Unfair terms in insurance contracts - Options paper

Background

1. The Productivity Commission, in its 2008 *Review of Australia's Consumer Policy Framework*, recommended that a new generic, national consumer law should apply in all sectors of the economy.[1] It further recommended that this generic law include a national unfair contract terms law.[2] These recommendations will be implemented through the Australian Consumer Law (ACL) and related reforms.

2. In its 2009 inquiry by the Senate Economics and Legislation Committee (the Committee) into the Trade Practices Amendment (Australian Consumer Law) Bill, one issue that was considered was that section 15 of the *Insurance Contracts Act 1984* (IC Act) would operate to prevent some or all of the unfair terms provisions proposed to be inserted in the ASIC Act (which mirror those in the ACL in respect of financial services) applying to terms in insurance contracts.

3. Views differed on whether the inclusion of insurance contracts under the unfair contract terms provisions of the ASIC Act was appropriate. Submissions from consumer representatives argued that the unfair contract terms provisions should operate in respect of terms in insurance contracts.[3] Submissions from industry representatives argued that there was no justification to have the unfair contract terms provisions apply to terms in insurance contracts.[4]

4. In September 2009, the Committee stated in its report (at paragraphs 10.12 – 10.14) that:

- The Committee is of the view that consumers are not provided with adequate protection in insurance contracts under existing law.
- The Committee recommends that the government address insurance contract legislation to ensure that the IC Act provides an equivalent level of protection for consumers to that provided by the ACL.
- Consideration by the government of the 2004 review of the IC Act should determine whether this will be achieved by amending the IC Act to achieve a harmonisation with the amendments proposed in the ACL, or by amending the ACL to apply to insurance contracts.

---

[1] Recommendation 4.2 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, Australian Government, Canberra.

[2] Recommendation 7.1 PC (2008).

[3] See submissions to the Committee from Consumer Action Law Centre, Insurance Law Service (Consumer Credit Legal Centre (NSW) Inc), Legal Aid Queensland, National Legal Aid and Choice, available at http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_09/submissions.htm

[4] See submissions to the Committee from the Insurance Law Council and the National Insurance Brokers Association, available at available at http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_09/submissions.htm

Purpose of options paper

5. In order to formulate the Government's response to the Committee's recommendations, stakeholder views are sought to assist with:

- clarifying the nature and scope of the problem;
- assessing the adequacy of existing regulation; and
- identifying and assess options to remedy the problem.

6. Specific questions on which stakeholder views are sought are listed in the paper. In particular, stakeholder input is sought on identifying relevant costs and benefits associated with a number of options to address the problem, and whether there are any other factors that would impact on the feasibility of options.

How to lodge submissions

Submissions may be lodged electronically, by post or facsimile. Please direct submissions to:

Unfair terms in insurance contracts: Options Paper
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

Fax: 02 6263 2770
Email: ICAReview@treasury.gov.au

Telephone: (02) 6263 3979

Problem

Summary

7. For the purposes of this paper, the problem is the actual or potential disadvantage or loss suffered by consumers as a result of insurance contracts containing contract terms that are harsh and/or unfair.

Scale, scope and risk

8. One submission to the Committee stated that there was 'considerable public reporting over the last two decades on what might be described, in one form or another, as examples of systemic unfairness in the drafting of terms in insurance policies.'[5] Several specific examples of terms in insurance contracts that were said to be harsh and/or unfair to consumers were presented to the Committee. Particular examples included:

- A claim for stolen luggage was denied after the insured left his baggage 'unattended' where the stolen baggage was within reach, but the insured was distracted at the time of the theft, asking for directions.

[5] See submission to the Committee from National Legal Aid at p5.

- A mature-aged traveller was denied cover for cancellation of a trip due to undergoing coronary surgery, on the basis that heart problems experienced 20 years earlier were a pre-existing condition.

- A comprehensive motor vehicle insurance policy contained an exclusion so that the main driver of the vehicle (who had a poor driving record) was not covered. The exclusion was not highlighted at the time of purchase.

- A claim was refused under a no-fault comprehensive motor vehicle policy due to a failure to take 'all precautions to avoid the incident'.

- A motor vehicle policyholder was required to satisfy the insurer that the owner or driver of another vehicle was not insured, in order for an uninsured motorist extension to apply.

- A landlord was not covered by his home buildings insurance policy when the tenant burned down the home, because of an exclusion in the contract for damage caused by an invitee.

9. According to the 2008-09 Annual Report of the Financial Ombudsman Service, in that year the service dealt with 6,406 insurance disputes. Of those, 73% (approximately 4,680) of the disputes related to a decision of the insurer – the majority of which are likely to be the total or partial denial of a claim.

10. For some perspective, in the previous year of 2007-08 there were 3,172,539 claims lodged against personal lines of general insurance and 3,103,106 of those claims (or 98%) were paid.[6] Motor had the lowest rate of rejected claims (less than 1%) and consumer credit the highest (17%), followed by travel (8%).

11. Industry representatives, in response to the examples provided to the Committee, argued that there is a difference between terms that are inherently unfair, and terms that are otherwise fair but are capable of being applied unfairly in particular cases. Further, industry representatives submitted that the full facts of cases need to be analysed to determine whether reliance on a term in a particular case was unfair.

12. Whether the particular examples cited would be 'unfair' for the purposes of a statutory formulation is a matter involving a degree of legal analysis. No implication should be drawn from there inclusion in this paper that the examples cited above would, if the matter was argued, necessarily be in breach of unfair contract terms provisions.

Consultation question 1

Please provide any data/information, not referred to above, that would assist in determining the extent to which unfair contract terms in insurance contracts are causing consumers actual or potential loss or damage.

---

[6] See *General Insurance Code of Practice Overview of the 2007-2008 Financial Year*, published by the former Insurance Ombudsman Service.

Existing regulation

Insurance Contracts Act 1984

13. The IC Act has a number of provisions that might be relevant to address harsh and unfair terms in insurance contracts. There are some amendments proposed to the IC Act which are expected to be progressed through the Insurance Contracts Amendment Bill 2010 (ICA Bill). Accordingly, in this section of the paper, in addition to a short description of the relevant provisions in the IC Act are some comments on their perceived effectiveness and scope of operation (where relevant, noting proposed changes in of the ICA Bill) in comparison with the unfair terms provisions of the ACL/ASIC Act.

Section 14 - the duty of utmost good faith

14. Section 14 of the IC Act prevents a party from relying on a provision of an insurance contract if to do so would be to fail to act with the 'utmost good faith'.[7] The concept of utmost good faith is a broad one and difficult to define, but encompasses principles of fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, and community standards of fairness, decency and reasonableness.[8]

15. The following points may be made about the scope and effectiveness of section 14, relative to the unfair contract terms protections under the ACL/ASIC Act, from a policyholder/consumer perspective:

<u>Possible advantages</u>

- *Applies to any contract*: Section 14 applies to any insurance contract. The unfair contract terms provisions in the ASIC Act (and the ACL) apply only to 'consumer contracts' in a standard form.

- *Applies to any policyholder*: Section 14 applies to any policyholder. The unfair contract terms provisions of the ASIC Act (and the ACL) apply only to 'consumer contracts', which are entered into by individual consumers whose acquisition of goods or services (including financial services) is wholly or predominantly for personal, domestic or household use or consumption.

- *Third party beneficiaries*: PROPOSED CHANGE IN ICA BILL: The ICA Bill proposes to expressly extend the duty of utmost good faith in section 13 to be owed by third party beneficiaries (after the contract is entered into). This is expected to clarify that the insurer's duty of utmost good faith also extends to such persons, as a matter of reciprocity. The unfair contract terms provisions under the ASIC Act (and the ACL) would only apply to contractual parties.

<u>Possible disadvantages</u>

- *Onus of proof*: Under section 14, the onus would normally be on the policyholder to prove that the reliance on the term in dispute by an insurer breached the duty of

---

[7] Subsection 14(3) provides that whether the insured was notified of the provision prior to entering into the contract (pursuant to a requirement of section 37 regarding notification of unusual terms or otherwise) is relevant to whether reliance on the provision would be in breach of the duty of good faith. However, whether the insured was notified of a provision in dispute is not determinative of whether reliance on the provision by the insurer is a breach of the duty of utmost good faith .

[8] Tarr AA et al, *Insurance: The Laws of Australia* (2009), Thomson Reuters.

utmost good faith. Under the unfair contract terms provision of the ASIC Act (and the ACL), the onus is on the claimant to prove an imbalance in rights and obligations, but they will have the advantage of a rebuttable presumption that the term is not reasonably necessary to protect its legitimate interests.

- *Who brings the action:* Under section 14, it is up to a policyholder whose claim is denied to bring an action (in a court or, more commonly, through the Financial Ombudsman Service) alleging the reliance on a term was in breach of section 14. Under the unfair contract terms provisions of the ASIC Act (and the ACL), in addition to the consumer, ASIC would be able to bring actions for injunctions, damages and declarations that terms are unfair (see also 'impact of a successful challenge' below).

  - PROPOSED CHANGE IN ICA BILL: Under changes proposed in the ICA Bill, ASIC would have power to bring a 'public interest' action on behalf of one or more insureds (with their consent) under section 55A of the IC Act for a breach of section 14.

- *Impact of successful challenge:* A successful challenge to reliance on a term in dispute under section 14 would normally affect only the contract (and policyholder(s)) that were the subject of the case. The impact would usually be that the insurer would not be permitted to rely on the term in question for the purposes of denying an insurance claim.

  Under the unfair contract terms provisions of the ASIC Act (and the ACL), if a term is unfair, it is void. The result (assuming the contract can continue to operate without it) would be similar in that the insurance claim could not be denied in reliance on it. In addition, under the unfair contract terms provisions of the ASIC Act (and the ACL) the regulator may apply for various other orders for the benefit of non-party consumers, including 'non-party redress', including varying and avoiding other contracts, and rendering contracts unenforceable, that involve persons that are not insureds or third party beneficiaries of the contract in dispute.

  - Care would be needed in use of such powers to ensure that policyholders and third party beneficiaries were not inadvertently disadvantaged by the variations to their insurance arrangements.

Other relevant provisions of the IC Act

16. The following provisions of the IC Act do not directly provide a remedy for unfair terms, but they may be relevant to some cases of purported reliance by an insurer on a contractual term to deny a claim.

- Sections 35 and 37 prevent reliance by an insurer on certain clauses (that is, unusual and 'non-standard' clauses) if they have not been previously drawn to the attention the insured. Usually this is done by providing a potential insured with a copy of the policy wording prior to entering the contract.

- Section 21, 21A, 26 and 28 include safeguards relating to the reliance by an insurer on non-disclosure and misrepresentation.

- Section 44 regulates insurers relying on averaging provisions.

- Sections 46 and 47 prevent insurers from relying on exclusions regarding some categories of pre-existing defects/imperfections or sickness/disability.

- Section 53 renders void provisions in contracts that permit insurers to vary terms to the prejudice of anyone but themselves.

- Section 54 restricts the extent to which an insurer can rely on an act or omission of the insured.

Other relevant regulation

17. Conduct by insurers that would breach of the duty of utmost good faith and unfair terms provisions (in whatever form) would, but for the operation of section 15 of the IC Act, be potentially also affected by provisions in the ASIC Act which prevent financial services licensees from engaging in unconscionable conduct (sections 12CA, 12CB and 12CC). However, section 15 of the IC Act operates to exclude those provisions from operating in so far as they would permit judicial review of a contract as a remedy (for example, an order under subsection 12GM(7) of the ASIC Act in relation to the term in dispute).

> ***Consultation question 2***
>
> *Please provide details of any existing regulation, not referred to above, that affects unfair terms in insurance contracts.*

Objective of Government action

18. The main objective of Government action in relation to the problem is to prevent consumers (including third party beneficiaries) of standard form insurance contracts from suffering detriment due to terms in the contract that are unfair or harsh.

Options that may achieve objectives

19. Five options that may achieve the objective have been identified:

- *Status quo:* The problem would continue to be addressed through the operation of section 14 of the IC Act (as expected to be modified through the ICA Bill).

- *Option A – Permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts:* Changes to the operation of section 15 would be made to permit the unfair terms provisions in the ASIC Act to operate in addition to, and alongside, the IC Act remedies.

- *Option B – Extend IC Act remedies to include unfair terms provisions:* The IC Act would be amended to include remedies relating to unfair contract terms along the lines of those that are to be included in the ASIC Act but the provisions would be specifically tailored to the case of insurance contracts and the existing regulatory framework in the IC Act. Section 15 would continue in operation so that the unfair contract terms provisions of the ASIC Act would not apply.

- *Option C – Enhance existing IC Act remedies:* Existing remedies in the IC Act, particularly section 14, would be modified (beyond the changes proposed in the ICA Bill) to improve their effectiveness to prevent use of unfair contract terms in standard insurance contracts with consumers. Section 15 would continue in operation so that the unfair contract terms provisions of the ASIC Act would not apply.

- *Option D – Encourage industry self-regulation to better prevent use of unfair terms by insurers:* Use of unfair terms by insurers would be addressed through self-regulatory means, such as a specific section dealing with the issue in, for example, the General Insurance Code of Practice.

Preliminary impact analysis

Affected stakeholder groups

20. In the case of all the options examined, the affected groups are, in order of potential impact from highest to lowest:

- parties to insurance contracts, being policyholders (part of the 'consumer' group) and insurers (part of the 'industry' group);
- third party beneficiaries cover provided in insurance contracts (consumer);
- dispute resolution facilities, including industry-based systems and courts (for this purpose, included in the 'government' group);
- the insurance regulator (government).

Status quo

21. The status quo is described in some detail in the 'Problem' section of the paper, above. The following key features are noted:

- there is a concern that the status quo position is not dealing effectively with all cases of unfair terms in insurance contracts, which was accepted by the Committee as a valid concern;
  - in particular, use of section 14 by consumers is rare, possibly because it is 'costly and cumbersome';
- dispute resolution bodies have noted that sometimes a reliance on a term that is 'unfair', is still not a breach of the duty of utmost good faith; and
- to simplify the assessment of other options against the status quo, the forthcoming changes proposed in the ICA Bill are assumed to exist, in particular:
  - the proposed extension of the duty of utmost good faith to third party beneficiaries; and
  - the proposed facility for ASIC to bring a public interest action for a breach of section 14.

Table 1.1 Status quo preliminary impact assessment summary

	Benefits	***Costs***
Consumers		Some policyholders/third party beneficiaries will continue to be denied otherwise valid claims due to unfair/harsh policy terms
Industry		
Government		

Consultation question 4

A. Please provide details of any additional costs and benefits, not referred to above, of the status quo.

B If possible, please state the magnitude (either in dollar terms or qualitatively) of the costs and benefits referred to above and any additional costs and benefits.

Option A – Permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts

22. As noted in the 'Problem' section above, the carve-out from the unfair contract terms provisions for insurance contracts, in section 15 of the IC Act was one of the issues considered by the Committee. Some submissions to the Committee argued that making the unfair contract provisions of the ASIC Act apply to insurance contracts would give rise to benefits for consumers, relative to the status quo. It was argued by consumer representatives before the Committee that key benefits would be:

- consumers affected by terms in standard contracts that are unfair would have access to remedies to prevent that from occurring;
- the regulator would be in a position to apply, effectively, for the banning of unfair terms, which would prevent the same term from disadvantaging consumers in other cases;
- the exclusion of insurance contracts from the scope of the ACL is anomalous and undermines the effectiveness of a sector-neutral approach to unfair contractual terms.

23. In response, industry has argued that the benefits would not be very great compared to the status quo:

- industry argued that many examples presented to the Committee were not necessarily terms that would be found to be unfair-rather, interpretation and/or conduct in connection with the term could be the issue;
- policyholders already have access to dispute resolution mechanisms in the insurance area that are low-cost and user friendly;
- the unfair contract terms provisions would not, in some respects, have the same scope as the existing provisions, in particular;
  - they do not give review rights to third party beneficiaries (under proposed changes, section 14 is expected to bestow such rights);

- they apply only to ‘consumers’ under the ACL holding standard form contracts, whereas section 14 applies to all contracts and all policyholders; and

- exercise of blanket banning powers regarding terms found to be ‘unfair’ could potentially disadvantage some consumers because it would interfere with their existing insurance arrangements in ways that may not be predictable.

24. Industry also argued that extension of the unfair contract terms provisions of the ASIC Act to cover insurance contracts would result in other costs/disadvantages. In particular:

- regulatory compliance costs for insurers would be increased due to:
  - an overlay of a generic unfair terms rules over the ‘tailored’ regime of the IC Act;
  - differences in coverage of contracts between the unfair contract terms provisions and the IC Act (referred to immediately above);
- litigation would become more complex and costly, due multiple causes of action to cover the same issue in dispute.

Table 1.2 Option A preliminary impact assessment summary

	Benefits	***Costs***
Consumers	Access by retail policyholders to additional remedies to prevent reliance on unfair terms in standard contracts Use of ‘blanket’ banning of unfair terms would serve to prevent future disadvantage to other consumers	Possible increase in premiums if insurers pass on increased costs Small risk of disadvantage associated with ‘blanket’ banning
Industry		Increased complexity of regulation due to difference in coverage between ACL and IC Act, and costs associated with ‘dual pleadings Commercial uncertainty arising from potential ‘blanket’ banning
Government	Increased flexibility of remedies for ASIC	

Consultation question 5

A Please provide details of any additional costs and benefits, not referred to above, of Option A.

B If possible, please state the magnitude (either in dollar terms or qualitatively relative to the status quo) of the costs and benefits referred to above and any additional costs and benefits.

C Are there any other factors that impact on the feasibility of this option?

Option B – Extend IC Act remedies to include unfair contract terms provisions

25. Rather than have the unfair contract terms provisions of the ASIC Act apply to insurance contracts (as per Option A), it could be possible to maintain the position that the IC Act is the only legislation that deals with judicial review of unfair contracts, but extend the remedies under the IC Act to expressly include the sorts of remedies that the unfair contract terms provisions of the ASIC Act would provide.

26. This approach recognises the Commonwealth's exclusive power to regulate insurance matters (apart from State insurance) under section 51(xiv) of the Constitution. This means that unfair terms provisions would be contained in the ACL (for non-financial services), the ASIC Act (for financial services other than insurance contracts) and the IC Act (for insurance contracts). From the perspective of legislative simplicity, this constitutional reality, which also dictates the requirement for separate provisions for financial services (due to a referral of state powers), can be practically overcome through a policy commitment to maintain the consistency, to the extent appropriate, of unfair contract terms laws across each piece of legislation. This approach is currently adopted with respect to the consumer protection provisions of the TPA and the investor protection provisions of the ASIC Act.

27. The main advantage of this approach, as opposed to Option A, is that:

- the IC Act would continue to be the primary source of regulation regarding insurance contracts and 'dual pleadings' in insurance disputes would not be an issue;

- it would enable the provisions to be tailored so that the regime fits in with existing concepts in the IC Act. For example, at least in the context of general insurance, consideration could be given to replacing 'standard form' and 'consumer contract' under the ACL, with concepts already established under the IC Act, such as 'eligible contract of insurance'. This would minimise regulatory complexities and anomalies due to marginal gaps/overlaps between the IC Act framework and the unfair contracts regime in the ASIC Act;

- a particular issue that could be addressed is whether some categories of terms in insurance contracts should be subject to unfair terms, but others should be subject only to the other remedies.

28. By way of further explanation of the final point, it may be possible to make terms in insurance contracts subject to the unfair contracts terms remedies in respect of the types of terms identified in the ASIC Act and the ACL, for example:

- a term that permits one party (but not the other) to vary the terms of the contract; and

- a term that permits, or has the effect of permitting, one party to unilaterally determine whether the contract has been breached or to interpret its meaning.

It is not obvious why insurance contracts should be treated differently from other contracts in relation to providing remedies for those types of terms.

29. However, both general and life insurance contracts can be distinguished from many other types of consumer contracts in that the contract for the product and the product are, in effect, one and the same thing. It is arguable that the extent of the cover provided (and not provided) is, in the insurance context, of a similar nature to, if not the same as, the 'main subject matter' of a contract, which is not subject to review under the ACL. It is arguable, on that basis,

that the unfair contract terms provisions should be limited in their application to matters that are outside the parameters of defining the cover. Issues surrounding the fairness and transparency of exclusions from cover would be dealt with under other IC Act remedies.

Table 1.3 Option B preliminary impact assessment summary

	Benefits	***Costs***
Consumers	Access by retail policyholders to additional remedies to prevent reliance on unfair terms in standard contracts (though tailoring may result in lesser coverage than Option A) Use of 'blanket' banning of unfair terms would serve to prevent future disadvantage to other consumers	Possible increase in premiums if insurers pass on increased costs Small risk of disadvantage associated with 'blanket' banning
Industry		Commercial uncertainty arising from potential 'blanket' banning
Government	Increased flexibility of remedies for ASIC	

Consultation question 6

A Please provide details of any additional costs and benefits, not referred to above, of Option B.

B Where possible, please state the magnitude (either in dollar terms or qualitatively, relative to the status quo) of the costs and benefits referred to above and any additional costs and benefits.

C Are there any other factors that impact on the feasibility of this option?

Option C – Enhance existing IC Act remedies

30. Options A and B would both involve significant changes to the regulatory framework for insurance contracts by introducing a new basis for challenge/review of a contract (that is, an unfair contract term). Under Option C, the problem of unfair terms would be addressed by modified the existing section 14 remedy reduce its disadvantages, from a consumer perspective.

31. Changes to section 14 that might be considered to address the disadvantages referred to above in the 'Problem' section could include:

- Reversing the onus of proof, so where an insurer is relying on a term in the contract that is the subject of an allegation by a policyholder/third party beneficiary that it is in breach of the duty of utmost good faith, the insurer would be required to demonstrate that reliance on the term is not in breach of section 14. Some safeguards to discourage frivolous or vexatious allegations might also be considered in that context.

- As mentioned above, in changes already proposed to the IC Act, ASIC could bring an action on behalf of one or more insureds in relation to a breach of section 14.

This would not result in an immediate 'blanket' voiding of a particular term. Rather, if the action succeeded, any insurer that continued to seek to rely on the term circumstances similar to that of the case would risk being in breach of section 14. ASIC would have powers to address breaches under its powers to deal with Australian Financial Services Licensees.

Table 1.4 Option C preliminary impact assessment summary

	Benefits	***Costs***
Consumers	Onus of proof changes would reduce the costs and difficulties for insureds/3P beneficiaries in bringing actions relating to alleged unfair terms Use of representative actions and/or powers to address breaches of section 14 could be used to prevent future disadvantage to other consumers	
Industry		Onus of proof changes would result in increased costs of defending against 'unfairness' claims
Government	Increased flexibility of remedies for ASIC	

Consultation question 7

A Please provide details of any additional costs and benefits, not referred to above, of Option C.

B If possible, please state the magnitude (either in dollar terms or qualitatively, relative to the status quo) of the costs and benefits referred to above and any additional costs and benefits.

C Are there any other factors that impact on the feasibility of this option?

Option D – Encourage industry self-regulation to prevent use of unfair terms by insurers

32. Rather than impose government regulation, another option may be to encourage the insurance industry to adopt self-regulatory stance on inclusion in insurance contracts of terms that are 'unfair', in the ordinary sense of the word.

33. A possible model is that an industry code of practice would include a guiding principle about the fairness of terms. Consumers that considered an insurer was in breach could complain to some kind of compliance/enforcement body established under the Code, and there would be processes for the body to require the insurer to rectify any breach of the code that the body identifies. It would also be possible for the body to monitor contracts.

34. There are a number of advantages and disadvantages of this approach over 'black letter' regulation.

35. Possible advantages include that:

- insurers may be more sensitive to adverse judgements by peers about their contracts than they would be about judgements made in a litigious setting that might be based on technical interpretations;

- a self-regulatory organisation could be well-placed to give guidance to insurers on options for framing provisions that are not harsh or unfair; and

- reputational risk at the industry level would weigh against an industry-based decision-maker being biased against consumer/policyholder claims.

36. Possible disadvantages include that:

- self-regulation may not be viewed as being as credible from a consumer perspective, especially if there is a perception that complaints are handled with a bias in favour of insurers;

- the processes and remedies available would not be as transparent as one laid down under the law; and

- there is already a Code of Practice in the general insurance field that might be used as a platform for self-regulation on unfair contract terms, but there is no such code in the life insurance sector.

Table 1.5 Option D preliminary impact assessment summary

	Benefits	***Costs***
Consumers	Consumers may benefit from changes in conduct of insurers in drafting and administering contract terms	
Industry	Possible 'reputational' enhancements for industry	Costs associated with developing the guidance and ongoing monitoring costs, particularly in the life insurance industry
Government		

Consultation question 8

A Please provide details of any additional costs and benefits, not referred to above, of Option D.

B Where possible, please state the magnitude (either in dollar terms or qualitatively, relative to the status quo) of the costs and benefits referred to above and any additional costs and benefits.

C Are there any other factors that impact on the feasibility of this option?

Notes on previous consultation

37. The issue of unfair terms in insurance contracts and, in particular, whether section 15 of the IC Act needed to be retained, was considered as part of the second stage of the review of the *Insurance Contracts Act 1984* in 2004. Submissions to that review were 'starkly divided on the ongoing need for section 15 with strongly held views being expressed both in favour and against its retention'.[9] The review panel concluded that the consequences of repealing section 15 were too uncertain to warrant taking that step. However, the arguments were finely balanced, and if a nationally consistent model for review of consumer unfair contracts were developed, the balance of consideration may shift and the issue should be revisited.

38. The consideration of the same issue in 2009 in the context of the inquiry by the Senate Economics and Legislation Committee into the Trade Practices Amendment (Australian Consumer Law) Bill, including the Committee's conclusion, is described the introduction to this paper.

---

9 A Cameron and N Milne, *Review of the Insurance Contracts Act 1984 (Cth) – Final report on second stage: Provisions other than section 54,* (2004), Canberra, Treasury at paragraph 6.7.