

Consumers' Federation of Australia



SUBMISSION IN RESPONSE TO THE

**“PROPOSALS PAPER ON SECOND STAGE:
PROVISIONS OTHER THAN SECTION 54”**

The CFA was established in 1974 and is the main peak body for consumer advocacy organisations in Australia. Currently the CFA has 95 member groups around Australia across a variety of areas of interest to consumers.

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Contact:

Fiona Guthrie
Deputy Chair
Consumers' Federation of Australia
C/- Consumer Credit Legal Service
Bank Place
Melbourne Vic 3000

info@consumersfederation.com
0402 426 835

John Berrill
Partner
Maurice Blackman Cashman
Level 10
456 Lonsdale Street
Melbourne Vic 3000

jberrill@mbc.aus.net
03 9605 2700

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List of Acronyms

CCC	Code Compliance Committee (of the IEC)
CFA	Consumers’ Federation of Australia
EDR	External Dispute Resolution
FSRA	Financial Services Reform Act
IEC	Insurance Enquiries and Complaints Ltd
MCCA	Ministerial Council on Consumer Affairs
SCOCA	Standing Committee of Officials of Consumer Affairs

OVERALL VIEW ON THE PROPOSALS PAPER

The Consumers' Federation of Australia (CFA) welcomes the Proposals Paper as striking a fair balance between the interests of consumers and industry. We appreciate the significant work and thinking that has gone into it.

As we noted in our original submission, the IC Act has been an effective piece of legislation. It does not require wholesale change, although as with any law, there are always areas that can be improved. The proposals from the Review Panel are consistent with this view.

The impetus for the review in the first place, seems to have arisen largely from the introduction of the Financial Services Reform Act (FSRA). Some commentators seemed to think there was significant duplication between FSRA and the IC Act, and possibly to the extent, that significant parts of the IC Act could be repealed.

Thankfully, the Review Panel has cogently set out the significant differences between the two regimes but at the same time, suggested harmonisation measures, where this makes sense. The most obvious example of the latter is the proposal to change the clarity test of "clearly inform" in sections 35 and 37 to "clear, concise and effective", the language used in the Corporations Act.

As an aside, the reforms to legislation enacted by FSRA and should be allowed to stand the test of time. Industry has already spent millions of dollars in ensuring compliance with it. The Review Panel's reforms in relation to the IC Act in contrast, will not impose significant compliance costs. In our view, the overall benefits will outweigh the costs. For example, competition will be enhanced if consumers can compare products and premiums based on realistic standard cover provisions. This is not the case at present.

As requested, our response mainly addresses the areas that that the Review Panel did not foreshadow in the Issues Paper. However we also cover some other aspects. A summary is as follows:

1. Utmost good faith – we support the proposed expansion of sections 13 and 14, but suggest that if it is to have any practical impact, examples of the utmost good faith obligation (such as determine and pay claims within a reasonable time) should be included in the legislation;
2. Section 15 – as the Review Panel notes, the wider issue of unfair contract terms is being considered by the Standing Committee of Officials of Consumer Affairs (SCOCA). Decisions about the retention or otherwise of section 15 should be revisited in the light of the findings from the SCOCA process. The Review Panel should explicitly recommend this occurs;
3. Bundled contracts and Remedies of insurers – we do not support any change to section 29(3) of the IC Act to unbundle life insurance contracts. Morbidity life insurance policies should remain within the ambit of section 29 of the IC Act.
4. Communication requirements – we suggest that any changes to the IC Act take into account the approach being taken in the credit arena, as this represents best practice.

5. New clarity test – we support the rationale for the change of wording proposed by the Review Panel. However, we suggest that disclosure could be further improved by recommending the technique adopted in credit legislation of providing an “up front” summary – this is commonly described as a “Schumer Box”.
6. Third party beneficiaries – the proposed expansion of section 48A should provide that a third party beneficiary can bring an action against an insurer without the intervention of the policy owner.
7. Innocent co-insureds – we suggest that the Review Panel explicitly recommend that this issue be referred to the Australian Law Reform Commission for investigation.

SECTION 1 – PROPOSALS NOT FORESHADOWED IN THE ISSUES PAPER

1.1 UTMOST GOOD FAITH

The Review Panel deals with sections 13 and 14 of the IC Act - the duty of utmost good faith - in both Chapters 1 and 6 of the Proposals Paper. Chapter 6 also considers the impact of a wider duty of utmost good faith on section 15. The CFA's view in relation to these issues is that we:

1. support the proposed expansion of section 14, where this links claims handling processes to licensing and provides remedies for insureds where the insurer breaches the IC Act;
2. suggest that if the expansion is to have any impact, the Review Panel include examples in its final report of how a duty of utmost good faith could provide remedies for insureds. For example, where there has been a failure to determine and pay the claim within a reasonable time. Examples should also be included in the amended law;
3. are not convinced however, that a duty of utmost good faith would have any impact on unfair contract terms or unconscionable conduct;
4. urge the Review Panel to recommend that section 15 be subject to separate review once the SCOCA process has been finalised.

Our reasoning in coming to these views is set out below.

Chapter 1 – Linking the duty of utmost good faith to licensing

The CFA supports the proposition in Chapter 1 of the Proposals Paper that “a breach of the duty of utmost good faith should be both a breach of an implied contractual term and a breach of the IC Act” (Proposal 1.2 , page 3). This expansion would link such breaches with the licensing regime administered by ASIC. One of the main reasons the Review Panel suggests this step is to ensure that the regulatory framework adequately addresses claims handling processes.

Effective claims handling goes to the heart of the relationship between an insurer and an insured. It is reasonable therefore to link performance in this area to licensing. Insurance companies with manifestly deficient claims handling processes should be subject to a sanction that may have an impact on their licence to operate. The Review Panel rightly argues that such an option would only be considered by a regulator for egregious breaches.

The industry is likely to argue that conduct issues, and inter alia, claims handling processes, are more than adequately addressed by the new Public Consultation Draft Code of Practice, (the “Code”) released on the 9th June, 2004. Whilst we accept that the draft Code includes a number of positive measures in relation to claims handling, it will not by itself, adequately address this issue across the industry. There are two reasons.

First, the Code is voluntary. Not all insurance companies will necessarily sign up to it. This is potentially a significant deficiency. (Prior to FSRA, compliance with the Code had been mandatory¹.)

Unfortunately there are examples in other industries of organisations that were originally signatories to a voluntary code, withdrawing as soon as the application of that code to them resulted in an outcome that they did not like². This could easily occur in the insurance industry. If an organisation either withdrew, or did not participate in the Code in the first place, there would be no mechanism to sanction poor conduct in that organisation at all. In any event, we have concerns about the sanctions in the draft Code as it stands (see next point).

Second, apart from its content, the real test of any Code is whether it can be effectively enforced. We have concerns about the draft Code in this regard. The Code will be monitored and enforced by the Code Compliance Committee (CCC) of the Insurance Enquiries and Complaints Ltd (IEC). This is an appropriate mechanism and continues current practice. Under the draft Code however, in effect the CCC will only be able to address a “serious material breach or a serious systemic failure”. The CCC has limited enforcement powers in relation to other breaches. And sanctions for breaches do not extend to monetary penalties or compensation to consumers who may have been affected by the conduct.

Chapter 6 – Remedies for breaches implied or imposed by operation of law

There is some merit in expanding section 14 so that breaches of the IC Act are also breaches of the duty of utmost good faith. However, we have a number of concerns about the practical implementation of the proposal and suggest that the Review Panel consider these in coming to a final position.

To date, there have been very few cases taken by insureds under sections 13 and 14. There may be any number of reasons for this, including disincentives in the form of cost and delay faced by insureds. In particular, it is unlikely that where an insured suffers bankruptcy from failure of an insurer to meet a claim in a timely way, that the insured will be prepared to take a “test case”.

The lack of case law inhibits dispute resolution bodies from routinely relying on sections 13 and 14 and certainly from extending its application from strict precedent. This makes it difficult for industry dispute resolution schemes to interpret the good faith requirement in such a way that it applies to situations not previously considered by the courts.

The fact that section 14 has not been used in the ways that might have been originally intended is very disappointing from a consumer rights perspective. Without more specific guidance from the legislature on the type of conduct that might demonstrate non-compliance with the duty of utmost good faith, it is difficult to imagine that the current situation will change.

For this reason, the CFA urges the Review Panel to incorporate in their proposals strong statements about how an expanded duty of utmost good faith could apply. For example, in relation to late payments, the approach set out in 6.30 should be strengthened (failure to

¹ When first introduced in 1993 the Code was voluntary. It was made mandatory in 1997 by amendments to the Insurance Act 1973. Prior to this legislative underpinning, 85% of the industry had signed up.

² A good example is the code of conduct promulgated by the Australian Direct Marketing Association. One of the largest direct marketing companies simply withdrew when the ADMA code monitoring committee found it had breached the code. There was nothing ADMA could do.

determine or pay a claim within a reasonable time is a breach of the duty of utmost good faith and is actionable) and reiterated in Chapter 1.

Consistent with modern drafting practice, amendments to section 14 should also include some concrete examples as to what is meant by ‘utmost good faith’. This could be in a form similar to the “matters to which the court may have regard” in assessing whether a transaction is unjust under section 70 of the Consumer Credit Code and could cover both insurance-specific examples and more generally applicable examples.

Providing concrete examples will be particularly important for industry dispute resolution schemes. As we have noted above, without such examples, these schemes may find it difficult to apply the duty of good faith in circumstances that have not been the subject of judicial consideration.

The CFA also notes that the availability of *Hungerford v Walker* damages in addition to section 57 is arguable on the basis of *Moss v Sun Alliance Australia Ltd* (1990) 94 ALR 592 but this should be clarified by legislation. The CFA urges the Reviewers to make a proposal to this effect.

Chapter 6 – Remedies for unfair contractual terms (section 15)

We do not think the proposed expansion of section 14 will have any impact on unfair contract terms.

The Review Panel argues at 6.14 that “the consequences of repealing section 15 are too uncertain to warrant taking that step”³. Instead the Review Panel, as also outlined in Chapter 1 of the Proposal Paper, suggests reliance on the duty of utmost good faith:

“(the Review Panel) believes that sections 13 and 14 of the IC Act have the potential to be utilised by insureds in connection with insurer conduct that might otherwise be dealt with under statutes dealing with unfair contracts or unconscionable conduct”⁴.

As a remedy in relation to unfair contract terms or unconscionable conduct, the proposal seems to contradict the requirements of section 15. For example, our understanding of the proposal seems to suggest that a consumer could argue that it is a breach of the duty of utmost good faith for an insurer to engage in conduct that is unconscionable and prohibited by the ASIC Act. However, section 15 provides that insurance contracts are excluded from relief under the unconscionability provisions of the ASIC Act. Further, it is unlikely that utmost good faith provisions could extend to questions of substantive fairness (such as contract terms per se) as opposed to procedural fairness (claims handling or unfair reliance on strict contract rights)

Even if section 14 were amended in the manner proposed by the Review Panel, there still remains the difficulty that relief and remedies under section 14 are provided on an individual basis. Section 14 simply does not provide any means of dealing with unfair contract terms on a systemic basis. This is even more of concern if consumers are to rely primarily on industry dispute resolution schemes – as most schemes provide that previous decisions and determinations are not binding on the scheme.

³ Page 49.

⁴ At 6.15, page 49.

For the following reasons, we urge the Review Panel to re-visit this issue, given that the proposed expansion of section 14 is unlikely to have any impact on unfair contract terms:

- In consumer protection laws, section 15 is unique to insurance. All other consumer products and services are subject to various laws that prohibit unconscionable conduct and/or unfair contracts. While the intentions at the time of the IC Act suggested that different treatment might be appropriate for insurance products, we do not believe that the case for different treatment can still be maintained, at least in respect of consumer contracts.

We note, for example, that insurance products have not been exempted from the recent changes to the Corporations Law implemented by the Financial Services Reform Act and other legislation.

- The Proposal Paper states that one of the arguments for retaining section 15 is that liability is re-insured, often on an overseas market, and re-insurers will not necessarily be bound by Australian judicial review. With respect, in relation to consumer contracts, this is a matter to be resolved between insurers and their re-insurers. What is of concern to individual consumers is the right to remedies in the event of unfair or unconscionable conduct by insurers.

Similar issues arise in the context of consumer mortgages, however the financial services industry has not sought, (and nor would it obtain) exemption from such basic consumer protection principles as statutory unconscionability etc.

- The Proposal Paper also notes that the complexities of insurance contracts have been suggested as a reason for the retention of section 15. However, it might equally be argued that other financial products (for example, superannuation products) have the same level of complexity as insurance products. In our view, the complexity or otherwise of insurance products does not seem to be an adequate reason to retain section 15.

It is our firm view that individualised, case-by-case remedies will never be able to fully address the problems associated with unfair terms in consumer contracts. Instead, legislation that enables a government agency or a court to find that a particular term is unfair and is prohibited from use in all relevant contracts is urgently needed.

Given the above, and the fact that SCOCA and MCCA are currently considering the need for national or uniform unfair contract terms legislation, we do not believe that this review process has had sufficient opportunity to fully explore the issues around section 15. This is an important issue for consumers, and warrants further detailed consideration.

We therefore urge the Review Panel to explicitly recommend that the government establish a separate process to review the application of section 15 in light of the:

- trends towards consistently applicable consumer protection legislation;
- lack of use of section 14; and
- current SCOCA/MCCA process investigating options for unfair contract terms regulation.

This separate process should take place once the final SCOCA/MCCA decision is made.

1.2 BUNDLED CONTRACTS AND REMEDIES OF INSURED

Breach of the Duty of Disclosure by the Insured – Life Insurance

The Proposals Paper makes three recommendations to amend Part 4 of the Act generally and Section 29 of the Act specifically. The most significant of the recommendations is that most contracts of life insurance should be subject to the remedies under Section 28 of the IC Act (Proposal 7.3).

Proposals 7.1 and 7.2

With respect to Proposals 7.1 and 7.2, we make the following further comments:

- From the Proposals Paper text, the amendments proposed are at least in part justified because of the interpretation of section 29(3) of the IC Act in *Schaeffer v. Royal & Sun Alliance Life Assurance Aust Ltd* (Schaeffer’s case) which it is said stands for the proposition that if an insurer would have offered an insured any life insurance contract on any terms, section 29(3) has no operation and is thereby of limited effect (see the submission detailed in paragraphs 7.21 and 7.22 as adopted by the Review Panel in paragraphs 7.34 to 7.38).
- With respect, section 29(3) of the IC Act does not provide such a narrow remedy for life insurers. Whilst it is correct that section 29(3) uses the phrase “a contract” rather than “the contract” (as appears in section 29(2) and (4)), it also includes the phrase “on any terms”. When read together, it appears that the effect of section 29(3) is that an insurer has a remedy if it would not have offered the risk proposed on any terms and does not extend to any life insurance contract whatsoever. Unless the risk proposed for by the insured included an investment product or other life insurance products in a bundled contract, the insurer would not have to establish it would not have offered such other products to apply section 29(3) of the IC Act.
- The more narrow interpretation of section 29(3) of the IC Act suggested in the Proposal Papers, renders the phrase “on any terms” redundant.
- The broader interpretation of section 29(3) of the IC Act is in fact consistent with the dictum in Schaeffer’s case. As Davies J.A., with whom McPherson J.A. and Cullinane J. agreed, said “...the insurer would not have been prepared to enter into a contract on any terms: in other words, the insurer would have declined the risk” (underlined for emphasis).
- Accordingly, it is submitted that the impetus for change to section 29(3) of the IC Act to unbundle life insurance contracts and to amend the wording of section 29(3) is based on the false premise that the remedies under section 29(3) are so narrow as to be ineffective.
- It is submitted that the linkage of the remedy under section 29(3) of the IC Act to the risk the insured proposed for, is entirely appropriate. Retrospective underwriting necessarily involves assessing the risk at the point of sale and to allow an insurer to “cherry-pick” which of the risks in a bundled contract it alleges it would have accepted can fundamentally change the contract that was entered into and leave an insured with a mere shell of the insurance deemed appropriate at the point of sale.

Proposal 7.3

Regarding Proposal 7.3, we make the following further submissions:

- The substantive justification for removing life insurance morbidity products from section 29 of the IC Act and subjecting them to the remedies under section 28 of the Act, is that such pure risk products have largely developed after the introduction of the IC Act. As such, they are more akin to general insurance policies rather than traditional life insurance policies with surrender values for the purposes of remedies for non-disclosure and misrepresentation.
- However, there are substantial differences between life insurance policies such as income protection, trauma, total and permanent disability and mortgage protection insurance policies on the one hand and general insurance policies on the other hand:
 - The non-disclosure and misrepresentation issues relevant to such life insurance policies fall into three main categories: pre-existing medical disabilities, pre-policy income and occupational classes. Of these, only the occupational class of an insured is a relatively straightforward factual matter for disclosure.
 - The calculation by an insured of his/her pre-policy income is often very complex, particularly for self-employed persons who make up a significant proportion of persons holding income protection policies. Unlike pay-as-you-earn tax payers, the income, expenses and taxation liabilities of self-employed persons are often difficult to determine at any particular point in time and many insurers do not require the provision of taxation documentation before issuing income protection policies.
 - Similarly, the decision to be made by an insured as to what pre-policy medical disabilities, treatments and lifestyle health risks to disclose, involves an assessment of what is of underwriting significance which can be complex.
 - In contrast, the disclosure obligations for general insurance products are usually straightforward factual matters such as the disclosure of criminal or traffic convictions, previous and outstanding claims against an insured, motor vehicle modifications etc.
 - Life insurance policies are guaranteed renewable and as such disclosure requirements are more detailed because the insurer will only get one opportunity to assess the risk.
- The distinction between the disclosure obligations under life insurance and general insurance policies is highlighted by the exclusion of life insurance products from the less complex, more streamlined disclosure requirements under section 21A of the IC Act.
- Given the above:
 - Non-disclosure and misrepresentation and the remedies for breaches with respect to general insurance policies are relatively straightforward and the honesty or otherwise of an insured is less of an issue.
 - In contrast, non-disclosure and misrepresentation is much more complex with respect to life insurance products and more likely to be as a result of innocent conduct by an insured in completing application forms for insurance cover.

- As such, decisions as to non-disclosure or misrepresentation by consumers of life insurance products are much more likely to be marginal and include subjective issues as to the knowledge and honesty of a life insured.
 - To remove morbidity life insurance policies from the scope of section 29 of the IC Act, will significantly erode consumers' rights by removing the knowledge and honesty of an insured from the determination of an insurer's remedies for non-disclosure and misrepresentation in respect of many life insurance policies.
- In summary, it is submitted that morbidity life insurance policies are clearly distinguishable from pure risk general insurance policies for the purposes of the disclosure requirements and remedies under the IC Act and should remain within the ambit of section 29 the IC Act.
 - To subject such morbidity life insurance policies to the retrospective underwriting regime of section 28, would remove the relevance of a consumer's "innocence" in a significant number of non-disclosure or misrepresentation disputes with dramatic consequences. The benefits payable under such policies are often long-term income streams or large lump sums.
 - Consumers have very limited rights of review of insurers' decisions under sections 28 and 29 of the IC Act (see generally the Rules of the Insurance Enquiries and Complaints Service and the Financial Industry Complaints Service which both severely limit the powers to review insurers' underwriting decisions). Accordingly, the broadening of life insurers' remedies for non-disclosure or misrepresentation under Proposal 7.3 will not be balanced by making insurers fully accountable for their decisions and will thereby substantially undermine the rights of consumers of life insurance products.

1.3 COMMUNICATION REQUIREMENTS

The CFA supports Proposals 2.1 and 2.2 in relation to electronic communication.

In relation to the form of the safeguards however, we suggest that any changes to the IC Act take into account the approach to be taken in relation to credit. This is because this approach is likely to represent best practice.

As the Review Panel notes at 2.18, the Uniform Consumer Credit Code Management Committee (UCCCMC)⁵ has only recently considered the issue of electronic communication. Changes to the Credit Code to facilitate electronic communication are incorporated in the Consumer Credit (Queensland) Amendment Bill 2004 and regulations. We understand that the consultation draft of this legislation is about to be released.

⁵ UCCCMC is a sub-committee of the Standing Committee of the Officials of Consumer Affairs. UCCCMC is currently chaired by Consumer Affairs Victoria. SCOCA itself reports to the Ministerial Council on Consumer Affairs.

1.4 STANDARD COVER, DISCLOSURE AND THE “NEW CLARITY TEST”

Changing “clearly inform” to “clear, concise and effective”

We agree with the Review Panel that changing “clearly inform” to “clear, concise and effective” may encourage a different presentation of information in the policy and hence understanding by insureds.

This change is consistent with that used in FSRA. Had FSRA not been in place, our suggestion would have been to adopt the wording used in the United States of “clear and conspicuous”. The Federal Reserve currently has on foot a proposal to insert this definition into a number of regulations in relation to credit and privacy.

Disclosure in a separate document

We agree with the Review Panel that disclosure of non-standard or unusual terms via a separate document may not lead to better outcomes (as argued at 5.14 and 5.27 in the Proposals Paper).

The Review Panel may like to consider how this sits with their latter conclusion set out in Proposal 5.4 “that a PDS may include information that satisfies the disclosure requirements of the standard cover provisions of the IC Act”⁶.

We assume that the Panel may see this as an adjunct to improved policy wording and that the PDS is not by itself, an adequate disclosure mechanism. Alternatively, we are aware that some insurers are moving to combine their PDS and policy documents.

Our view however is that neither a PDS or improved policy wording that is “clear, concise and effective”, will even in concert, adequately address the vexed issue of disclosure. Our suggestion for an improved regime is outlined next.

A better form of disclosure – the Schumer Box approach

The intent of the ALRC was that unusual terms or derogations from standard cover should be disclosed separately (but not necessarily in a separate document). Consumers needed to be told about them and told about them in no uncertain manner. In today’s policy language, such disclosure is fundamental for consumer choice and hence effective competition.

Latter amendments and judicial interpretation of the relevant sections resulted in a perverse situation - disclosure could occur via the policy document itself. This can hardly be termed “disclosure” because there is no meaningful attention drawn to the derogations.

Practically this approach is unlikely to empower consumers because they do not have the knowledge of what is omitted or a basis for comparison of changes. We all know that most people do not read their policy documents in full, and even if they did, do not fully understand the implications. This is one reason that standard cover is such a vital protection for consumers. The law does not reflect human behaviour.

⁶ Page 46.

As set out in our original submission, our suggestion is that disclosure in relation to standard cover could be made by insurers by adapting what is termed the “Schumer Box” approach used in credit legislation in the United States and in Australia.

This approach is named for the United States Senator who first suggested it. In the credit arena, it requires credit providers to identify the key components of a loan in a “box” (financial table) at the front of the contract. Key components include for example, the interest rate and repayments. An example (not fully completed, but based on a personal loan) is shown below:

1. Loan amount	\$741.87
2. Annual percentage rate	12.0 % per annum
3. Total amount of interest charges payable	\$203.10
4. Repayments	You must pay us monthly/ quarterly repayments of \$56.06 each during the term of four years. The total repayments are \$944.97. The first repayment is due on etc etc
5. Fees and charges	
(i) These fees and charges are payable in connection with this agreement.	Nil
(ii) These fees and charges may become payable in connection with this agreement.	Nil
Note:	Under this agreement any of the following information which is given above may be varied, and without your consent: <ul style="list-style-type: none"> • Annual percentage rate; • Total amount of interest charges; • Etc etc

In the insurance field, the Schumer Box approach would be even simpler to apply. For example, the “Schumer Box” on the first page of the contract would alert consumers to any variations from standard cover. It would be sufficient to say something like:

“This policy provides the standard cover for a car/home contents etc policy as set out in the Insurance Contracts Act, apart from the following differences:

differencesee. page no”

The exact form of wording could usefully be the subject of consultation.

The Schumer Box approach would be consistent with insurers meeting their obligation to provide disclosure in a “clear, concise and effective manner”. But more importantly, the disclosure would be up front and sign-posted and not part of a separate document. This provides at least some chance that consumers may read it.

1.5 LIFE INSURANCE AND THIRD PARTY BENEFICIARIES

Paragraphs 10.16 to 10.21 inclusive of the Proposals Paper discussed the rights of third party beneficiaries to claim from or bring proceedings against life insurers.

The text compares Section 48A (Life Insurance) to Section 48 (General Insurance) and raises issues of the lack of rights of life insureds and third party beneficiaries to claim/recover the proceeds of life insurance policies and makes recommendations to amend Section 48A of the Act.

Specifically, Proposal 10.3 states that Section 48A should be amended to enable a third party to bring an action against an insured directly.

Section 48A defines a third party as the nominated beneficiary of the life insured “specified in the contract”.

This definition is narrower than Section 48 (General Insurance) and Section 48AA (Life Insurance Policies under Retirement Savings Accounts) which extend to persons “specified or referred to in the contract, whether by name or otherwise”.

The potential significance of the narrower definition under Section 48A, is that even if the section is amended as proposed, third party beneficiaries who are not specified in a life insurance contract will still not have a right of action/claim against the life insurer. In particular, beneficiaries under group life insurance policies such as group policies taken out by superannuation fund trustees and employers would not be covered, as they are not “specified” in the contract of insurance as beneficiaries.

If the broader definition of third parties under Sections 48 and 48AA was adopted, section 48A would extend to beneficiaries under such group life policies, consistent with the suggestion in paragraph 10.21.

Accordingly, it is submitted that Proposal 10.3 should be amended to state:

“Section 48A of the IC Act should be amended so it is clear that a third party specified or referred to in the contract, whether by name or otherwise, can bring an action against an insurer without the intervention of the policy owner.”

SECTION 2 – SPECIFIC COMMENTS ON OTHER PROPOSALS

2.1 INNOCENT CO-INSUREDS

We agree with the Review Panel that this is a complex issue and that further research and analysis is required.

However this further investigation needs to be much wider than simply encouraging “industry peak bodies to assist in organising collection of the data to inform future consideration”. A more rigorous approach is needed.

Our suggestion is that the Review Panel recommend that this issue is referred to the Australian Law Reform Commission. Industry bodies may well play a useful role, but the ALRC is best placed to undertake an independent investigation that considers the legal and social implications of the difficulties faced by co-insureds.

2.3 EXTENDED WARRANTIES

We note the Review Panel did not consider that a sufficient case had been made that the IC Act should be amended to bring extended product warranties within its scope. It was our view that the arguments in favour of such amendment were distinct from the type or extent of difficulties faced by consumers purchasing this type of product. Were it necessary to make out a better case based on consumer detriment we believe it would be possible to do so, not least based on an argument of "illusory cover".

We maintain, however, that the key issue is the fact that while extended warranties are not regulated insurance policies, they are in effect policies of insurance, and escape regulation through an artificiality of construction. As a matter of policy, regulation that allows avoidance by careful structuring of products or services should be considered flawed. Once this is accepted, both the fact that only one such product was identified and the fact that it involves relatively small amounts become far less relevant.

2.4 RESTRICTIONS ON INSURERS’ CONTRACTUAL RIGHTS AND REMEDIES

Proposal 8.1 is that the “powers available under sections 31 and 56 of the IC Act should be available to dispute resolution bodies.⁷” It would be helpful if the Review Panel in its final paper were to suggest how this proposal could be put into practice. Our suggestion is that both sections 31 and 56, be amended to include explicit references to dispute resolution bodies.

⁷ Page 70

As an example, Section 31(1) would then read (with amendments in bold caps):

“In any proceedings by the insured in respect of a contract of insurance that has been avoided on the ground of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, the court **OR ANY DISPUTE RESOLUTION BODY** may, if it would be harsh and unfair not to do so, but subject to this section, disregard the avoidance ...

The words “any dispute resolution body” above, are purposefully broad. They would encompass, without any need for argument, Small Claims Tribunals and bodies of that nature, ASIC approved EDR schemes and other structures that we have not envisaged.