

23 July 2021

By email: goodfaith@ag.gov.au

To whom it may concern

Use of the Term Good Faith in Civil Penalty and Criminal Offence Provisions

The Insurance Council of Australia (ICA) welcomes the opportunity to respond to the Attorney-General's Department (Department) consultation, *Inquiry into the Use of the Term Good Faith in Civil Penalty and Criminal Offence Provisions in Commonwealth Legislation (the consultation paper)*.

The ICA is the representative body of the general insurance industry in Australia and represents approximately 95 percent of private sector general insurers. A foundational component of the Australian economy, the general insurance industry employs approximately 60,000 people, generates gross written premium of \$53.9 billion per annum and on average pays out \$166.2 million in claims each working day (\$41.5 billion per year).

This letter makes some high-level comments for your consideration. Answers to questions posed in the consultation paper are included in the **Appendix**.

General Comments

As the consultation paper notes, the *Insurance Contracts Act (the Act)* imposes a duty of "utmost good faith" (**the duty**) on parties to an insurance contract. The Act has contained the duty since 1984. There is extensive case law on its nature and extent, and industry practices are predicated on the current understanding. The centrality of the duty to insurance is reflected in the comment in the final report of the Financial Services Royal Commission (**FSRC**) that "*in insurance, all of the norms may be seen as embodied in the duty of utmost good faith imposed on each party to an insurance contract...*".¹

While the ICA is open to considering any proposals that the Department puts forward, we remain to be convinced that a comprehensive statutory definition would bring meaningful benefits for policyholders, industry or the broader community.

In addition to our answers to the questions posed in the consultation paper, the ICA makes the following additional comments. First, to note the challenges in creating a single comprehensive definition for a term used in a diversity of situations:

- Elements of a "good faith" duty appropriate for the dairy industry or criminal law (examples from the consultation paper) may not be applicable to insurance, and vice versa. This will require detailed examination of the case law, contexts and applications of this duty, to avoid unintended consequences.
- Statutory duties of this type are typically designed to cover a variety of conduct not contemplated by Parliament at the time of enactment. It would be difficult to provide meaningful and workable definitions of the wide range of conduct which may attract the duty. Further, a broadly defined statutory duty may

¹ FSRC final report, vol 1, p11



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require judicial interpretation, resulting in an outcome similar to the current position but with additional uncertainty while case law is established.

- There are significant risks that, in "codifying" certain conduct as constituting "good faith", it could effectively narrow the scope of conduct which would be considered to constitute acting in good faith by creating a greater onus to justify conduct not explicitly set out in legislation.

Second, to note the challenges within the specific context of the Act:

- The duty prescribed by the Act is slightly different to the other examples offered in the consultation paper, being "**utmost** good faith" rather than "good faith". The significance of this will need further consideration.
- The creation of a comprehensive definition that applied to civil penalty clauses may increase consumer confusion. While the duty imposed by the Act is reciprocal, civil penalties attach only to the insurer. This raises the question of how any amendment that targeted civil penalties only would impact consumers. For example, a narrowly constructed definition could apply only to provisions attracting civil penalties. This would thereby exclude consumers but potentially create multiple definitions, thereby exacerbating the issues that the consultation is trying to solve.
- Recent legislative changes should be given time to settle and their operation to be observed. Most significantly, insurance contracts are now subject to "unfair contract terms" (UCT) legislation from 5 April 2021.² While the UCT provisions operate independently, there is a degree of overlap. The ICA suggests that recent amendments be given time to settle and their impact be understood before further changes are made. Similarly, any further consideration of the scope of "good faith" duties in the insurance industry should consider the impact of the extension of UCT provisions.
- The FSRC examined the insurance industry, as part of its broader inquiry. While it referred to the duty in its final report, and it was clearly viewed as critical, it did not recommend any amendments.

Next Steps

While we remain open to considering any specific proposals that the Department may develop, the ICA does not see any real basis to clarify further the duty of utmost good faith. Further, as noted above, there are clear challenges associated with creating a comprehensive statutory definition.

If you have any further questions or comments, please contact Aparna Reddy (General Manager, Policy – Regulatory Affairs) on 02 9253 5176 or areddy@insurancecouncil.com.au.

Yours sincerely

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CEO & Managing Director

² [Unfair contract term protections for consumers | ASIC - Australian Securities and Investments Commission](#)



Appendix: Answers to Consultation Questions

Note: The ICA has not addressed Questions 7 and 8, which are directed towards Regulators.

General Questions

1. Does a lack of legislative definition of the term good faith contribute to any lack of clarity or certainty in civil penalty and offence provisions?

The Act has contained such a duty since 1984. There is case law on its nature and extent and industry practices are predicated on this current understanding. It is well understood by the industry.

As noted in the covering letter, the ICA notes that these broad duties are often intended to cover a variety of scenarios not envisaged by Parliament at the time of enactment.

2. Do some areas of law and regulation benefit from the use of the term good faith over others?

The ICA has no view on the operation of the duty in other areas of law and regulation.

3. Does the interaction of a legislative definition of good faith and common law interpretations cause any legal or practical issues?

The ICA is not aware of any legal or practical issues of this nature.

4. Would defining the term in legislation when used in civil penalty and offence provisions or otherwise affect regulatory coherence, and if so, could non-legislative mechanisms such as regulatory guides complement express definitions to help mitigate this effect?

While the current consultation is directed towards the use of the duty of good faith in criminal and civil penalty provisions, the ICA notes that the term is used more broadly. Consideration would need be given as to how broadly any comprehensive term would apply.

Individuals and Industry

5. Do you understand what is expected of you to uphold your obligation to act in good faith in the legislation you operate under?

The ICA considers that the duty of utmost good faith is understood well by the insurance industry. If there was ever a need to clarify it, this would be best done through regulatory guidance, rather than legislative definition.

6. Do you believe that a comprehensive definition of good faith, particular to your regulated area, contained in legislation, would make it easier for you to uphold your obligation to act in good faith?

This would depend on how the comprehensive definition is formulated. Our covering letter has noted some of the challenges associated with creating a comprehensive definition that works across a diverse range of industries.