Submission regarding the Senate Committee's inquiry and report into the *Insurance Contracts Amendment Bill 2013*

Thank you for the opportunity to provide a submission regarding *the Insurance Contracts Amendment Bill 2013* ('Amendment Bill'). This submission has been prepared by Consumer Action Law Centre and the Insurance Law Service.

General Comments

We support the introduction of the *Insurance Contracts Amendment Bill 2013* ('Amendment Bill') which provides some long-awaited and important updates to insurance law in Australia, as first outlined in the Cameron-Milne Review in 2004[1], including:

- Improvement on the application of the duty of utmost good faith
- Clarification of ASIC Act powers of intervention under the Insurance Contracts Act
- Refinement on the law as it applies to the duty of disclosure
- Application of remedies of insurers to life insurance contracts
- Updating of insurance law to allow for electronic communication of documents
- Improvement on the rights available to third party beneficiaries

[1] Cameron-Milne Review – Final Report on second stage: provision other than s 54, 2004. It also should be noted that to previous attempts at enacting the recommendations of the Cameron-Milne Review were made in the Insurance Contracts Bill 2007 and Insurance Contracts Bill 2009.

However, there are a series of reform issues outlined in the Cameron-Milne Review and in past submissions made by consumer advocates[2] that have simply not made their way into this Bill. This reform package contains no amendment for provisions relating to key consumer concerns regarding:

- Unfair terms – remove the carve-out of insurance contracts from unfair contract terms protections: Insurance is the only transaction involving a standard form contract that a consumer is likely to enter into that is exempted from the national unfair terms regime in the Australian Consumer Law and ASIC Act. [3]

    - *Insurance is currently exempted from unfair terms law because of s15 of the Insurance Contracts Act, which prevents judicial review of a contract 'on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable*

- Instalment contracts – s 39 & 62: the current law is out-dated and heavily favours rights of insurers over consumers on cancelation of instalment contracts

- Standard form contracts – s 35: the law needs updating to reflect the fact that most contracting, particularly on general insurance, happens over the phone. Further the Regulations as to the standard terms in particular contracts need updating.

- Interest - the increase in the interest rate pursuant to S 57 of the Insurance Contracts Act recommended in the Cameron-Milne Review is not contained in this Bill.

In light of the fact that these issues have now been debated in various forms and without resolution for over a decade, we are willing to see the passage of the *Amendment Bill* without their inclusion, but we want to emphasise that they must stay on the government's agenda for future reform. These are significant issues for consumer advocates that must be eventually addressed.

Unfair Contract Terms

The most important issue for consumer advocates is removing the insurance industry's exemption from unfair contract terms protections. Key recommendations have been made by a number of national reviews for the removal of the exemption and the application of unfair terms legislation to standard form insurance contracts. 4 A proposal to extend unfair

2 See Senate Economics Legislation Committee report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (2009); Natural Disaster Insurance Review inquiry into flood insurance and related matters (2011); House of Representatives Committee on Social Policy and Legal Affairs inquiry into the operation of the insurance industry during disaster events (2012); and The draft report of the Productivity Commission into Barriers to Effective Climate Change Adaptation (2012); Joint Consumer response to Treasury release of the Insurance Contracts Amendment Bill 2013 (2012).

3 Section 28 of the ACL and s 12BM of the ASIC Act exclude contracts which are the constitution of a company or similar body. Section 28 of the ACL also excludes contracts for marine salvage and towage, charterparty of a ship and the contract for the carriage of goods by ship.

4 House of Representatives Standing Committee on Social Policy & Legal Affairs, Inquiry into the operation of the insurance Industry during Disaster Events, September 2011, National Disaster Insurance Review 2011, Senate Economics Legislation Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009

contract terms protections to insurance was finalised in late 2012 after extensive consultation with both insurers and consumer advocates by the office of the Assistant Treasurer, the Hon David Bradbury. This proposal—which would insert new elements in the Insurance Contracts Act rather than simply extend the existing ASIC Act provisions to insurance—was not the preferred option for consumer advocates. However, the result is in our view workable and a considerable improvement on the current situation. More importantly it was a result achieved through genuine negotiation between both sides of the debate which deserves to be enacted.

We understand that an amendment to the *Insurance Contracts Act* is currently being developed and a consultation draft will be released in the near future. Assuming the draft legislation reflects the agreement reached between industry, consumer advocates and government, we encourage Parliament move quickly to amend the Bill before Parliament to include the new legislation prohibiting unfair contract terms, or otherwise to enact these needed consumer protections as soon as practical after the upcoming election.

Interest

Interest Section 57 of the Insurance Contracts Act specifies that interest is: payable on late payment of insurance benefits from the date a benefit should reasonably have been paid. The rate is set out in Section 32 of the Insurance Contracts Regulations 1985 and is currently the 10 year Treasury Bond yield rate plus 3%. The Cameron-Milne Report recommended this rate be increased to the 10 year Treasury Bond yield rate plus 5%.

We strongly support this recommendation as enhancing the incentive on insurers not to unreasonably delay or deny payment of benefits and to compensate consumers from being unreasonably kept out of their benefits. We have seen far too many claims delayed or denied (in part or in full) and the current "penalties" are insufficient.

The Regulation could easily be amended in conjunction with the Amendment Bill.

Our response to the *Insurance Contracts Amendment Bill 2013*:

Summary of the joint-response submitted December 2012 to the Treasury's release of the Amendment Bill[5]

Schedule 1 – Utmost good faith & remedies of the insured

We support the proposed amendments to the duty of utmost good faith (s 13(2) to (4)), including the power of ASIC to exercise its full range of powers in relation to an insurer's failure to comply with the duty in the handling of a claim (s 14A). Further regulatory reform will be necessary to ensure that breaches of particular provisions of the *Insurance Contracts Act* are identified as a breach of Utmost Good Faith.

[5] The full submission is attached to this document.

Schedule 2 - Electronic communications:

We acknowledge the need to update the *Insurance Contracts Act* to take into account modern forms of communication and accordingly support this amendment. Additional reforms are necessary to enact regulations which will provide the protection necessary for consumers who will receive important documents electronically, like cancellation notices.

Schedule 3 – ASIC powers

We support the enactment of provisions which enhance the intervention power of ASIC under *Insurance Contracts Act*. To the extent that harmonisation between both the *ASIC Act* and the *Insurance Contracts Act* can be made, this should be a priority for further reform. For example, in the context of unfair terms regulation, ASIC should have full enforcement powers under the *ASIC Act* to properly achieve the legislative objectives of those consumer provisions.

Schedule 4 - Disclosure

We support the proposed amendments to the duty of disclosure save that we have some reservations as to the meaning & effect of the prescriptions in s 21(b) (i) & (ii) and whether it would have been more meaningful to include the additional item recommended in the Cameron-Milne Report, namely, 'the circumstances in which the contract was entered into, including the nature and extent of questions asked'. Consideration should be given over time to the effectiveness of amendments proposed in s 21 & s 21A & B clarifying the nature and scope of duty of disclosure and also whether the definition of eligible contracts should be amended to extend to life policies

Schedule 5 – Remedies of insurers: life insurance contracts

- **Part 1**

We support the proposed amendment regarding unbundling of life insurance contracts.

- **Part 2**

We generally support the proposed amendments to s 29 regarding remedies for non-disclosure and misrepresentation., although the Section does require amendments to correct the unintended consequences of the use of the word 'a' in S 29(3) and to expand the limitation in the remedy available pursuant to S29(4). There may be some difficulties in the interpretation of a reasonable and prudent insurer and what is a similar contract, but overall we support the amendments with the one suggestion that the above tests pursuant to ss 29(6)-(9) should also be applied to s 29(3).

- **Part 3**

We support the proposed amendment to the remedy for misstatement of date of birth.

- **Part 4**

We do not support the proposed addition of s 59A. Whilst we have no problem with the insertion of a clause dealing with the right to cancellation of a life insurance policy for fraud on a claim, the proposed s 59A as drafted runs counter to s 29 by purporting to allow for cancellation for non-disclosure and misrepresentation and also runs counter to ss 31 and 56 which apply proportionality to cancellation/avoidance for fraud. We believe the section needs to be redrafted to account for the above. We otherwise support the proposed amendment to s 63.

Schedule 6 – Third parties

We support the proposed amendments

Schedule 7 – Subrogation

We support the recommendations outlined in Schedule 7 regarding rules that are intended to provide for the division of any proceeds from a recovery action between the insurer and the insured.

Concluding Remarks

Consumer representatives and consumer organisations welcome the opportunity to comment on the *Insurance Contracts Amendment Bill 2013*. Should you require further information, please contact:

Gerard Brody
CEO
Consumer Action Law Centre

Katherine Lane
Principal Solicitor
Insurance Law Service

Who We Are

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Insurance Law Service

The Consumer Credit Legal Centre is a community legal centre that also runs the Insurance Law Service ("ILS"). The ILS is funded by the Legal Aid Commission of NSW and the Federal Government through the Community Legal Services Program. ILS has been providing advice and assistance to Australian consumers in relation to insurance since July 2007. In that time our solicitors have provided advice in the course of over 13,500 calls, and opened more than 550 casework files. Advice is provided free of charge on a 1300 number available throughout Australia. While based in NSW, the ILS is a national service and more than 68% of calls taken in the 2011/2012 financial year were from interstate, including 20% from Qld, 25% from Victoria and 10% from Western Australia.

We have a dedicated website (www.insurancelaw.org.au) which contains specific information about flood/storm and bushfire related claims, general information about claiming on your car or home insurance (in Arabic, Chinese and Vietnamese in addition to English), and a range of other resources such as sample letters for use by consumers in raising a dispute with their insurance company. The ILS also provides training for other community sector agencies on insurance issues, particularly trainee financial counsellors.

Response to Insurance Contracts Amendment Bill 2013

December 2012

Submission on behalf of Legal Aid NSW

Consumer Action Law Centre,

Insurance Law Service &

Consumer Representatives to Treasury

Introduction

This submission has been prepared by Legal Aid NSW, Consumer Action Law Centre, Insurance Law Service, and by the following individual consumer representative:

- John Berrill (Maurice Blackburn)

Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). It provides legal services, including advice, minor assistance and representation in Federal and State courts and tribunals, to socially and economically disadvantaged people.

In the financial year of 2010 – 2011, Legal Aid NSW provided client services to thousands of people with civil law matters, including information, advice and legal representation. Legal Aid NSW solicitors frequently advise clients, and litigate a range of matters under consumer protection legislation, including many that are credit related. Legal Aid NSW has recognised expertise in the area of insurance law and regularly contributes to law reform at both a State and Federal level, including in relation to consumer law.

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Insurance Law Service

The Consumer Credit Legal Centre is a community legal centre that also runs the Insurance Law Service ("**ILS**"). The ILS is funded by the Legal Aid Commission of NSW and the Federal Government through the Community Legal Services Program.

The ILS has been providing advice and assistance to Australian consumers in relation to insurance since July 2007. In that time our solicitors have provided advice in the course of over 6,000 calls, and opened more than 300 casework files. Advice is provided free of charge on a 1300 number available throughout Australia. While based in NSW, ILS is a national service and more than 59% of callers taken in the past 12 months were from interstate, including 25% from Victoria and 23% from Queensland.

Individual Consumer Representatives

John Berrill is a partner in the national law firm Maurice Blackburn and head of the firm's Insurance & Superannuation Department. John is a former consumer director of the Financial Industry Complaints Service (FICS) Board and also the FICS Panel. He is a long-standing and current representative of the Consumers Federation of Australia.

Executive Summary

We support the introduction of the *Insurance Contracts Amendment Bill 2013* which provides some long-awaited and important updates to insurance law in Australia, as first outlined in the Cameron-Milne Review in 2004[1], including:

- Improvement on the application of the duty of utmost good faith
- Clarification of *ASIC Act* powers of intervention under the *Insurance Contracts Act*
- Refinement on the law as it applies to the duty of disclosure
- Application of remedies of insurers to life insurance contracts
- Updating of insurance law to allow for electronic communication of documents
- Improvement on the rights available to third party beneficiaries

We outline in this submission some suggested amendments to particular provisions in the Exposure draft that relate to:

- Schedule 4 – Disclosure
- Schedule 5 - Life insurance contracts
- Application – Life insurance contracts

[1] Cameron-Milne Review – Final Report on second stage: provision other than s 54, 2004. It aso should be noted that to previous attempts at enacting the recommendations of the Cameron-Milne Review were made in the Insurance Contracts Bill 2007 and Insurance Contracts Bill 2009.

The enactment of this Exposure Draft should be seen as the first tranche in a series of reforms in insurance that should continue to take place.

Further regulatory reform will be necessary to accord more fully with the full suite of reforms and recommendations outlined in the Cameron-Milne Review and elsewhere. Various provisions outlined in this Bill for reform have additional aspects of reform that are equally necessary. These include:

- Schedule 1 – Utmost good faith & remedies of the insured

  Breaches of particular provisions of the *Insurance Contracts Act* should be identified as a breach of Utmost Good Faith.

- Schedule 2 - Electronic communications:

  Regulations should be enacted to provide the protection necessary for consumers who will receive important documents electronically, like cancellation notices .

- Schedule 3 – ASIC powers

  The Cameron-Milne Review highlighted the move toward harmonisation of regulatory powers between *ASIC Act* and *Insurance Contracts Act*. To the extent that such harmonisation between both Acts can be made, this should be a priority in the next round of review of the Insurance Contracts Act.

- Schedule 4 - Disclosure

  Consideration should be given over time to the effectiveness of amendments proposed in s 21 & s 21A & B clarifying the nature and scope of duty of disclosure and also whether the definition of eligible contracts should be amended to extend to life policies

There are also a series of reform issues outlined in the Cameron-Milne Review and elsewhere that have simply not made their way into this Bill. This reform package contains no amendment for provisions relating to key consumer concerns regarding:

- Unfair terms – removal of unfairness from s15: Insurance is only industry that currently contains an exemption from the national unfair terms regime in the Australian Consumer Law and ASIC Act.

- Instalment contracts – s 39 & 62: the current law is outdated and heavily favours rights of insurers over consumers on cancelation of instalment contracts

- Standard form contracts – s 35: the law needs updating to reflect the fact that most contracting, particularly on general insurance, happens over the phone

- Interest - the increase in the interest rate pursuant to S 57 of the Insurance Contracts Act recommended in the Cameron-Milne Review is not contained in this Bill.

Given the limited time to respond, this submission responds more generally to the key aspects of the Bill that we suggest warrant further consideration before enactment.

Schedule 1 – Scope and application

- **Part 1 – Duty of Utmost Good Faith**

We support the proposed amendments to the duty of utmost good faith[2], including the power of ASIC exercise its full range of powers in relation to an insurer's failure to comply with the duty in the handling of a claim[3].

The consumer experience in relation to claims handling can be mixed. At times, claims processes work well, particularly where a decision is made early on by an insurer in the claim lodgement process to pay a claim. However, where claims do not follow this path of early payment, our casework experience is that consumer rights, including the duty of utmost good faith, are not always adhered to in a fair and appropriate manner.[4]

It is vital that ASIC can exercise its full range of powers in relation to an insurer's failure to comply with the duty of utmost good faith in the handling or settlement of a claim. While ASIC has undertaken some useful work in reviewing issues associated with claims handling,[5] it has been unable to take further compliance and enforcement action due to its limited powers under the *Insurance Contracts Act*.

- **Part 2 & 3 – Bundled contracts**

We support the proposed amendments.

Schedule 2 – Electronic communication

We acknowledge the need to update the *Insurance Contracts Act* to take into account modern forms of communication and support the amendment.

Our support is subject to the enactment of appropriate safeguards outlined in Recommendation 2.1 & 2.2 of the Cameron-Milne Review. These include a commitment to the making of appropriate Regulations without delay to ensure:

- Clarity of notices
- Consent by the recipient to electronic communication and nomination by the recipient of an information system for that purpose
- Ability to print and retain communications
- Certainty of time and place of origin and receipt
- Specific notices (such as variations to life insurance contracts or notice of cancellation)[6] must be communicated by traditional means in addition to, or instead of, electronic means[7].

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[2] s 13(2) to (4) *Insurance Contracts Amendment Bill 2013*
[3] s14A *Insurance Contracts Amendment Bill 2013*
[4] See for instance Legal Aid NSW submissions to the House of Representatives Standing Committee on Social Policy & Legal Affairs, Inquiry into the operation of the insurance Industry during Disaster Events, September 2011
[5] See, eg, ASIC review of motor vehicle claims handling: http://www.asic.gov.au/asic/asic.nsf/byheadline/11%E2%80%93163MR+ASIC+reviews+motor+vehicle+insurance+claims?openDocument
[6] See 2.17, Cameron-Milne Review – Final Report on second stage: provision other than s 54

Schedule 3 – Powers of ASIC

We support the enactment of provisions which enhance the intervention power of ASIC under *Insurance Contracts Act*. However whilst the express powers ASIC has under the *Insurance Contract Act* overlap with existing powers under the ASIC Act, it is clear that ASIC has considerably more powers under the ASIC Act. For example, under the ASIC Act powers include issuing infringement notices, seeking civil penalties, as well as seeking redress for loss or damage suffered by non-party consumers.

To the extent that harmonisation between both Acts can be made, this should be a priority for further reform. A good example of the necessity for harmonisation would be in the context of unfair terms regulation, where ASIC would need to have full enforcement powers under the ASIC Act to properly achieve the legislative objectives of those consumer provisions.

Schedule 4 – Disclosure and misrepresentation

Part 1

We support the proposed amendments to the duty of disclosure save that we have some reservations as to the meaning & effect of the prescriptions in s 21(b) (i) & (ii) and whether it would have been more meaningful to include the additional item recommended in the Cameron-Milne Report, namely, 'the circumstances in which the contract was entered into, including the nature and extent of questions asked'.

Parts 2-4

We support the proposed amendments.

Schedule 5 – Remedies of insurers: life insurance contracts

Part 1

We support the proposed amendment regarding unbundling of life insurance contracts.

Part 2

We generally support the proposed amendments to s 29 regarding remedies for non-disclosure and misrepresentation.

The Section does require amendments to correct the unintended consequences of the use of the word 'a' in S 29(3) and to expand the limitation in the remedy available pursuant to S 29(4). We agree that the removal of the 3 year limitation for remedies for innocent non-disclosure and misrepresentation offset with the introduction of a reasonable and prudent insurer test for retrospective re-underwriting is a fair balance between the interests of the parties.

There may be some difficulties in the interpretation of a reasonable and prudent insurer and what is a similar contract, but overall we support the amendments with the one suggestion that the above tests pursuant to ss 29(6)-(9) should also be applied to s 29(3).

Part 3

We support the proposed amendment to the remedy for misstatement of date of birth.

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[7] Recommendation 2.2, Cameron-Milne Review – Final Report on second stage: provision other than s 54 Insurance Contracts Act

Part 4

We do not support the proposed addition of s 59A. Whilst we have no problem with the insertion of a clause dealing with the right to cancellation of a life insurance policy for fraud on a claim, the proposed s 59A as drafted runs counter to s 29 by purporting to allow for cancellation for non-disclosure and misrepresentation and also runs counter to ss 31 and 56 which apply proportionality to cancellation/avoidance for fraud.

We believe the section needs to be redrafted to account for the above.

We otherwise support the proposed amendment to s 63.

Schedule 6 – Third parties

Parts 1-6

We support the proposed amendments

Schedule 7 – Subrogation

We support the recommendations outlined in Schedule 7 regarding rules that are intended to provide for the division of any proceeds from a recovery action between the insurer and the insured.

General – Application

We generally support the clauses across the Exposure Draft which deal with the application of the various amendments, with the exception of the variation of a life insurance contract by an increase in the sum insured .

Many life insurance policies allow for the automatic increase in the sum insured annually by, for example, increases in the CPI. Such increases are not usually optional or underwritten and as such we believe such increases should not be included in the transitional arrangements.

Other matters not raised in the draft Bill

Whilst we are generally supportive of this legislative reform, we note that the Bill contains no amendment for provisions relating to key consumer concerns regarding:

- Unfair terms – need for removal of exemption under s 15: Insurance is currently only consumer product that contains an exemption from the national unfair terms regime in the *Australian Consumer Law* and *ASIC Act*. Key recommendations have been made at a national level, which recommend the removal of the exemption and the application of unfair terms legislation to standard form insurance contracts.[8]

- Instalment contracts – s 39 and s 62: the current law is outdated and heavily favours rights of insurers over consumers on cancelation

  The ICA's provisions regarding cancellation of insurance policies by insurers operate harshly against insureds, particularly in relation to insurance paid for in instalments. The effect of s 62 is that insurers can cancel an insurance contract due to an unpaid

[8] House of Representatives Standing Committee on Social Policy & Legal Affairs, Inquiry into the operation of the insurance Industry during Disaster Events, September 2011, National Disaster Insurance Review 2011, Senate Economics Legislation Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009

premium instalment where at least one instalment has remained unpaid for a period of at least one month and provided the insurer clearly informed the consumer in writing of the effect of the provision before the contract was signed. Further, s 39 enables an insurer to refuse a claim even where a policy is on foot but premium unpaid for 14 days, subject to clearly informing of the effect of this provision at inception.

Our casework experience is that socially and economically disadvantaged consumers are more likely to enter into instalment contracts of insurance, often ending in dispute with insurers over whether the policy was on foot at the time of an insured event. There are good public policy reasons to support, given the ease of electronic communications, customers being given a warning prior to cancellation and being advised of such, following non-payment of an instalment. We are aware that some insurers do notify insureds after non-payment of a premium instalment, and see no reason why this shouldn't be standard practice across the industry.

Given the harsh result if a premium instalment remains unpaid, a fair notice framework might involve two notices being provided to an insured after non-payment of an instalment before any right of cancellation is to accrue to the insurer. The first notice should be at least 14 days after non-payment, and the next should be 14 days later, to allow for two full periods of Centrelink benefits of salaries for a consumer to remedy non-payment.

Equally, opportunity should be given for consumers in financial hardship to enter into a financial hardship arrangement to avoid cancellation of policy (s 62) or the right to avoid liability (s 39). Equivalent obligations have existed in relation to banking and energy products for some time. While we welcome these issues being considered in the context of the review of the General Insurance Code of Practice, we think that changes to the law are also required.

Further, consumer interests and legal certainty are best served by additional notice prior to cancellation, which will protect consumers before any harm is done. This ensures continuity of contract between existing insurers and consumers – which we suggest is also good for business.

- Standard form contracts – s 35: On the current judicial interpretation of this provision[9], s 35 does not in our view achieve the legislative intent of Australian Law Reform Commission for this important consumer protection provision.[10]. Further work is needed to improve the effectiveness of s 35.

- Telephone disclosure: As part of the review into s 35, consideration needs to be given that informed choice for consumers happens at the time of purchase of product, which is generally over the phone. There is very little consumer protection relating to informed choice and disclosure at the time when they most need it, on the phone when they purchase the product.

- Key Fact Sheets (KFS): Whilst we are generally supportive of reforms to simplify disclosure, we would further support:

    - The application of KFS to other products such as motor vehicle and travel

[9] See *Hams v CGU Insurance Ltd* (2002) 3 ANZ Ins Cas 60-647
[10] See ALRC 20 (1980) at para 48 & 72

- The ability of consumers to make an informed choice about the product that they are purchasing or considering purchasing, at the time of the inquiry – which is usually over the phone

- Utmost good faith – s 14 & remedies of the insured: The Cameron-Milne Review recommended that the duty of utmost good faith could be strengthened to apply to breaches of particular provisions applied or imposed in the *Insurance Contracts Act*[11] including:
  - Breaches of communications provisions (eg notices), particularly where there is no other remedy in the Act, including ss 41, 74, 75
  - Breaches of contract term provisions in the Act[12], which affect or modify common law rights and obligations of parties, including ss 38, 45, 53, 59, 60

.

- Pre –existing defects - s 46: The intention of s 46 was to protect consumers from the rejection of insurance claims for pre-existing defects they had no knowledge of. That intention has now been undermined by the decision of *Nelson v Hollard Insurance Co Pty Ltd* [2010] NSWSC 199. Here, it was held that indemnity clauses in insurance policies will only be caught within the ambit of s46 of the IC Act where the event sought to be excluded (i.e. loss flowing from a defect or imperfection in a thing) is qualified by reference in the policy to it needing to have existed prior to entry into the contract

  The Financial Ombudsman Service is required to follow this decision and a number of determinations have been issued confirming this.[13] This section needs to be clarified in the Act to ensure it clearly supports the original intention of the section.

Concluding remarks

Consumer representatives and consumer organisations welcome the opportunity to provide these comments. Should you require further information, please contact:

- John Berrill, Maurice Blackburn (jBerrill@mauriceblackburn.com.au) or telephone (03) 9605 2752

- Gerard Brody, Consumer Action Law Centre (gerard@consumeraction.org.au) or telephone (03) 9670 5088.

- Kat Lane, Insurance Law Service (kat.lane@cclcnsw.org.au or telephone (02) 82041350

- David Coorey (david.coorey@legalaid.nsw.gov.au) or telephone (02) 9219 5824.

[11] Recommendation 6.1 Cameron-Milne Review – Final Report on second stage: provision other than s 54
[12] Part V – VIII Insurance Contracts Act
[13] FOS determination 225330 –Whether section 46 of the Insurance Contracts Act 1984 has application depends on consideration of the relevant policy terms. For section 46 to apply, it is necessary to show that the relevant policy terms, that is the limitation or exclusion, has the effect to limiting or excluding liability by reference to the condition of a thing at a time before the contract was entered into. The exclusions needs to refer to a point in time and not simply state a number of conditions including wear and tear, rust, deterioration or corrosion, soil movement or settlement or an unreasonable failure to properly maintain or repair a building. If the exclusion is not dependent and does not refer to a point in time, prior to commencement of the policy but over a period up to the time of the loss, then s46 does not apply.