

Chapter 3

Consumer protections

Introduction

3.1 The aim of consumer protections is to protect Australian consumers under a national law by ensuring that consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia. However, as the evidence in this chapter illustrates, life insurance is currently exempt from several consumer protections.

3.2 This chapter begins by summarising the Australian Consumer Law (ACL) and its application to financial services. The chapter then examines the consumer protections that apply to life insurance and compares those protections to the ACL. A substantial list of exemptions is identified and some significant exemptions are discussed in detail to provide examples of the potential for reform. The proposed product design and distribution obligations and ASIC's product intervention powers, and the Banking Executive Accountability Regime (BEAR), are also considered.

3.3 Given that this chapter focusses on legislated consumer protections, the Life Insurance Code of Practice is discussed separately in chapter 4.

Australian Consumer Law

3.4 The ACL is a national consumer law in effect from 1 January 2011, covering:

- a national unconscionable conduct and unfair contract terms law covering standard form consumer and small business contracts;
- a national law guaranteeing consumer rights when buying goods and services;
- a national product safety law and enforcement system;
- a national law for unsolicited consumer agreements covering door-to-door and telephone sales;
- simple national rules for lay-by agreements; and
- penalties, enforcement powers and consumer redress options.¹

3.5 The ACL is split across different Acts and regulators depending on the type of product or service that is being offered. The regulators for the ACL are:

- the Australian Competition and Consumer Commission (ACCC), in respect of conduct engaged in by corporations, and conduct involving the use of postal, telephonic and internet services under the *Competition and Consumer Act 2010* (Competition and Consumer Act);

1 Commonwealth of Australia, *The Australian Consumer Law*, <http://consumerlaw.gov.au/the-australian-consumer-law/> (accessed 24 July 2017).

- state and territory consumer protection agencies, in respect of conduct engaged in by persons carrying on a business in, or connected with, the respective state or territory; and
- the Australian Securities and Investment Commission (ASIC) in relation to financial products and services under the *Australian Securities and Investments Commission 2001* (ASIC Act).²

Productivity Commission consideration of life insurance and the ACL

3.6 In 2008, the Productivity Commission considered whether consumer protections for financial services in the ASIC Act should be exempt from the generic provisions of the ACL.³ The Productivity Commission stated that 'statutory carve outs of this nature can potentially provide unscrupulous operators with opportunities to make minor changes to their activities so as to slip between the regulatory cracks. To avoid this, there should be no exclusions of particular sectors from the new national generic consumer law.'⁴

3.7 The Productivity Commission considered that there was a strong underlying rationale for consumer law to encompass all sectors. The 2008 report recommended that the generic consumer law should apply to all consumer transactions, including financial services, with ASIC to remain the primary regulator.⁵

3.8 In its 2017 review of the ACL, Consumer Affairs Australia and New Zealand stated that a key strength of the ACL is its generic nature, applying across all sectors of the economy. Consumer Affairs Australia and New Zealand suggested that exemptions in the ASIC Act should be reviewed, with a view to removing those that are no longer in the public interest, particularly given the objective of providing a generic, economy-wide law. The review noted that:

The ACL contains a number of exemptions, many of which were carried over from the former Trade Practices Act. CAANZ [Consumer Affairs Australia and New Zealand] considers that exemptions in the ACL risk undermining the benefits of a nationally consistent approach to consumer protection.

CAANZ [is] proposing to extend the unconscionable conduct protections to publicly-listed companies and apply the unfair contract terms protections to standard form insurance contracts.⁶

2 Australian Competition and Consumer Commission, *Unfair contract terms: A guide for business and legal practitioners*, March 2016, p. 6.

3 Productivity Commission, *Consumer Law Enforcement and Administration*, March 2017, pp. 32, 44.

4 Productivity Commission, *Review of Australia's Consumer Policy Framework*, April 2008, p. 24.

5 Productivity Commission, *Consumer Law Enforcement and Administration*, March 2017, pp. 32, 44.

6 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Reform*, March 2017, pp. 72, 77, 98.

Life insurance consumer protections

3.9 This section summarises the consumer protections that currently apply to life insurance (the duty to act in utmost good faith) as well as those that are due to come into operation in 2018 (the FOFA conflicted remuneration provisions). The main protections that apply to life insurance are listed in Table 3.1.

Table 3.1: Life insurance consumer protections

Consumer Protections	Non-financial services under the <i>Competition and Consumer Act 2010</i>	Financial services	Life insurance
The duty of the utmost good faith	N/A	N/A	<i>Insurance Contracts Act 1984</i> Section 13 applies to each party
Insurers may not refuse to pay claims in certain circumstances	N/A	N/A	<i>Insurance Contracts Act 1984</i> Section 54
Remedies	N/A	N/A	<i>Insurance Contracts Act 1984</i> Sections 54-56
Pre 1/1/11 federal, state, territory laws	N/A (The former Trade Practices Act contained similar consumer protection provisions to those in the CC Act).	The ASIC Act contained consumer protection provisions predating the commencement of the CC Act.	<i>Insurance Contracts Act 1984</i> provisions dealing with the duty of utmost good faith that predated the <i>Competition and Consumer Act 2010</i> were amended in 2013.
Information Standards	Part 3-4: The Minister may set information standards.	Product Disclosure Statement requirements are contained in the Corporations Act and the National Consumer Credit Protection Act.	Product Disclosure Statement requirements under the Corporations Act.
FOFA and Conflicted Remuneration			From 1 January 2018, commission caps introduced over three years.

Source: Australian Securities and Investments Commission, *Submission 45*, p. 31; Australian Securities and Investments Commission, answers to question on notice, 4 August 2017 (received 4 December 2017).

Duty to act in the utmost good faith

3.10 Section 13 of the *Insurance Contracts Act 1984* (Insurance Contracts Act) requires each party to act towards the other party, in respect of any matter arising, with the utmost good faith.⁷

3.11 The ACL Review Final Report of March 2017 concluded that the duty to act in utmost good faith provided less consumer protection than that provided by ACL.⁸

3.12 In addition, ASIC's ability to commence proceedings under the Insurance Contracts Act is more restricted than for other consumer protection provisions. ASIC is limited to representative proceedings under the Insurance Contracts Act, intervening in existing proceedings, or taking licensing action under the Corporations Act.⁹

3.13 Furthermore, ASIC is not able to seek civil penalties for a breach of the duty of utmost good faith. A review of penalties is currently being considered by the government-established ASIC Enforcement Review Taskforce. ASIC has proposed that the government consider amending the sanctions regime that applies to life insurance in order to deter poor conduct by life insurers by:

- allowing civil penalties for breaches of the utmost good faith duty; and
- aligning penalties for directors of life insurance companies with the civil and criminal penalties that apply to directors of managed investment schemes.¹⁰

3.14 Further evidence received by the committee comparing the effectiveness of the duty of utmost good faith to unfair contract terms laws is discussed in the later section on unfair contract terms.

FOFA

3.15 The Future of Financial Advice (FOFA) reforms (Part 7.7A of the Corporations Act) include conduct obligations for the giving of personal advice to retail clients, and obligations to act in the best interests of the client, and to prioritise the interests of the client ahead of those of the advice provider. The FOFA reforms also included a ban on conflicted remuneration structures including commissions and

7 *Insurance Contracts Act 1984*, Section 13.

8 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, March 2017, p. 53.

9 Australian Securities and Investments Commission, answers to questions on notice, 4 August 2017 (received 4 December 2017).

10 Australian Securities and Investments Commission, *Report 498: Life insurance claims: An industry review*, October 2016, p. 100; ASIC Enforcement Review Taskforce, Position Paper 7, *Strengthening Penalties for Corporate and Financial Sector Misconduct*, 23 October 2017, p. 70.

volume based payments. When they were originally introduced, however, the FOFA reforms excluded any bans on conflicted remuneration in relation to life insurance.¹¹

3.16 However, from 1 January 2018, benefits will no longer be exempt, although the commission caps and clawback arrangements will be introduced over a three year transition period as discussed in chapter 5.¹²

Life insurance exemptions from consumer protections

3.17 A range of consumer protections apply to financial services. This section summarises the consumer protections from which the life insurance industry is currently exempted. The consumer protections that apply to financial services and from which the life insurance industry is exempted are listed in Table 3.2.

3.18 Table 3.2 also indicates equivalent or related consumer protections under the *Competition and Consumer Act 2010* that apply to non-financial services.

Section 15 of the Insurance Contracts Act 1984

3.19 Some of the most significant exemptions from consumer protections in the life insurance industry arise from section 15 of the Insurance Contracts Act. The explanatory memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 set out the way in which insurance contracts are exempted from the operation of various consumer protections under the ACL:

Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance (as defined by that Act) is not capable of being made the subject of relief under any other Commonwealth Act, a State Act or an Act or Ordinance of a Territory. In this context 'relief' means relief in the form of:

- the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or
- relief for insureds from the consequences in law of making a misrepresentation,

but does not include relief in the form of compensatory damages. The effect of section 15 is to mean that the unfair contract terms provisions of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984*, to the extent that that Act applies.¹³

11 Australian Securities and Investments Commission, answers to questions on notice, 21 August 2017 (received 8 September 2017); Australian Securities and Investments Commission, *FOFA—Background and implementation*, <http://asic.gov.au/regulatory-resources/financial-services/future-of-financial-advice-reforms/fofa-background-and-implementation/> (accessed 8 November 2017).

12 Australian Securities and Investments Commission, answers to questions on notice, 21 August 2017 (received 8 September 2017).

13 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, pp. 31–32.

Table 3.2: Consumer protections and exclusions for the life insurance industry

Protection	Consumer protections for non-financial services under the <i>Competition and Consumer Act 2010</i>	Consumer protections for financial services	Consumer protections for life insurance
Misleading or deceptive conduct	Part 2-1:	ASIC Act: Section 12DA: Misleading or deceptive conduct, including representations.	Excluded by section 15 of the <i>Insurance Contracts Act 1984</i> .
Unconscionable conduct	Part 2-2:	ASIC Act: Section 12CA – 12CC: Unconscionable conduct within the meaning of the unwritten law and also in connection with financial services. Conduct may be unconscionable if it is particularly harsh or oppressive, and is beyond hard commercial bargaining.	Excluded by section 15 of the <i>Insurance Contracts Act 1984</i> .
Unfair contract terms	Part 2-3: Standard form consumer and small business contracts.	ASIC Act: Section 12BF – 12BM: Standard form consumer and small business contracts.	Excluded by section 15 of the <i>Insurance Contracts Act 1984</i> .
Unfair practices	Part 3-1: False or misleading practices, unsolicited supplies, pyramid schemes, pricing.	ASIC Act: Section 12BB, 12DB – 12DM: False or misleading representations, pricing, rebates, bait advertising, referral selling, accepting payment without supply, harassment or coercion, pyramid selling, unsolicited supplies.	Excluded by section 15 of the <i>Insurance Contracts Act 1984</i> .
Unsolicited consumer agreements	Part 3-2: Relevant types of agreement are prescribed in regulations.	Sections 736, 992A and 992AA of the Corporations Act regulate the hawking of financial products.	There are limited exclusions in relation to certain insurance products under regulation 7.8.24 of the Corporations Regulations

Guarantees and warranties	Part 3-2: Guarantees consumer rights when buying goods and services.	Section 12ED: Warranties in relation to the supply of financial services that will be rendered with due care and skill and be fit for purpose. There is no warranty that financial services will be supplied within a reasonable time, although protection is provided by section 12DI of the ASIC Act.	Excluded by subsection 63(b) of the CC Act and subsection 12ED(3) of the ASIC Act.
Claims handling exemption	N/A	N/A	Excluded by Corporations regulations 7.1.33 (discussed in chapter 7)
Corporations Act Chapter 7	N/A	Protections on informed consumer about financial products and fairness, honesty and professionalism of providers	Section 765A of the Corporations Act, excludes insurance contracts and life policies that are not contracts.
Dollar disclosure	N/A	Section 947B – 947D set out what information is required in statements of advice. Section 1013D sets out what information is required in product disclosure statements.	Instrument 2016/767 provides exemptions for the life insurance industry from disclosing dollar amounts for costs, fees, charges, expenses, benefits and interests.
<i>Product design distribution and intervention power</i>	N/A	Proposed powers for ASIC to proactively intervene where it identifies significant consumer detriment.	Treasury's proposals paper appears to propose to exempt distributors who provide personal advice.
<i>National Consumer Protection Act 2009</i>			Lenders are not required to provide life insurance rebates to businesses that pay loans off early.

Source: Australian Securities and Investments Commission, *Submission 45*, p. 31; Australian Securities and Investments Commission, answers to question on notice, 4 August 2017 (received 4 December 2017); Treasury, answers to question on notice, 22 August 2017 (received 6 September 2017); Treasury Proposals Paper, *Design and Distribution Obligations and Product Interventions Power*, December 2016, p. 3.

3.20 Although the wording has varied over the time, the central aspects of section 15 which exclude relief in respect of harsh, oppressive, unconscionable, unjust, unfair or inequitable contracts have been in the Insurance Contracts Act since it came into effect in 1984.¹⁴

3.21 The introductory remarks on operating fairly in the first version of the Insurance Contracts Act state that it was:

An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes.¹⁵

3.22 The explanatory memorandum for the bill which led to the Insurance Contracts Act argued that the duty to act in good faith meant that other consumer protections were not necessary:

In view of the Bill's clear statement of the duty of good faith, a general power to review its terms is unnecessary. Furthermore, it is appropriate that there should be no question whether the Bill or State legislation or other Commonwealth legislation applies in a particular case and so no room for lengthy disputes as to which should apply.¹⁶

Unfair contract terms

3.23 Unfair Contract Terms (UCT) laws apply to standard form consumer contracts. A standard form contract will typically be one prepared by one party to the contract and not negotiated between the parties—it is offered on a 'take it or leave it' basis. The ASIC Act defines 'consumer contract' as follows:

A consumer contract is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.¹⁷

3.24 A term of a consumer contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and

14 *Insurance Contracts Act 1984*, Act No. 80 of 1984.

15 *Insurance Contracts Act 1984*, Act No. 80 of 1984.

16 *Insurance Contract Bill 1984, Explanatory memorandum*, 1983–1984, p. 25.

17 Australian Competition and Consumer Commission, *Unfair contract terms: A guide for business and legal practitioners*, March 2016, pp. 7–8; *Australian Securities and Investments Commission Act 2001*, subsection 12BF(3).

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- would cause detriment to a party if it were to be applied or relied on.¹⁸
- 3.25 The following actions can be pursued in relation to unfair contract terms:
- A court can declare a term of a standard form consumer contract to be unfair. Once a term is declared to be unfair, it will be void. However, the remainder of the contract will continue to apply, if it can continue without the void term.
 - Individuals can apply to a court to have a term of a standard form contract they entered into declared unfair and accordingly, void.
 - ASIC can also apply to have a term of a particular standard form contract declared unfair.
 - The law does not impose a pecuniary penalty on a business that includes or seeks to rely on an unfair contract term. However, consumers can seek redress for any loss that is incurred as a result of a term of a standard form contract that is declared to be unfair.¹⁹

3.26 Some indication of the potential extent to which unfair terms may permeate contracts can be gained from the work that the ACCC has done in other industries. In 2013, the ACCC completed a review of the unfair contract terms in the airlines, telecommunications, fitness and vehicle rental industries, as well as some contracts commonly used by online traders. Following the review, 79 per cent of unfair terms were removed from standard form contracts following the ACCC finding that the following unfair terms were in standard form contracts:

1. Contract terms that allow the business to change the contract without consent from the consumer.
2. Terms that cause confusion about the agency arrangements that apply and that seek to unfairly absolve the agent from liability.
3. Terms that unfairly restrict the consumer's right to terminate the contract.
4. Terms that suspend or terminate the services being provided to the consumer under the contract.
5. Terms that make the consumer liable for things that would ordinarily be outside of their control.
6. Terms that prevent the consumer from relying on representations made by the business or its agents.
7. Terms seeking to limit consumer guarantee rights.

18 Australian Competition and Consumer Commission, *Unfair contract terms: A guide for business and legal practitioners*, March 2016, p. 11.

19 Australian Securities and Investments Commission, *Unfair contract terms for consumers*, <http://asic.gov.au/about-asic/what-we-do/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-consumers/> (accessed 30 January 2018).

8. Terms that remove a consumer's credit card chargeback rights when buying the service through an agent.²⁰

3.27 The committee also notes that, following the passage of unfair contract terms legislation for small business loans, major banks have reviewed those contracts and removed unfair contract terms.²¹

3.28 The ACCC has identified significant inconsistencies in the way that unfair contract terms legislation applies. For example, life insurance is covered by the Insurance Contracts Act and is therefore exempted from the unfair contract terms legislation. By contrast, private health insurance, state and Commonwealth government insurance, and re-insurance are not regulated by the Insurance Contracts Act and are therefore subject to the unfair contract terms laws.²²

3.29 Divergent views were put to the committee about the proposal to subject the life insurance industry to the application of unfair contract terms. Broadly speaking, regulators and consumer groups were very much in favour of moves to apply unfair contract terms to life insurance, while the life insurance industry was, at best, somewhat reticent about such moves.

3.30 However, even amongst industry participants, the committee received different perspectives from life insurance companies and the Financial Services Council (FSC). For example, the FSC argued that there would be greater consumer benefit in amending the Life Insurance Code of Practice rather than extending unfair contract terms legislation or intervention powers.²³

3.31 By contrast, some life insurance companies acknowledged that they were now generally supportive of subjecting life insurance contracts to some form of unfair contracts terms, while also noting that this would not be a straightforward matter. For example, ANZ indicated that, while it supported the extension of unfair contract terms laws to life insurance, it was of the view that consumer protections should be framed as an extension of the existing duty of utmost good faith rather than applying the current unfair contract terms laws to life insurance. ANZ gave the following reasons for this view:

- there are a number of existing consumer provisions in the *Insurance Contracts Act 1984*;
- there is inconsistency in the unfair terms provisions in the Competition and Consumer Act and the ASIC Act;

20 Australian Competition and Consumer Commission, *Unfair contract terms Industry review outcomes*, March 2013, p. 1.

21 Australian Securities and Investments Commission, *17-278MR Big four banks change loan contracts to eliminate unfair contract terms*, 24 August 2017, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-278mr-big-four-banks-change-loan-contracts-to-eliminate-unfair-terms/> (accessed 8 November 2017).

22 Australian Competition and Consumer Commission, *Unfair contract terms: A guide for business and legal practitioners*, March 2016, pp. 9–10.

23 Financial Services Council, *Submission 26.1*, pp. 14–15.

- the 'subject matter' of a contract of insurance will be very different to the 'subject matter' of many standard form consumer contracts; and
- reasonable exclusions of cover which have been disclosed to consumers at the time they enter into the contract of insurance should either specifically fall within the 'subject matter' of the contract, or otherwise be exempt from the operation of the new law.²⁴

3.32 ANZ also argued that the life insurance industry would need sufficient time to amend existing policies to ensure that they do not contain unfair terms.²⁵

3.33 Mr Nicholas Scofield from Allianz Australia Insurance acknowledged that there were different views within the industry over the application of unfair contract terms to the life insurance industry. He noted that while the Insurance Council had come to the view that it wanted to 'work on the application of unfair contract terms to general insurance', he was of the view that there were particular challenges in achieving this. Mr Scofield indicated that, in his view, there was significant uncertainty as to what the 'subject matter' of a life insurance contract actually was, and that this may differ significantly from that for general insurance and other goods and services. Nevertheless, Mr Scofield said that Allianz was willing to work constructively with government and other stakeholders to address these matters.²⁶

3.34 ASIC observed that the life insurance industry had argued against extending unfair contract terms to life insurance. ASIC acknowledged that there were issues that would need to be overcome in applying unfair contract terms to life insurance. However, ASIC supported extending unfair contract legislation to life insurance and was of the view that these challenges could be overcome and that the application of unfair contract terms to life insurance would be an important addition to the protections available for consumers.²⁷

3.35 ASIC explained that the introduction of unfair contract terms was complicated by the fact that life insurance premiums are calculated on the actuarial risk that is assumed by the life insurer. In other words, it cannot necessarily be assumed that a contract that covers certain risks while excluding others is unfair because it may have been designed in that way in order to be able to offer it at a much lower price than a contract without the exclusions.²⁸

24 ANZ, *Submission 44.1*, pp. 1–2.

25 ANZ, *Submission 44.1*, p. 2.

26 Mr Nicholas Scofield, General Manager, Corporate Affairs, Allianz Australia Insurance, *Committee Hansard*, 18 August 2017, pp. 37–38.

27 Mr Michael Saadat, Senior Executive Leader, Deposit Takers, Credit and Insurers; Regional Commissioner, New South Wales, Australian Securities and Investments Commission, *Committee Hansard*, 8 September 2017, p. 39.

28 Mr Michael Saadat, Senior Executive Leader, Deposit Takers, Credit and Insurers; Regional Commissioner, New South Wales, Australian Securities and Investments Commission, *Committee Hansard*, 8 September 2017, p. 39.

3.36 Mr Nick Kirwan, Policy Manager at the FSC, drew the committee's attention to the difficulties experienced in the United Kingdom (UK) when unfair contract term provisions had been applied to life insurance. Specifically, the courts in the UK found that if one party was able to vary a contract (that is, increase the premium), then the other party had to have the right to cancel. The courts' interpretation was that the consumer had the right to cancel without a penalty. In addition, the court also decided that 'if the person's health had changed and they'd had a life insurance policy which they cancelled, they were suffering a penalty because they wouldn't be able to replace that insurance again'. Mr Kirwan was therefore of the view that if the government were to legislate for the removal of unfair contract terms from life insurance policies, the legislation would need to consider the UK experience and ensure that it does not result in significant premium increases.²⁹

3.37 The committee notes that this has resulted in life insurance policies in the UK now being offered with fixed premiums with terms of only up to 10 years. This experience may necessitate specific life insurance provisions deeming unilateral premium adjustments by an insurer be 'fair' for the purposes of unfair contract term provisions where clear motive is given to the insured that premiums may increase and how.

3.38 However, Mr Peter Kell, Deputy Chairman of ASIC, explained that the unfair contract terms provisions already require certain tests to be satisfied to take into account the particular requirements of the life insurance industry:

...it's a three-part test. One of the key elements of that test, for any industry sector, is the term 'necessary' from a business perspective, if you like. So there is the opportunity within the UCT [unfair contract terms] provisions, as they are currently constructed, to take into account particular issues within different sectors. That's one of the reasons we think it can and should be extended to insurance, and that it won't be an insurmountable problem to offer that additional level of protection.³⁰

3.39 Several submitters and witnesses strongly disagreed with the arguments put forward by the life insurance industry about the duty of utmost good faith obviating the need for unfair contract terms to apply to life insurance. For example, the Financial Rights Legal Centre informed the committee that it has long been the view of consumer advocates that there is no sound reason to exempt the insurance industry from the unfair contract terms protections. The Financial Rights Legal Centre argued that the duty of utmost good faith had not prevented the use of unfair terms in insurance contracts and did not provide consumers with a remedy against their use:

There have been a number of arguments put forward by the insurance industry against imposing the UCT regime on insurers. One, for example is that the duty of utmost good faith as codified in the *Insurance Contracts*

29 Mr Nick Kirwan, Policy Manager, The Financial Services Council, *Committee Hansard*, 1 December 2017, p. 25–27.

30 Mr Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 8 September 2017, p. 40.

Act 1984 (Cth) is adequate to ensure consumers are protected. Insurers have argued that this duty covers the same issues that arise with unfair contracts and imposing the UCT regime on insurers would add an additional layer of regulatory complexity. Financial Rights strenuously disagrees with this view and believes that the duty of utmost good faith has neither prevented the spread of unfair terms in insurance contracts nor has it provided the courts or external resolution schemes with any power to provide a remedy to consumers when an unfair term has been used.

Sections 13 and 14 of the Insurance Contracts Act do not provide that an insurer is in breach of the duty of utmost good faith merely because of the fact that they wish to rely on a contractual term that is unfair. The Financial Ombudsman Service has struggled in determinations to deal with unfair contract terms due to the limitation in the Insurance Contracts Act 1984 and the limited scope of the duty of utmost good faith.³¹

3.40 Similarly, CHOICE pointed out that the duty of utmost good faith was legally uncertain and had not prevented the spread of unfair terms in insurance contracts:

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. The utmost good faith clause in the Insurance Contracts Act is unclear and jurisprudence is imprecise. This makes application of the law particularly difficult. The leading High Court case notes utmost good faith is more commonly applied in relation to requirements of honesty in the dealings and processes around the contract. This does not go to the fairness of particular terms to a contract. To date, the utmost duty of good faith has not put an end to the types of clauses outlined above.³²

3.41 The Financial Rights Legal Centre argued that subjecting general and life insurance contracts to the unfair contract terms regime would have significant benefits including greater transparency and fairness for consumers, as well as allowing for the provision of remedies for consumers who have suffered significant detriment because an insurer relied on an unfair term:

It would create an incentive for insurers to draft their contracts with an eye to fairness and would further incentivise insurers to review their existing contracts and remove terms which may be unfair, rather than face enforcement action later. It would also improve the fairness of insurance contract fine print—making policies easier to read and compare, giving consumers stronger protection under the law, and promoting genuine competition.³³

3.42 Likewise, CHOICE stated that, compared to the imprecision of the requirement to act in utmost good faith, the unfair contract terms provisions were clear, precise, and balanced and should be seen as best practice:

31 Financial Rights Legal Centre, *Submission 17*, p. 21.

32 CHOICE, *Submission 49*, p. 14.

33 Financial Rights Legal Centre, *Submission 17*, p. 24.

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. 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.³⁴

3.43 CHOICE also argued that there are actually much stronger arguments to apply unfair contract terms protections in insurance, and particularly life insurance, than in many other goods and services where they already apply. CHOICE considered that unfair contract terms goes to the heart of some of the cultural problems in the insurance industry in terms of appropriate conduct and the treatment of consumers. In CHOICE's view there are strong economic arguments for actually having consistent law that applies across product and service markets. Furthermore, CHOICE noted that unfair contract terms have been reviewed several times by government agencies and there have been multiple recommendations to remove the exemptions for the life insurance industry.³⁵

3.44 The Consumer Action Law Centre informed the committee that it considers that there is no sound reason to carve out the insurance industry from these otherwise economy-wide provisions.³⁶

3.45 In 2008, the Productivity Commission's review of Australia's consumer policy framework recommended a prohibition on unfair contract terms in standard form contracts and argued for a single, generic consumer law to apply across all sectors of the economy finding 'little reason for any variation' in its content.³⁷

3.46 In 2012, the then Commonwealth government introduced a bill to extend the protections from unfair contract terms available for consumer contracts of other financial products and services to general insurance contracts. The bill was referred to the committee.³⁸ However, the bill and the inquiry lapsed when the House of Representatives was dissolved in August 2013.

3.47 The Senate Economics References Committee also identified concerns with exemptions for the general insurance industry from consumer protections and specifically laws on unfair contract terms. That committee recommended removing the exemption following its conclusion that:

34 CHOICE, *Submission 49*, p. 15.

35 Mr Alan Kirkland, Chief Executive Officer, CHOICE, *Committee Hansard*, 24 February 2017, p. 15.

36 Consumer Action Law Centre, *Submission 27*, p. 4.

37 Productivity Commission, *Review of Australia's Consumer Protection Policy Framework*, Inquiry Report No 45, 2008, Vol 2, pp. 58–61, 327.

38 Financial Rights Legal Centre, *Submission 17*, p. 23.

General insurance plays an important role in maintaining the financial stability of consumers, and indeed, of the Australian economy. Given this, effective protections are essential during all stages of a consumer's relationship with an insurer. The committee is of the view that the exemption of general insurers from the unfair contract terms provisions...is unwarranted and creates a significant gap in consumer protections.³⁹

3.48 As part of the consideration of life insurance policy reform (including proposals to make insurance contracts subject to the unfair contracts provisions), ASIC drew attention to the penalty provisions for breaches of the duty of utmost good faith which it considered to be inadequate at present.⁴⁰

3.49 Consumer Affairs Australia and New Zealand has recently conducted a wide-ranging review of the ACL. Treasury advised that following the review findings, there was support amongst consumer affairs ministers to remove the exemption from the application of unfair contract terms laws currently enjoyed by the life insurance industry:

While it has been argued that the duty of utmost good faith provides equivalent consumer protections to UCT provisions, a number of stakeholders have disagreed. Most recently, the final report of the Australian Consumer Law Review, released in March 2017, has proposed that this exemption be removed on the basis that this equivalence has not been demonstrated.

Consumer affairs ministers considered the report on 31 August 2017 and supported the proposal to remove the exemption.⁴¹

3.50 Treasury informed the committee that it was now starting to look at unfair contract terms laws for life insurance with a view of providing advice to the minister.⁴²

Product design and distribution obligations and product intervention powers

3.51 ASIC advised the committee that Australia's approach to the regulation of financial services in recent years has placed a heavy emphasis on product disclosure.⁴³ Mr John Price, ASIC Commissioner, told the committee that the emphasis on product

39 Senate Economics References Committee, *Australia's general insurance industry*, August 2017, pp. ix–xi.

40 Mr Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 8 September 2017, p. 38.

41 Treasury, Answers to questions on notice, 22 August 2017 (received 6 September 2017).

42 Mr James Kelly, Principal Adviser, Financial Systems Division, *Committee Hansard*, 8 September 2017, p. 63.

43 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, pp. 11.

disclosure assumed, perhaps somewhat optimistically, that the investor will be able to read the disclosure and understand it and will act rationally.⁴⁴

3.52 However, there has been an acknowledgement that this light-touch approach may need to be augmented by further regulation. For example, one of ASIC's great concerns has been the lack of accountability around products that have been manufactured and marketed to groups of individuals for whom they are unsuited. In this regard, ASIC advised the committee that it was particularly pleased to see that the Financial System Inquiry (FSI) had recommended both product governance obligations and a product intervention power for ASIC.⁴⁵

3.53 ASIC's submission noted that the FSI had concluded that the current disclosure arrangements were not sufficient to deliver fair treatment to consumers. The FSI therefore proposed the following reforms to the financial services sector:

- increase the obligations of product issuers and distributors to act in the interest of consumers by introducing a targeted and principles-based product design and distribution obligation, a serious breach of which would be subject to a significant penalty;
- provide ASIC with a product intervention power that would enable ASIC to modify or, if necessary, ban harmful financial products where there is a risk of significant consumer detriment; and
- review ASIC's penalties and powers to ensure that the enforcement regime provides a credible deterrent for poor behaviour and breaches of financial services laws (for example, giving ASIC greater ability to ban individuals from the management of financial services firms).⁴⁶

3.54 Following the FSI conclusion that further measures were needed to ensure that consumer outcomes aligned with commercial incentives throughout the whole financial product lifecycle, Treasury instituted a consultation process on product design and distribution obligations and product intervention powers.⁴⁷

3.55 Treasury categorised its approach to protecting financial consumers as an evolution that had moved from empowering consumers through disclosure to one where disclosure is supplemented by making financial service providers more accountable. Noting that the FOFA legislation already bans financial advisers from receiving some benefits that could conflict with advice (conflicted remuneration), the additional proposed measures include:

44 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, p. 13.

45 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, pp. 11–12.

46 Australian Securities and Investments Commission, *Submission 45*, pp. 25–26.

47 Treasury Proposals Paper, *Design and Distribution Obligations and Product Interventions Power*, December 2016, p. 3.

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- products to be targeted at consumers based on the ability of the product to meet consumer needs (design and distribution obligations); and
 - powers for ASIC to proactively intervene where it identifies significant consumer detriment (product intervention power).⁴⁸

3.56 The Treasury proposals paper indicated that distributors that provide personal advice will be excluded from the distributor obligations. Importantly, Treasury also indicated that the intervention power would not extend to remuneration of distributors selling products.⁴⁹

3.57 In evidence to the committee, Mr Peter Kell, Deputy Chairman of ASIC was firmly of the view that the proposed laws would be improved by:

- extending the coverage of financial products to include funeral insurance;
- giving ASIC the ability to make interventions in relation to remuneration; and
- increasing the 18 month timeframe for which interventions can apply.⁵⁰

3.58 Mr Greg Medcraft, then Chairman of ASIC, reinforced the point made by Mr Kell that remuneration is a critical part of the whole process because the incentives embedded in remuneration can influence the way that products are distributed and sold. Mr Medcraft suggested that it was therefore essential that ASIC's intervention powers include the ability to intervene with respect to remuneration.⁵¹

3.59 Mr Kell also pointed out a further benefit of the product intervention power, namely that it would assist industry sectors in removing unethical practices by relieving those participants with good intentions from the problem of losing market share by being the first to move.⁵²

3.60 Consumer rights groups strongly supported the proposed changes. For example, the Consumer Action Law Centre submitted that it supports the implementation of the product design and intervention powers.⁵³

3.61 The Financial Rights Legal Centre supported the proposed product design and intervention powers and argued that they should be put in place without exemptions:

48 Treasury Proposals Paper, *Design and Distribution Obligations and Product Interventions Power*, December 2016, p. 3.

49 Treasury Proposals Paper, *Design and Distribution Obligations and Product Interventions Power*, December 2016, pp. 4, 31.

50 Mr Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, p. 13.

51 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, pp. 13–14.

52 Mr Peter Kell, Deputy Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 16 June 2017, p. 14.

53 Consumer Action Law Centre, *Submission 27*, pp. 3–4.

...exclusions are not justified and would limit ASIC's ability to take action in the life insurance market, particularly against dodgy sales practices. It is our view that ASIC needs the ability to use PIPs [product intervention powers] across the entirety of the financial products and services it regulates.⁵⁴

3.62 The Financial Planning Association of Australia (FPA) supported the Financial System Inquiry recommendation on product intervention powers with the caveat that product intervention powers should not be used solely to rectify product disclosure. The FPA suggested that a limited form of merits regulation, along the lines of regulating for product safety, market integrity, and/or systemic stability, would be an appropriate use of product intervention powers. The FPA noted that a similar approach has been adopted by the European Union and the European Securities and Markets Authority.⁵⁵

Corporations Act—Chapter 7—financial product exemptions

3.63 Section 765A of the Corporations Act provides that a range of products are not financial products for the purposes of Chapter 7 of the Corporations Act, including health insurance, insurance provided by the Commonwealth, states and territories, a contract for insurance, and a life policy that is not a contract.⁵⁶

3.64 These financial product exemptions may limit ASIC's powers to enforce the object of Chapter 7 of the Corporations Act which is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.⁵⁷

3.65 Consumer Affairs Australia and New Zealand suggested that it is not sufficiently clear in the drafting of the ASIC Act that its existing protections that mirror certain ACL protections apply to financial products as well as financial services. In light of this lack of clarity, Consumer Affairs Australia and New Zealand recommended that the ASIC Act be amended to clarify that all ACL-related consumer protections that already apply to financial services also apply to financial products.⁵⁸

54 Financial Rights Legal Centre, *Submission 17*, p. 33.

55 Financial Planning Association of Australia, *Submission 21*, pp 5–7.

56 *Corporations Act 2011*, s. 765A.

57 *Corporations Act 2011*, s. 760A.

58 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Reform*, March 2017, pp. 6, 72.

Banking Executive Accountability Reform

3.66 In the 2017–18 budget, the government announced the proposed introduction of the Banking Executive Accountability Regime (BEAR). The BEAR aims to enhance the responsibility and accountability of banks and their directors and senior executives.⁵⁹

3.67 The proposed legislation would empower APRA to more easily remove or disqualify directors and impose financial consequences on individuals and banks. The proposed measures would require banks to register individuals with APRA before appointing them as senior executives and directors. In July 2017 the government released a consultation paper on the proposed reforms.⁶⁰

3.68 ASIC explained that the proposed BEAR addresses the prudential aspects of bank executives and directors conduct. Prudential matters are supervised by APRA. The BEAR does not cover conduct in relation to customers or shareholders, matters which are supervised by ASIC.⁶¹

3.69 By contrast, ASIC noted that the executive accountability regime in the United Kingdom covers conduct in relation to customers and shareholders issues as well as conduct in relation to prudential issues.⁶²

3.70 ASIC also indicated that the current BEAR proposal is restricted to banks, whereas in the United Kingdom, the regime applies to financial services more generally.⁶³

3.71 Mr Greg Medcraft, then Chairman of ASIC, acknowledged that while the BEAR legislation probably needed to start with the banks, it should then be broadened to include insurance companies.⁶⁴

3.72 Mr Medcraft also expressed support for extending the application of the BEAR to conduct issues in addition to the proposed systemic prudential matters that the BEAR currently proposes to address. In this regard, Mr Medcraft argued that the most frequent issues that arise in financial services are conduct issues that affect consumers and investors rather than major systemic matters that have prudential consequences. Extending the BEAR to conduct issues would allow ASIC to take

59 Treasury, Consultation paper, *Banking executive accountability regime*, 13 July 2017, pp. 1–2.

60 Treasury, Consultation paper, *Banking executive accountability regime*, 13 July 2017, pp. 1–4.

61 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 11 August 2017, pp. 29–30.

62 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 11 August 2017, pp. 29–30.

63 Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Committee Hansard*, 11 August 2017, p. 30.

64 Mr Greg Medcraft, Chairman, ASIC, Senate Economics Legislation, *Committee Hansard*, 26 October 2017, p. 9.

action against senior management on matters that had adversely affected consumers and investors.⁶⁵

3.73 Treasury informed the committee that the proposed BEAR focuses on banks due to both the critical role that banks play in the economy and in response to community concern regarding recent poor behaviour by the banks.⁶⁶

3.74 Treasury also explained that the scope of the BEAR is intended to include all entities within a group with an Authorised Deposit Taking Institution (ADI) parent. This would include subsidiaries of ADIs, including those that provide non-banking services and those that are foreign subsidiaries. The proposed scope would mean that the BEAR may apply in relation to a business such as a life or general insurer that is part of an ADI group or subgroup. Importantly, however, the BEAR would not apply to a life insurer that was not part of an ADI group or subgroup.⁶⁷

3.75 On 24 November 2017, the Senate Economics Legislation Committee recommended that the BEAR legislation be passed with the implementation date to be extended to one year from the passage of the bill. That committee also argued that:

Consumer protections are just as important as prudential matters in establishing and maintaining community trust in the financial sector. While the BEAR is a welcome and important start, the committee believes that, in time, heightened accountability obligations should be extended to non-ADI firms in the financial sector and also to matters that affect consumer outcomes (as has been done in the United Kingdom).⁶⁸

Committee view

Consumer Protections

3.76 Evidence to the inquiry highlighted inconsistencies in consumer protections between the financial services sector and other sectors of the economy. Given the increasingly integrated nature of the economy and the bundling of products both within financial services and with non-financial services (such as loans for cars or houses), the committee considers that such inconsistencies create:

- barriers for consumers in understanding and asserting their rights; and
- unnecessary operating complexities and costs for business.

3.77 The committee notes that the 2008 Productivity Commission found a strong underlying rationale for a generic consumer law to encompass all sectors of the economy, including financial services. The committee endorses this view and

65 Mr Greg Medcraft, Chairman, ASIC, Senate Economics Legislation, *Committee Hansard*, 26 October 2017, p. 9.

66 Treasury, answers to questions on notice, 22 August 2017 (received 6 September 2017).

67 Treasury, answers to questions on notice, 22 August 2017 (received 6 September 2017).

68 Senate Economics Legislation Committee, *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 [Provisions]*, November 2017, p. 29.

considers that it is in the interests of both consumers and businesses for consumer protections in relation to financial and non-financial services to be aligned.

3.78 More specifically, the committee also notes that consumer protections are not harmonised across financial services including life insurance. In addition to the impacts on consumers' rights and regulatory burdens on business discussed above, such inconsistent applications of the consumer protection law also create inappropriate incentives for industry participants that are subject to weaker consumer protections. The committee considers that financial products, including life insurance, that are sold together or in product bundles should all be subject to harmonised consumer protections. The committee is therefore recommending that consumer protections apply consistently to all financial services and products.

3.79 The committee is particularly concerned that consumer protections in relation to life insurance are grossly inadequate due to the very large number of exemptions, some of which are summarised in Table 3.2.

3.80 A glaring example of the lack of adequate consumer protections is Section 15 of the Insurance Contracts Act which rules out judicial review of contracts which are harsh, oppressive, unconscionable, unjust, unfair or inequitable. This appears to leave an enormous gap in consumer protections for an industry as large as life insurance that has performed poorly in protecting consumers.

3.81 Furthermore, the symmetrical nature of the good faith duty is incompatible with the highly asymmetrical nature of the relationship between an individual or small business dealing with large powerful life insurance companies.

3.82 The committee notes that in the early 1980s with an industry dominated by mutual life insurers, it may have been possible to sustain an argument that a duty to act in good faith may have been sufficient to offset the loss of substantial consumer protections through the application of section 15 of the Insurance Contracts Act.

3.83 However, persistent misconduct by today's corporate life insurance industry demonstrates that the rationale for Section 15 of the Insurance Contracts Act is no longer credible. It is simply no longer reasonable to exempt the life insurance industry from the application of consumer protections.

3.84 The committee is not swayed by arguments from the life insurance industry that the industry needs special provisions due to the nature of risk involved in the industry, or the potentially high value of transactions. Instead, the committee considers that such points are an argument for stronger, not weaker, consumer protections because when the life insurance industry is not accountable for its share of the contracted risk, the consumer ends up being fleeced and left carrying all the risk.

3.85 While this inquiry is focussed on life insurance, the committee is convinced the same consumer protections should apply to all insurance, including both life and general insurance. The committee is therefore recommending that Section 15 of the Insurance Contracts Act be reformed to enable consumer protections to apply to life insurance contracts, with appropriate transitional and other arrangements to accommodate the challenges observed by ASIC to exist.

3.86 The committee notes that this recommendation is consistent with the intended operation of the Australian Consumer Law, namely that consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia.

3.87 Furthermore, the committee notes that the 2017 Senate Economics References Committee inquiry into General Insurance recommended removing the exemptions which the general insurance industry currently enjoys with respect to unfair contract terms provisions.

3.88 While the committee has considered unfair contract terms in some detail, it considers that the same conclusions can be drawn about other consumer protections under the Australia Consumer Law.

Recommendation 3.1

3.89 The committee recommends that:

- **consumer protections for financial and non-financial services are aligned to remove current inconsistencies;**
- **section 15 of the *Insurance Contracts Act 1985* be reformed to enable consumer protections to apply to life insurance contracts, with appropriate transitional and other arrangements to accommodate the challenges observed by ASIC to exist;**
- **consumer protections for life insurance are aligned with consumer protections for other financial services and products, including but not limited to removing the exemptions identified in Table 3.2 of this chapter;**
- **consumer protections for life insurance uniformly cover:**
 - **all life insurance industry sectors, including direct, retail and group;**
 - **all life insurance industry participants, including but not limited to insurers, distributors, licensees, advice licensees, advisers, superannuation trustees and employees of such organisations; and**
 - **all forms of life insurance, including but not limited to life, trauma, disability, income protection; funeral insurance; and**
- **consumer protections for general insurance are aligned with consumer protections for other financial services.**

3.90 The committee notes that, following the passage of unfair contract terms legislation for small business loans, major banks have reviewed those contracts and removed unfair contract terms.

3.91 The committee also notes that following a review in 2013 by the Australian Competition and Consumer Commission, 79 per cent of unfair contract terms were removed from standard form contracts across a range of other industries.

3.92 The above examples suggest that it would not be unreasonable to expect that contracts for life insurance might also contain unfair contract terms.

3.93 The committee therefore observes that life insurers could take a proactive approach and immediately begin reviewing their contracts with a view to removing any unfair contract terms. Indeed, life insurers should not need to wait for the passage of legislation that requires the removal of unfair contract terms. Nevertheless, experience has shown that the life insurance industry is unlikely to remove unfair terms unless required to do so. The committee therefore recommends that, in addition to its recommendation above on removing the exemptions from consumer protections that the life insurance industry currently enjoys, that ASIC engage with life insurers to begin removing unfair contract terms from life insurance contracts as soon as possible.

Recommendation 3.2

3.94 The committee recommends that ASIC engage with life insurers to begin removing unfair terms from life insurance contracts as soon as possible.

Design and distribution obligations and ASIC's product intervention powers

3.95 The committee notes the government's proposed design and distribution obligations and ASIC's product intervention powers. The committee endorses the key features of the Treasury Proposals Paper, namely that:

- products are to be targeted at consumers based on the ability of the product to meet consumer needs (design and distribution obligations); and
- ASIC is to have powers to proactively intervene where it identifies significant consumer detriment (product intervention power).

3.96 However, the committee notes that ASIC's proposed product intervention powers do not include the ability to make interventions in relation to remuneration. The committee considers that the nature of remuneration, and in particular the incentives that it puts in place, can have a profound and not always positive influence on the way that products and services are sold. All too often, certain types of remuneration have sent the wrong signals with the effect that customer outcomes have come a poor second to the self-interest of certain industry participants.

3.97 The committee therefore endorses the suggestions made by both the Deputy Chairman and then Chairman of ASIC that the proposed legislation would be improved by:

- extending the coverage of financial products to include funeral insurance;
- giving ASIC the ability to make interventions in relation to remuneration; and
- increasing the 18 month timeframe for which product intervention orders can apply.

Recommendation 3.3

3.98 The committee recommends that ASIC's proposed product intervention powers be amended to:

- **include funeral insurance;**
- **give ASIC the ability to make interventions in relation to remuneration; and**
- **increase the 18 month timeframe for which product intervention orders can apply.**

3.99 The committee notes that several proposed pieces of legislation cover financial services but not necessarily life insurance. Examples include the Banking Executive Accountability Regime (BEAR) and the proposed product design and distribution obligations and ASIC's product intervention powers.

3.100 The committee considers that where new legislation is proposed, there should be a presumption that the legislation would apply uniformly to all financial services including life insurance.

3.101 In this regard, the committee also endorses the views expressed by the then ASIC Chairman that, once implemented, the BEAR regime should be extended to cover life insurance.

Recommendation 3.4

3.102 The committee recommends that the government's proposed Banking Executive Accountability Regime, financial product design and distribution obligations, and financial product intervention powers for ASIC, should apply to life insurance and life insurers.

3.103 The committee also endorses the views expressed by the ASIC Chairman with respect to the scope of the BEAR. In this regard, the committee agrees that most of the issues that have come before this committee over the last decade have been poor conduct or misconduct that has resulted in substantial adverse impacts on consumers and investors.

3.104 The committee supports the notion that the scope of the BEAR should be extended to cover consumer and investor matters and that ASIC have the requisite power to take action on conduct in relation to those matters. The committee is of the view that extending the scope of the BEAR in this manner would alter the risk calculus of senior management within the financial services industry. The committee considers that such a shift would have positive outcomes for consumers and investors.

3.105 The committee recognises that widening the scope of the BEAR will not happen immediately and that the proposed regime first needs to be bedded down. Nevertheless, the committee is persuaded of the importance of including conduct matters under the BEAR. On this basis, the committee is recommending that the scope of the BEAR be extended to include consumer related conduct matters and enable ASIC powers to take action on these matters.

Recommendation 3.5

3.106 The committee recommends that the scope of the Banking Executive Accountability Regime be extended to include consumer related conduct matters and enable ASIC powers to take action on these matters.

3.107 Finally, the committee notes that the Financial System Inquiry recommended a review of ASIC's penalties and powers to ensure that the enforcement regime provides a credible deterrent for poor behaviour and breaches of financial services laws.

3.108 The committee endorses the view put forward by the Chairman of ASIC that creating a sufficient deterrent for misconduct in the financial services sector requires both significant penalties and a reasonable prospect of being caught. ASIC has long advocated for penalties to significantly exceed the benefits obtained, so that penalties provide a deterrent, rather than just becoming a cost of doing business.⁶⁹

3.109 The committee welcomes the establishment of the ASIC Enforcement Review Taskforce. The committee supports the ASIC Enforcement Review Taskforce proposal for a substantial increase in civil penalty amounts under ASIC-administered legislation. The penalties proposed by the Taskforce would be three times the benefits obtained.⁷⁰

3.110 In light of both the views of the corporate regulator and the ASIC Enforcement Review Taskforce, the committee is therefore recommending that penalty amounts under ASIC-administered legislation be three times the benefits obtained for every life insurance industry participant involved in a transaction, including advisers, licensees and insurers.

3.111 The committee is also recommending that ASIC undertake a major audit of financial product advice in the life insurance industry that will audit one in every five advisers over a three year period. This will create a reasonable prospect that advisers, licensees and insurers engaging in misconduct are caught.

Recommendation 3.6

3.112 The committee recommends that the penalty amounts under ASIC-administered legislation, including the life insurance industry, should be set at three times the benefits obtained for every party to the transaction, including advisers, licensees and insurers.

69 See, for example, Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission, *Senate Economics Legislation Committee Hansard*, 26 October 2017, p. 6.

70 See Australian Government, The Treasury, ASIC Enforcement Review, *Positions Paper 7—Strengthening Penalties for Corporate and Financial Sector Misconduct*, p. 4, <https://treasury.gov.au/consultation/c2017-t229819/> (accessed 17 November 2017).

Recommendation 3.7

3.113 The committee recommends that ASIC conduct random audits of 20 per cent of the life insurance adviser population over a three year period. Where misconduct is identified, appropriate entries should be recorded on the financial advisers register, and statistics on licensees and insurers should be published, so the public can be informed. Advisers that have been reviewed must also publish the outcome on their website in a highly visible location. If necessary ASIC should be provided with additional funding to allow these random audits to occur.