislation even provides an extensive list of the types of terms which would be considered unfair. This is a far cry from the amorphous 'utmost good faith' requirements. The UCT obligations are so clear that the Australian Competition and Consumer Commission and consumer organisations have used the laws to engage directly with businesses around removing unfair terms.²⁹ This has seen many businesses voluntarily improve their terms. With limitations on regulator budgets and the cost of litigation for business compliance, the UCT provisions should be viewed as balanced best practice regulation.

Recommendation 11

- Remove the exemption insurance has from the prohibition on unfair contract terms. This could be achieved by amending section 15 of the *Insurance Contracts Act (1984)* so that the provision which currently excludes insurance contracts from the operation of any other Commonwealth, State or Territory Act applies the unfair contract terms provisions in the *Australian Securities and Investments Commission Act (2001)*.

Comparison websites

If run in the interests of consumers, comparison websites can level the playing field for consumers in a complex market. However, without the application of basic consumer protections, comparison sites can further reinforce the market dominance of major players and chill competition.

Our concerns with existing comparison websites include:

- Some sites are potentially misleading about how much of the market they compare. For example, 'Compare the Market' is advertised as a *market* comparison service, however according its car insurance site it does not compare major players GIO, AAMI, NRMA, RACV, SGIC, SGIO, Allianz or QBE.³⁰

²⁹ For example, see ACCAN, 2016, 'Unfair and misleading fine print could be costing you' available at: <http://accan.org.au/hot-issues/726-unfair-and-misleading-fine-print-could-be-costing-you>; ACCC, 2016, 'ACCC warns businesses time is running out to review their standard form contracts for unfair contract terms', available at: <https://www.accc.gov.au/media-release/accc-warns-businesses-time-is-running-out-to-review-their-standard-form-contracts-for-unfair-contract-terms>

³⁰ Compare The Market, 2017, 'What brands and products do we compare?' available at: <https://www.comparethemarket.com.au/car-insurance/disclosures/#service>

- Some sites are owned by the insurance companies they are comparing, potentially creating conflicts of interest. According to the Compare the Market Financial Services Guide seven of the 10 car insurance brands compared come from Auto & General Services Pty Ltd. Both Compare the Market and Auto & General are related entities, ultimately owned by the same parent company.³¹ Three of the five home insurance brands on Compare the Market are also arranged by Auto & General.

The core problems are a lack of transparency and independence among some comparison site operators.

Where disclosure does happen, it tends to be in the fine print or hidden in Financial Services Guides. These are usually located in areas of the website consumers attempting a simple comparison are unlikely to explore. Without adequate disclosure consumers are left in the dark about what really goes in to a product recommendation, or the potential for a conflict of interest. Where a potential conflict exists the onus should be on comparator sites to prominently disclose factors that may limit or skew the presentation of information to consumers.

Recommendation 12

- That comparison sites have a positive obligation to inform consumers of the factors involved in how a product is presented and prominently disclose potential conflicts of interest.

Product suitability

Finally, we are concerned that even with best practice disclosure requirements, there are a sizable proportion of consumers who will still have significant difficulty in selecting a product which meets their needs. This is evident in research prepared for the Insurance Council of Australia, which found 81% of homeowners/renters are exposed to financial loss because their insurance does not cover them to resume the same standard of living in the event of a crisis.³²

At its core this is a product safety issue. For example, as there are protections in place to prevent the sale of a child's toy which is choking hazard, so too there should be protections to

³¹ Compare the Market, 2016, 'Financial Services Guide', available at:

https://secure.comparethemarket.com.au/static/legal/FSG.pdf?_ga=1.79791511.1203711534.1486958006

³² Quantum Market Research, 2014, 'Understand home insurance research report', August 2014, available at:

http://understandinsurance.com.au/assets/research/ICA%20Understand%20Home%20Insurance_Report.pdf

prevent the sale of unsuitable insurance products. The impact of an unsuitable insurance product can be just as severe. Losing a home or car would be financially crushing for many consumers.

The problem with unsuitable insurance contracts was clearly recognised in the effort to bring about a standard definition for a flood. During the Queensland floods of 2011 there were instances where neighbours were hit by the same flood, both had flood coverage, but received completely different treatment at the hands of their insurers due to different technical definitions in their insurance contracts. The move to create a standard definition for a flood was a positive step, but it did not deal with the broader systemic problem in insurance sales.

The UK has introduced product suitability obligations for advised insurance sales.³³ An insurer must take reasonable care to ensure the suitability of its advice to a customer. This obligation is realised through requirements to:

- Establish a customer's needs, through information readily available and accessible to the insurer and obtaining further relevant information from a customer,
- Taking reasonable care to ensure that a policy is suitable for those needs, and
- Informing a customer if any needs are not met.

Australian consumers need this same level of protection to ensure that they are not thrown in to financial hardship because of an avoidable misunderstanding about the suitability of an insurance product.

Recommendation 13

- That insurers have a positive obligation to sell insurance products which are suitable to a consumer's identified need.

Enforceable requirements to provide consumer information

Thought needs to be given to the best regulatory measure(s) to ensure insurers are providing sufficient data and consumer information. Whichever regulatory mechanism is developed, it must be enforceable to ensure a consistent standard of information is provided to consumers across the entire market. An industry code would be an ideal lever for this kind of regulation due to its capacity to respond to changing markets and consumer need. However, the current

³³ FCA, 'Insurance: Conduct of Business', section 5.3, available at: <https://www.handbook.fca.org.uk/handbook/ICOBS.pdf>

General Insurance Code of Practice is not registered with ASIC and lacks regulator enforcement and monitoring. CHOICE strongly believes that industry should seek to register this code to build consumer confidence in the general insurance sector. The alternative is to enact these changes through the *Insurance Contracts Act* and Regulations.

Thought also needs to be given to how comparator website obligations can best be enacted. In 2015 the ACCC developed a guide for comparator website operators and suppliers.³⁴ This guide has a number of clear recommendations based around three key principles:

1. Facilitate honest, like-for-like comparisons,
2. Be transparent about commercial relationships,
3. Clearly disclose who and what is being compared.

Given comparison websites are now a well-developed market and there are ongoing problems, it is time to explore the need to elevate this guidance to an enforceable industry code.

Recommendation 14 and 15

- That industry should seek to register the General Insurance Code of Practice with ASIC and include the proposed reforms. Alternatively these changes could be enacted through the *Insurance Contracts Act* and Regulations.
- That the need to elevate the ACCC's 'Guide for comparator website operators and suppliers' to the status of industry code be reviewed.

³⁴ ACCC, 2015, 'A guide for comparator website operators and suppliers', available at: <https://www.accc.gov.au/system/files/CSBS%20-%20Comparator%20web%20sites%20project%20-%20Industry%20Guidance%20-%20final.pdf>