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Consumer Protection in Insurance Contracts: The Need for a 'Treating Customers Fairly' Regime*

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A B S T R A C T

In light of the findings of the 2019 Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, consumer protection has been highlighted as an area of particular concern, especially with respect to insurance. This article begins by exploring the current regulatory architecture for insurance consumer protection, including the recent amendments to the *Insurance Contracts Act 1984* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Analysis of these changes indicates that there are insufficient protections for consumers, because of a lack of appropriate redress, a lack of corporate cultural change within insurance providers, and weak regulatory enforcement. An examination of the United Kingdom's 'treating customers fairly' regime provides a potential solution to these problems; and which could be relatively easily applied within the Australian context. The authors conclude that the UK TCF regime would adequately address deficiencies in consumer protection in the Australian insurance market and provide better consumer outcomes in the future.

Keywords: Financial consumer protection, insurance contracts, financial system regulation, Treating Customers Fairly, TCF, consumer financial well-being, Banking Royal Commission, Hayne Royal Commission

Ⅰ. Introduction

The provision of financial services to retail consumers[1] by financial service providers ('FSPs') has been a consistent area of concern for decades. This was demonstrated in the Financial System Inquiries in 1997[2] and 2014,[3] and most recently, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2019 ('FSRC').[4] The FSRC highlighted the

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[1] Retail consumer is defined in s 761G and 761GA of the *Corporations Act 2001* (Cth) and in part 7.1 Division 2 of the corporations regulations and is used in accordance with these sections. See also *Corporations Act 2001* (Cth) s 761G(5)(b)(vii) and *Corporations Regulations 2001* (Cth) Reg 7.1.17, which outlines parameters concluding that a general insurance product will be provided to a retail client if it is a product listed. Further, the words 'consumer' and 'retail consumer' will be used interchangeably throughout.

[2] Commonwealth of Australia, "Financial System Inquiry." (March 1997) ('Wallis inquiry').

[3] Commonwealth of Australia, "Financial System Inquiry." (November 2014), p. 199 ('Murray inquiry').

[4] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1

complex and piecemeal approach to consumer protection -- scattered across multiple Acts, regulations, legislative instruments, and regulatory guides[5] -- facilitating regulatory arbitrage, creative compliance,[6] and ultimately rendering consumer protection in the financial services industry illusory. This culminated in Recommendation 7.4 of the FSRC Final Report, which recommended a comprehensive overhaul of consumer protection provisions in the *Corporations Act 2001* (Cth) and, where possible, to identify 'what fundamental norms of behaviour are being pursued'[7] in the legislation.[8]

An area where there is particular concern for the plight of consumers is in the insurance industry; specifically, general and life insurance. Both general and life insurance play a significant role for individual Australians, the economy and financial stability.[9] For retail consumers, such contracts provide peace of mind (rather than conferring a commercial advantage[10]) - it is a contract of faith. With respect to life insurance, most Australians have cover either directly or indirectly, through their superannuation (retirement) fund. Further, if the labyrinth of legislation, regulations, industry codes and regulatory guides were functional and fit-for-purpose, then it could be expected that most insurers would 'comply with most of their substantive obligations most of the time and that the community [could have] confidence that the insurance products [they] [acquired would] mostly be provided with fairness, honesty and professionalism'.[11] However, non-compliance and unscrupulous conduct appear to remain an endemic issue across the insurance industry.[12]

We are of the view that the adoption of a principles-based regulatory ('PBR') regime for the insurance industry would be optimal.[13] A principles-based regime would express the fundamental obligations and norms of behaviour that all providers could be expected to observe.[14] A correctly distilled principle[15] 'seeks to provide an overarching framework that guides and assists regulated entities to develop an appreciation of the core goals of the regulatory scheme,'[16] and allows regulators to police compliance with the spirit of the law, as distinct from legalistic compliance. Simultaneously, there should be an emphasis on *outcomes sought* rather than on *processes used* when determining compliance with any principle.[17] Thus, the adoption of a 'Treating Customers Fairly' ('TCF') regime for Australia's insurance industry, like that adopted in the United Kingdom, proves compelling. The adoption of such a framework would describe, in a succinct manner, the constellation of outcomes that the regulatory framework is intended to achieve and, simultaneously, informs both insurers and insureds of their rights and obligations.

This paper examines the benefits of the proposed introduction of fundamental norms of conduct to enhance consumer protection, along with a consolidated handbook, like that of the TCF regime in the UK, for the insurance industry. The paper focuses on general and life insurance.

('*FSRC*').

5 *FSRC*, ibid., p. 42.

6 Julia Black. "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis." *The Modern Law Review* 75, no. 6 (2012), p. 1040; Andrew Godwin, Vivienne Brand, and Rosemary Teele Langford. "Legislative Design - Clarifying the Legislative Porridge." *Company and Security Law Journal* 38 (2021), p. 286 ('*Legislative Design - Clarifying the Legislative Porridge*').

7 *FSRC*, op cit., p. 42.

8 *FSRC*, op cit., p. 496.

9 Consumer Action Law Centre. Submission: *Extending Unfair Contract Terms Protections to Insurance Contracts*. (Treasury: 2018), accessed 2 August 2022 <https://treasury.gov.au/sites/default/files/2019-03/Consumer-Action-Law-Centre_0.pdf >.

10 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortenson v Laing* at 313. *Australian Competition and Consumer Commission v Medibank Private Ltd [2017] FCA 1006.*

11 Pamela Hanrahan. "Fairness and Financial Services: Revisiting the Enforcement Framework." *Company and Securities Law Journal* 35 (2017), p. 420.

12 See, e.g., Michael Roddan, 'Senior companies reporter', *Australian Financial Review* (Sydney, 30 July 2021); Evgenia Bourova, Ian Ramsay, and Paul Ali. "A 'Damaging Loophole' 'Long Overdue' for Closing Extending Consumer Protections against Unfair Contract Terms to Insurance." *Competition and Consumer Law Journal* 27 (2020), p. 291 ('*Damaging Loophole*'); Zofia Bednarz and Kayleen Manwaring. "Keeping the (Good) Faith: Implications of Emerging Technologies for Consumer Insurance Contracts." *Sydney Law Review* 43, no. 4 (2021) p. 485 ('*Keeping the (good) faith*').

13 *Legislative Design - Clarifying the Legislative Porridge,* op cit, p. 295; Australian Government Treasury, *Submission to the Financial Services Royal Commission Interim Report*, 6 (*Treasury Interim Report Submission*) ('*Treasury Interim Report Submission*'); Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." In: Principles Based Legislation, 28 March 2007, p. 11 (available at <http://eprints.lse.ac.uk/62814/>.

14 Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." *Law and Financial Markets Review* (2007), p. 3.

15 *Treasury Interim Report Submission*, op cit., p. 7.

16 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), § [4.7], citing Surendra Arjoon, "Striking a Balance between Rules and Principles-Based Approaches for Effective Governance: A Risks-Based Approach." *Journal of Business Ethics* 68 (2006), 58.

17 Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." In: Principles Based Legislation, 28 March 2007, p. 8 (available at <http://eprints.lse.ac.uk/62814/>.

The impetus for this assessment stems from observed instances of consumer abuse,[18] and the inability of the current consumer protection regime to adequately protect and inform retail consumers of their rights and obligations. The paper proceeds as follows. First, Part II briefly outlines the current regulatory architecture governing general and life insurance products, highlighting the relevant consumer protection provisions. Part III builds on the previous section and discusses the practical implications for retail consumers provided by the existing legal framework, including illustrating its pervading flaws. Part IV reviews and examines the relevant legal framework for regulating insurance, with respect to retail consumers, in the United Kingdom under their TCF regime. It notes potential benefits for Australia. Part V proposes a new approach to consumer protection in Australia. It outlines how this could be achieved by reducing complexity, increasing coherence, and ultimately enhancing compliance and consumer outcomes. Part VI concludes.

Ⅱ. Australian Consumer Protection Regulatory Architecture

Australia's financial system (specifically banking) has been described as the central artery in the body of the economy.[19] In order to successfully fulfil this role, the financial system must be regulated to ensure that retail consumers are treated fairly. They must be provided with products that are fit-for-purpose, given service that is provided with care and skill, and sold financial products which perform in the way in which consumers are led to believe they will.[20] The current regulatory structure for consumer protection in Australia is piecemeal and, ultimately, lends itself to creative compliance[21] and legalistic interpretations by firms. This leads to a disjuncture between the underlying intention of the law, and the practical application thereof. This paper pays specific attention to the regulation of general insurance products and life insurance products. Consequently, there are six Acts, two industry codes of practice and a set of regulations that govern many of the consumer protections afforded to retail consumers. These include the:

- *Australian Prudential Regulatory Authority Act 1998* (Cth);
- *Life Insurance Act 1995* (Cth);
- *Life Insurance Code of Practice*;
- *Corporations Act 2001* (Cth);
- *Australian Securities and Investments Commission Act 2001* (Cth);
- *Insurance Act 1973* (Cth);
- *Insurance Contracts Act 1984* (Cth);
- *Insurance Contracts Regulations 2017*; and
- *General Insurance Code of Practice*.

Each of the relevant consumer protection provisions will be outlined in turn.

A. APRA

In accordance with Australia's Twin Peaks model of financial regulation, the Australian Prudential Regulation Authority ('APRA') is responsible for, among other things, the general administration of the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth), and prudential regulation of insurance providers. Pursuant to s 12 of the *Insurance Act 1973* (Cth),[22] a body corporate requires authorisation from APRA to carry on an insurance business in Australia, and s 15 outlines the circumstances in which APRA may revoke such authorisations. As the prudential regulator, APRA pays specific attention to matters regarding:

a) the conduct of any part of the affairs of, or the structuring or organising of, a general insurer, an authorised [non-operating holding company], a rele-

18 '…financial services entities paid almost $250 million in remediation to almost 540,000 consumers as a result of three particular forms of conduct in connection with home loans. The three forms of conduct were: … reliance on fraudulent documentation; processing or administration errors; and… breaches of responsible lending obligations.' *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, p. 35-6 ('*FSRC Interim Report*').

19 *FSRC*, op cit., p. 6.

20 See generally *FSRC,* op cit.

21 See for example: Andromachi Georgosouli, "The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work", *Journal of Law and Society*, Vol. 38, no. 3 (2011), p. 417.

22 Note, s 12A is the relevant corresponding section for the *Life Insurance Act 1995* (Cth).

vant group of bodies corporate, or a particular member or members of such a group, in such a way as:

i. to keep the general insurer, [non-operating holding company], group or member or members of the group in a sound financial position; or
ii. to facilitate resolution of the general insurer, [non-operating holding company], group or member or members of the group; or
iii. to protect the interests of policyholders of any general insurer; or
iv. not to cause or promote instability in the Australian financial system; or

b) the conduct of any part of the affairs of a general insurer, an authorised NOHC,[23] a relevant group of bodies corporate, or a particular member or members of such a group, with integrity, prudence, and professional skill.[24]

Of critical importance are the circumstances in which an insurer is placed under judicial management due to a finding of an unsatisfactory financial position, as demonstrated with the demise of HIH Insurance Limited, in 2001. In some situations, APRA can be substituted as the creditor for the persons that are entitled to certain claims under outstanding policies. Here, APRA will make payment before they would otherwise receive such payment, because of the winding up proceedings.[25]

B. Corporations Act

Generally, contracts of insurance are considered to be, for the purposes of the *Corporations Act 2001* (Cth) ('Corporations Act'), 'financial products'.[26] Before moving further, it is pertinent to note that coming to such conclusions requires legal training that most retail consumers will not have. 'Financial product' is defined in s 763A of the *Corporations Act* as 'a facility through which, or through the acquisition of which a person makes a financial investment; manages a financial risk or makes a non-cash payment'. Section 763C goes on to include entering into an insurance contract as management of a financial risk.[27] This is a fundamental definition as regards consumer protections, yet it is overladen with specific inclusions[28] and exclusions,[29] cross references, and unnecessary complexity that ultimately detracts from its coherence and utility.[30] Nonetheless, dealing in such products requires an insurance business to hold an Australia financial services licence ('AFSL'), which in turn, enlivens the obligations under s 912A to, amongst other things, 'do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly'.[31] It is the Australian Securities and Investment Commission's ('ASIC') responsibility for administering and enforcing those provisions. Critically, not all obligations imposed by chapter 7 of the *Corporations Act* on an AFSL holder apply to its dealings with retail clients. This disjuncture adds a further layer of complexity in deciphering precisely what consumer protections apply, to whom, and under what circumstances.

Moreover, chapter 7 of the *Corporations Act* outlines a broad range of pre-contractual disclosure obligations applicable to general insurers, for example, product disclosure statements. However, the flaws in a purely disclosure-focussed regime became increasingly apparent amidst the Global Financial Crisis ('GFC'), and through firm failures, such as Storm Financial and Opes Prime, where consumers were left with unexpected losses totalling more than $5 billion.[32] In part, this was due to a lack of consumer understanding about products, notwithstanding extensive disclosure documents (which were provided according to the legislative requirements).[33] However, contemporary research into behavioural finance has uncovered inherent consumer biases, the effect of which undermine the idea that individuals are 'rational' and, consequently, this limits the efficacy of disclosure as a means of ameliorating harm.[34] Chapter 7, part 7.8, division 7 of the *Corporations Act*, amongst other things, prohibits

23 Non-operating holding company.
24 *Insurance Act 1973* (Cth) s 3(1).
25 *Insurance Act 1973* (Cth) s 62ZW.
26 *Corporations Act 2001* (Cth) s 763A, 763C.
27 *Corporations Act 2001* (Cth) s 763A, 763C.
28 *Corporations Act 2001* (Cth) s 764A.
29 *Corporations Act 2001* (Cth) s 765A.
30 Australian Law Reform Commission, Financial Services Legislation: *Interim Report A* (ALRC Report 137). (2021) ('*ALRC Report 137*').
31 *Corporations Act 2001* (Cth) s 912A(1)(a).
32 Marina Nehme. "Product Intervention Power: An Extra Layer of Protection to Consumers." *Journal of Banking and Finance Law and Practice* 31 (2020), p. 89.
33 Ibid 90.
34 Daniel Kahneman, *Thinking Fast and Slow.* Penguin Books 2011), p. 224.

a financial services licensee from 'engag[ing] in conduct that is, in all the circumstances, unconscionable'.[35] Additionally, part 7.10, division 2 prohibits a person, in the course of carrying on a financial services business, from making false or misleading statements,[36] or engaging in dishonest conduct,[37] or misleading or deceptive conduct.[38] All of these provisions are vital for consumer protection, however there is, evidently, considerable difficulty that a retail consumer will encounter when trying to decipher and understand precisely what their rights and obligations are. This difficulty applies to both finding the relevant provisions and interpreting the legislation. Consequently, this is difficult to reconcile with the fundamental principles of the rule of law, that is, 'the law should be knowable and accessible; that it should be certain; and that it should be general in its application'.[39]

C. ASIC Act

In addition to the provisions outlined above, the *Australian Securities and Investment Commission Act 2001* (Cth) ('ASIC Act') contains various consumer protection provisions in part 2, division 2, subdivisions C-E and G. Most notable is subdivision BA which, as a direct result of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('FSRC'), now applies to insurance contracts.[40] The FSRC found that '[t]he considerations that render a[n] [Unfair Contract Terms] regime appropriate for other contracts for financial products and services apply equally to insurance contracts'.[41] These considerations include the asymmetrical relationship between large and powerful insurers, and retail consumers, opacity of pricing, competition in the insurance industry, and the high incidence of potentially unfair terms. As an example of a consistent issue regarding insurance contracts, we note, the example of *complete replacement cover home insurance* policies. They contain terms with language similar to the following:

> If we decide to pay you what it would cost us to rebuild or repair … we will pay you … the amount that we determine to be the reasonable cost of repairing or rebuilding. The amount that we determine to be the reasonable cost will be the lesser amount of any quotes obtained by us and/or by you for the rebuild or repair. Discounts may be available to us if we were to rebuild or repair.[42]

This clause allowed insurers to cash-settle claims for an amount that would be available to the insurer for the completion of a scope of work, but which were unobtainable by the insured.[43] Often this was the result of the insurer having access to discounts, and the wholesale costs of labour and materials. The effect of which was that consumers were left with payouts wholly inadequate to the task of rebuilding their homes.

In general, unfair contract terms ('UCT') provisions seek to assist in balancing the asymmetric power difference between retail consumers and insurers. The regime allows for a term, in a consumer or small business contract, to be rendered void if it is found to be 'unfair'. Pursuant to s 12BG of the *ASIC Act*, a term is deemed to be 'unfair' if:

a. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
c. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[44]

Additionally, several terms operating in conjunction with each other, which taken together create unfairness,

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35 *Corporations Act 2001* (Cth) s 991A(1).

36 *Corporations Act 2001* (Cth) s 1041E.

37 *Corporations Act 2001* (Cth) s 1041G.

38 *Corporations Act 2001* (Cth) s 1041H.

39 Tess Van Geelen. "Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law." *Company and Securities Law Journal* 38 (2021), p. 296.

40 *Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures)) Act 2020* (Cth).

41 Referring specifically to those under the *Insurance Contracts Act. FSRC*, op cit., p. 304.

42 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 3 p. 84; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 2 p. 437 ('FSRC vol 2').

43 *FSRC vol 2,* op cit., p. 435.

44 *Australian Securities and Investment Commission Act 2001* (Cth) s 12BG(1).

should be assessed with close attention to the statutory provisions, and should require a lower moral standard than unconscionability.[45] It is prudent to note that the UCT regime does not apply to terms that define the main subject matter of the contract,[46] or terms that set the upfront price payable under the contract.[47]

D. Insurance Contracts Act

Whilst much of the law relating to insurance contracts has its genesis in common law, the *Insurance Contracts Act 1984* (Cth) ('*ICA*') is not to be regarded as a total codification of the common law principles. The ICA has been referred to as remedial legislation and, as such, the courts have favoured the approach of construing the legislation 'in a manner that gives effect to the remedy and secures the result which it is the purpose of the legislation to achieve'.[48] Additionally, if circumstances give rise to an ambiguous interpretation of the legislation - literal, narrow, broad or otherwise - the approach taken by the court should be the reading that best protects the insured.[49] That said, many insurers continue to develop the wording of their policies with a particular regard to profit and competition.[50] Of particular importance here are the restrictions on relief, imposed by s 15 of the ICA on consumers, heavily limiting their avenues for relief to, mainly the ICA.

1. Section 12

Pressure, as a result of the systemic issues highlighted in the FSRC, led to the implementation of the *Financial Sector Reform (Hayne Royal Commission Response) Act* 2020 (Cth). Amongst other things, the amending legislation clarified the duty of an insured, under s 12, to ensure that it is interpreted as a 'duty to take **reasonable** care not to make a misrepresentation' (emphasis added) which, consequently, restricts s 13 with respect to the pre-contractual duty of disclosure. The language used in the previous version of s 12 had allowed insurers to deny legitimate claims where an insured had unintentionally left tangentially related illnesses undisclosed - illnesses suffered many years previously.[51] Additionally, ss 21 and 21B (now modified and repealed respectively) placed a different onus on the insured, which prevented insurers from asking general catch-all questions of the insured (for example in home and contents insurance). The effect of which was not to ask questions like "are you aware of any other circumstances that would affect the risk". These questions could be asked in commercial transactions but not when transacting with retail consumers - the effect of which would be to render the questions null. Commissioner Hayne noted that this was an unwieldy regime. Consequently, a new provision - s 20B - which applies to consumer contracts, requires the insured to take reasonable care not to make misrepresentations. An insured retail consumer cannot be expected to know what factors are relevant to the insurer. This provides for a more consumer friendly regime. Sections 28 and 29 provide outcomes for breaches. This substantially amended the common law position when enacted in 1986. In the case of fraud and misrepresentations, the insurer can void the contract. If the breach is innocent, the insurer can only reduce the level of cover.

2. Section 13

This section states:

1. A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
2. A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

2A. An insurer under a contract of insurance contravenes this subsection if the insurer fails to comply with the provision implied in the contract by sub-

[45] *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716.

[46] *Australian Securities and Investment Commission Act 2001* (Cth) s 12BI(1).

[47] *Australian Securities and Investment Commission Act 2001* (Cth) s 12BI(2).

[48] *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11 at [72].

[49] *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38; (2001) 204 CLR 641 at [50].

[50] *FSRC* vol 2, op cit., p. 437.

[51] Ibid., p. 332.

section (1).

Civil penalty: 5,000 penalty units.

3. A reference in this section to a party to a contract of insurance includes a reference to a third-party beneficiary under the contract.
4. This section applies in relation to a third-party beneficiary under a contract of insurance only after the contract is entered into.

Whilst the duty eludes a precise definition, it has been noted to import and connote notions of reasonableness, fairness, and decency, but critically, to extend wider than that, and requires each party to pay due regard to the interests of the other.[52] The leading authority on s 13 is *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1. Gleeson CJ and Crennan J stated:

> We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.[53]

At its core, this duty is symmetrical in nature, however it fails to recognise the practical difference and power imbalance between an individual consumer and a large insurance company. This imbalance has historically allowed the consumer protection aspect of this provision to be usurped by insurers and used as a tool to deny what would otherwise be legitimate claims by insureds. This disparity has been highlighted by the Consumer Action Law Centre, which reviewed 147 Financial Ombudsman Service (FOS) determinations in which a breach of the above duty was argued by either or both parties. The data revealed that in 83 per cent of cases, an insurer sought to avoid the contract by means of fraud, misleading or untruthful conduct or statements, non-disclosure or non-cooperation.[54] Whilst the section is mainly used by insurers, insureds could use this section where an insurer had failed to: make prompt admission of liability, to make payments or communicate acceptance or rejection of a claim within a reasonable time frame, and/or where there is an unjustified suspicion as to the legitimacy of the claim. Additionally, sub-section 13(2) makes a breach of the duty of utmost good faith a breach of the Act and, consequently, allows ASIC to enforce breaches of the duty.

3. Section 15

The position in Australia, arguably, appropriately reflects the fundamental nature of an insurance contract, being one of a 'transfer of risk', reflected in s 15 of the ICA. The underpinning rationale for this section stems from the unique nature of an insurance contract as a means of transferring risk between two or more parties and, as such, relief should predominantly be provided for only in the ICA.[55] However, to balance this restrictive provision, more is needed to entrench consumer protections in the ICA.

Section 15 provides:

Certain other laws not to apply

(1) A contract of insurance is not capable of being made the subject of relief under:
  (a) any other Act; or
  (b) a State Act; or
  (c) an Act or Ordinance of a Territory.

(2) Relief to which subsection (1) applies means relief

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52 Ian Enright and Robert Merkin Sutton. *Sutton on Insurance Law*. 4th ed. vol 1. Thomson Reuters, 201, pp. 472-476; *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 [15].

53 CGU Insurance Ltd v AMP Financial Planning Pty Ltd (2007) 235 CLR 1 [15].

54 *Insurance Contracts Act 1984* (Cth) s 13; Consumer Action Law Centre. Submission: *Extending Unfair Contract Terms Protections to Insurance Contracts*. (Treasury: 2018), accessed 2 August 2022 <https://treasury.gov.au/sites/default/files/2019-03/Consumer-Action-Law-Centre_0.pdf>.

55 Enright, Ian, Peter Mann, Rob Merkin QC, and Greg Pynt. *General Insurance: Background Paper 14.* Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. (2018).

in the form of:

(a) the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable;

This section provides that statutory relief cannot be sought under any other Australian legislation, excluding compensatory damages and, only recently, s 12BF (unfair terms of consumer contracts) of the *ASIC Act*, as alluded to above. This section only applies to legislation, and hence may not include common law principals. The consensus was that s 13 provided consumers with *more than adequate protection*, but that consumers are generally unwilling to take action on the basis of an unknown provision - s 13 - where there is a possibility of losing, and then incurring the respondent's costs.[56] This begs the question as to whether the current legislative provisions are adequate to protect consumers, especially given the complexity and high stakes of failure, associated with insurance contracts.

Furthermore, the FSRC aptly described the importance of including the claims-handling aspect of insurance under the definition of 'financial service'. Commissioner Hayne noted:

> There can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly, and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear. If it were to be said that it would place an extra burden of cost on one or more insurers or on the industry generally, the argument would itself be the most powerful demonstration of the need to impose the obligation.[57]

This is also brought to the fore due to the nature of insurance contracts as credence goods. Broadly, there are three categories of products, that is, *search goods*, *experience goods* and *credence goods*. *Search goods* describe a kind of product whose characteristics can be ascertained prior to purchase. For example, fruit and vegetables can be inspected and then purchased at a grocery store.[58] *Experience goods* relate to products, the quality of which can only be determined after having consumed the goods.[59] *Credence goods* refers to products 'whose characteristics cannot be fully known at the time of purchase and whose attributes are linked to the market, time, and contingent events',[60] making it more difficult to appropriately balance the responsibility of risk. For retail consumers, almost the entire value of the product lies in the ability to make a successful claim after a specified event occurs, which may be months, years, or decades in the future.[61] In addition, given the multitude of Acts, regulations, and codes of practice that govern consumer protection provisions in insurance contracts, it is difficult to understand how any non-lawyer or general retail consumer could effectively navigate and/or understand their rights and obligations. Ultimately, this presents a danger of making retail consumer protection in this space illusory.

E. Design Distribution Obligations

General insurance and life insurance products are financial products which attract the obligations set out in ss 994A-994Q of the *Corporations Act*.[62] These sections set out the product design and distribution obligations ('DDO') that financial product issuers and distributers must abide by when designing and distributing applicable financial products.

The DDOs are designed to force issuers and distributors to take a consumer-centric approach to the designing, marketing, and distribution of their financial products, to retail consumers. The key obligation for issuers is the requirement to create a 'Target Market Determination' ('TMD') for each product covered by the regime. The TMD must identify and describe the class of retail consumers that comprise the target market for the particular product

56 Australian Competition and Consumer Commission. *Consumer Credit Insurance Review* (ACCC Publication, 1998).

57 FSRC, op cit., p. 309.

58 John Armour, Jeffrey N. Gordon, Jennifer Payne, Daniel Awrey, Luca Enriques, Paul L. Davies, and Colin Mayer. *Principles of Financial Regulation*. 1st ed. ed.: Oxford University Press, 2016, p. 122.

59 *Principles of Financial Regulation*, op cit., p. 122.

60 Gail Pearson, "Suitability." *Company and Securities Law Journal 35* (2017), p. 469; *Principles of Financial Regulation*, op cit., p.122.

61 *FSRC*, op cit., p. 309; *Treasury Interim Report Submission.*

62 *Corporations Act 2001* (Cth) s 763A, 763C, 994A(1); *Corporations Regulations 2001* (Cth) regs 7.8A.02(4)-(5); *Corporations Act 2001* (Cth) s 910A as modified by ASIC, *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument* (2015/682, 28 July 2015).

and, in doing so, product issuers must consider the likely objectives, financial situation, and needs of the consumers in that class.[63] Furthermore, the TMD is not intended to be a consumer-facing disclosure document.[64] The requirement that the TMD be in writing, and publicly available, is purely to assist evidentiary requirements in substantiating claims of non-compliance with the DDO provisions, in the event that a dispute arises.[65] This also allows consumers to read the TMD for a product if they wish to. Critically however, it does not impose an obligation on consumers to have read or understood the TMD, since it is not a disclosure document.

First, an 'issuer', for the purposes of the DDO provisions, is any person that must prepare disclosure documents under the *Corporations Act*,[66] or anyone that sells financial products under a regulated sale, within the meaning of Div. 2 of Pt. 2 of the *ASIC Act*. Issuers also include any persons required by the *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') to create a target market determination ('TMD').[67]

The obligations for issuers can be summarised as follows: issuers are required (emphasis added):

- to make, in writing and publicly available, a TMD;[68]
- the TMD is to specify the target market for the product having considered the **likely objectives, financial situation** and **needs of the client**;[69]
- to review the TMD as and when required to **ensure it remains appropriate**;[70]
- to **keep records** of the decisions made in relation to the TMD and the new regime broadly;[71] and
- to notify ASIC of any '**significant dealings**'[72] in a financial product that are inconsistent with the financial product's TMD.[73]

A 'distributor' is, not surprisingly, a person who distributes a financial product. This includes Australian financial service (AFS) licensees and any of their authorised representatives, in addition to persons that may be exempt from holding an AFS license. The obligations placed on distributors of financial products can be summarised as follows: distributors must:

- not engage in 'retail product distribution conduct'[74] in relation to a product unless a TMD has been made;[75]
- not engage in retail product distribution conduct where a TMD may no longer be appropriate;[76]
- take reasonable steps to ensure that retail product distribution is consistent with the TMD;[77]
- keep records about any complaints made in relation to a financial product;[78] and
- notify the issuer of a product of any 'significant dealings' that are not consistent with the TMD.[79]

Once the issuer has determined the class of retail consumers for whom the financial product is suitable, the issuer and distributors must take reasonable steps to ensure that distribution of the product will be consistent with the TMD, and should not sell or provide the product to persons outside of the target market.[80] It is pertinent to note that a breach of this obligation will not necessarily

63 *Corporations Act 2001* (Cth) s 994B(8).

64 ASIC, *Product Design and Distribution Obligations* (Regulatory Guide No 274, December 2020) 46 [274.138].

65 Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 17 [1.49].

66 *Corporations Act 2001* (Cth) sub-ss 994B(1)(a)- 994B(1)(b).

67 *Corporations Act 2001* (Cth) sub-s 994B(1)(c); *Corporations Regulations 2001* (Cth) regs 7.8A.05, 7.8A.07; ASIC, *Product Design and Distribution Obligations* (ASIC Regulatory Guide No 274, December 2020) 14.

68 *Corporations Act 2001* (Cth) ss 994B(1)-994B(2), 994B(5).

69 *Corporations Act 2001* (Cth) s 994B(8).

70 *Corporations Act 2001* (Cth) s 994C.

71 *Corporations Act 2001* (Cth) s 994F.

72 Note, 'significant dealing' is not defined in the *Corporations Act* however the Revised Explanatory Memorandum indicates that it should take its ordinary meaning. This is expected to mean that an issuer must notify ASIC of dealings that 'would be worthy of its attention having regard to the object of the new regime and ASIC's role as its regulator': Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 23.

73 *Corporations Act 2001* (Cth) ss 994B-994C; Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 14 [1.42].

74 'Retail product distribution conduct' is dealing in a financial product in relation to a retail client: Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 14 [1.42].

75 *Corporations Act 2001* (Cth) s 994D.

76 *Corporations Act 2001* (Cth) sub-s 994C(3).

77 *Corporations Act 2001* (Cth) s 994E.

78 *Corporations Act 2001* (Cth) sub-ss 994F(2)-994F(2)(6).

79 *Corporations Act 2001* (Cth) ss 994F-994G; Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 15 [1.43].

80 *Corporations Act 2001* (Cth) s 994E.

arise, solely, by virtue of a retail client outside the target market, obtaining the product. However, it is expected that such circumstances would be considered when determining whether 'reasonable steps' were taken. Furthermore, 'retail product distribution conduct' is defined as dealing in, providing a disclosure document under Pt. 6D.2, or providing a Product Disclosure Statement ('PDS') under Pt. 7.9, for a product in relation to a retail client.[81] The term 'dealing' takes its ordinary meaning from s 766C of the *Corporations Act* (subject to some exclusions),[82] and includes 'applying for or acquiring a financial product', 'issuing a financial product', 'varying a financial product', 'disposing of a financial product', and arranging for a person to engage in such conduct.[83] It is clear that a wide variety of conduct is prohibited unless a TMD has been created for the product and, of critical importance, distributors must take reasonable steps to ensure distribution is consistent with the TMD.

Overall, and in combination, these obligations provide a step away from disclosure as the sole means of ameliorating retail consumer detriment. This is a direct result of placing responsibility on issuers and distributors to opine on an appropriate TMD for the product, ensure they give reasons for coming to that conclusion, and take reasonable steps to ensure that retail product distribution is consistent with the TMD. Additionally, non-compliance may be met with both civil and criminal penalties.[84]

F. General and Life Insurance Codes of Practice

Self-regulation via industry codes has some inherent and significant limitations. Treasury's submission to the FSRC aptly outlines a few, including:

- the standards set may not be adequate;
- not all industry participants may subscribe to, and be bound by, the code;
- monitoring and enforcement of compliance with the code may be inadequate; and
- consequences for breach of the code may not be enough to make industry participants correct and prevent systemic failures in its application.[85]

Commissioner Hayne further remarked that the range and diversity of code obligations, and some developments at common law,[86] may have contributed to there being some uncertainty about which provisions of industry codes may be relied upon, and enforced by, individuals. Uncertainty of this kind is highly undesirable. Participants in the financial services industry must know what rules govern their dealings.[87]

In addition, Recommendation 4.9 of the FSRC stated that, by 30 June 2021, the Insurance Council of Australia and ASIC should take all necessary steps to ensure that the provisions in the Codes of Practice that pertain to, and govern the terms of, the contract made between the insurer and the insured be designated as 'enforceable code provisions'.[88] This would allow breaches of the code to be enforced, and provide additional consumer protections. However, as at the time of writing, this has not occurred. With respect to the General Insurance Code of Practice, it is prudent to note that the Independent Review Office may be able to enforce the code, where there is a code compliance committee.

Whilst there is, arguably, merit to self-regulation in some industries, it appears that this structure has been ineffective to safeguard retail consumers and does not adequately assist them in understanding their rights and responsibilities. As regards insurers, complying with obligations that do not have legal force or significant sanctions[89] is likely to be viewed as nothing other than a cost of doing business.[90]

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81 *Corporations Act 2001* (Cth) s 994A.

82 *Corporations Act 2001* (Cth) sub-s 994A(1); *Corporations Act 2001* (Cth) s 766C. Note, exclusions apply to: sub-ss 766C(1)(d)-(e), sub-s 766C(4)(c) if the dealing is an offer of securities that needs disclosure to investors under Part 6D.2, and sub-s 766(3) if the dealing is a regulated sale of the product on the person's own behalf.

83 *Corporations Act 2001* (Cth) sub-ss 766C(1)- 766C(2).

84 *Corporations Act 2001* (Cth) ss 994B-994H, 994J, 994M, 1317.

85 *Treasury Interim Report Submission*, pp. 9-10.

86 *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302.

87 *FSRC*, op cit., p. 311.

88 *FSRC*, op cit., p. 315.

89 Insurance Council of Australia, *General Insurance Code of* Practice (Insurance Council of Australia, 2021), p. 44.

90 Insurance Council of Australia, *General Insurance Code of* Practice (Insurance Council of Australia, 2021), p. 44; *FSRC vol 2,* op cit., p. 328.

Ⅲ. Practical Implication for Consumers

The UCT regime changes are the most recent addition to the patchwork-style of consumer protection in the insurance market. These amendments appear significant, but arguably fail to address the root-causes of the problems, and thus only minimally improve consumer protection in the insurance market. There are several issues that continue to bedevil retail consumers, including: a lack of appropriate forms of redress, a lack of internal cultural change of insurance providers, and a general unwillingness to prosecute by ASIC.[91] Insurance providers are too focused on short-term financial gains, at times a product of a culture of greed, to fully appreciate the long-term detriment to consumer outcomes, profitability, and by extension, economic outcomes. While UCT measures have been described as promoting a proactive approach to insurance consumer protection, the extent of this may prove unconvincing.[92] UCT measures are inherently limited in their utility because of a largely reactive approach to consumer protection. That is, the offending must occur before the remedy can take place. It cannot be understated: the importance of a trustworthy insurance market, given insurers' involvement in what can be some of the most traumatising times in most consumers' lives.

A. Forms of Redress

The sole form of redress for UCTs is to void the unfair term to the extent that the contract can operate without it.[93] Voiding may not be the most appropriate form of redress for the consumer and, as Treasury noted in 2018, this 'may remove the basis for the claim entirely'.[94] Treasury recommended additional judicial powers, like injunctions, compensation, redress for non-party consumers, refusing to enforce the contract, refunds, and any other orders they deem appropriate.[95] Moreover, ASIC and ACCC have argued for a civil penalty regime for UCT as they provide a strong deterrent effect.[96]

In saying that, only having a pecuniary penalty may mean the insurer absorbs this as a 'cost of doing business'. That is, without additional powers to punish insurers, it may not prove effective. What insurers have evidently failed to appreciate is the role they play in the insureds' lives. As aforementioned, this cannot be made light of. This is evident by their failure to facilitate positive consumer outcomes that continue to drive down consumer and industry confidence. It does not appear convincing that insurance companies will be deterred in using UCTs when voiding is the only punishment, as this lacks an incentive to change.[97]

B. The Duty of Utmost Good Faith

The duty of utmost good faith still applies to insurance contracts and acts independently of UCT measures.[98] It prescribes an ethical standard for parties to act fairly and reasonably through every step of the contracting process.[99] This duty is not a recent development. It has played a role in insurance contracts since the case of *Carter v Boehm*,[100] and formed part of Australian common law until its introduction, when the ICA developed this common law position.[101]

This duty is regarded by some as having failed to protect consumers;[102] the FSRC noting a flagrant disregard for this duty.[103] Several groups note that this duty has

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91 Though it is worth noting that courts have still found a breach of the duty of utmost good faith by insurers. See, e.g., *ASIC v TAL* [2021] FCA 193; *ASIC v YOUI* [2020] FCA 1701; *Alliance v Delorvue* [2021] FCA FC 121; and *Advance v Darshn* [2022] FCA FC 48.

92 Consumer Action Law Centre, *Denied: Levelling the Playing Field to Make Insurance Fair,* Report, p. 7.

93 *ASIC Act* ss12BF(1) and (2).

94 *Damaging Loophole,* op cit., p. 281; Treasury, 'Enhancements to Unfair Contract Term Protections, Regulation Impact Statement for Decision' ('*Regulation Impact Statement*') p. 23.

95 Treasury, *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Unfair Contract Terms Reforms* (2021) ('*Exposure Draft*').

96 *Damaging Loophole,* op cit., p. 282; *Exposure Draft,* op cit., p. 7.

97 *Regulation Impact Statement*, op cit., p. 24.

98 *FSRC,* op cit., p. 307

99 Michael Mills, "Duty of Good Faith: The "Sleeper" of Insurance Obligations?". *Australian Law Journal* 80 (2006) 387 ('*Duty of Good Faith*'); Kenneth Sutton, *Insurance Law in Australia.* 3rd ed. Sydney: LBC, 1999, p. 158.

100 (1766) 97 ER 1662.

101 *Duty of Good Faith,* op cit., p. 388.

102 See, e.g., *Denied: Levelling the Playing Field to Make Insurance Fair,* op cit., p.12; Law Council of Australia, Consumer Law Committee, *Submission: Extending Unfair Contract Terms Protections to Insurance Contracts*, 27 August 2018, p. 16 (§ 62-64); Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the life insurance industry* (Report) pp. 38-39 (§ 3.39-3.40) ('*Joint Committee Report*').

103 *Duty of Good Faith,* op cit., p. 148-9: "… or very poor understanding

done little, if anything, to prevent 'the spread of unfair terms in insurance contracts' nor give the courts 'any power to provide a remedy to consumers', due to its legal imprecision, limited applicability, and lack of consumer understanding.[104]

1. Inaccessibility

This duty is 'little-known' and not often used by consumers.[105] Instead, this duty has been exploited by insurers, often repeatedly, to deny claims for arbitrary reasons.[106] In 83 per cent of cases where this duty was breached, it was the insurer making the claim.[107] The law surrounding insurance contracts is neither clear nor accessible to consumers. Research consistently shows that consumers do not understand the risks associated with unfair terms.[108] Additionally, self-represented parties fail in court due to this.[109] This means consumers need to understand that the duty has been breached in the first place, as well as have the time and resources to bring a case. This is often impossible for much of the population.

Combined with an already unequal playing field in the context of 'take-it-or-leave-it' standard form contracts,[110] the role of an asymmetric power difference leaves open the opportunity for exploitation. It is not to say that there needs to be an equal playing field between insurer and insured, but that the insurer recognises their inherent advantage, and does 'the right thing'. CHOICE notes that these legislative changes will go towards 'removing the loopholes' that allow insurers to both use UCTs and deny claims.[111] It can be questioned, though, whether the insurers will instead simply do what they have always done, which is to say, engage in creative compliance. This is because the financial industry simply innovates too quickly for 'prescriptive, rules-based approaches' to keep up.[112] Put differently, this approach to regulation fails in addressing the underlying cause, or motivation, of poor behaviour, that is, the role played by greed and minimum compliance.

2. Internal Behaviour

It is evident that insurers can, and will, exploit the law for financial gain. This was a major touchstone for Commissioner Hayne in the FSRC, noting that 'self-interest… will almost always trump duty'.[113] The duty is not enough of a deterrent to change the behaviour of insurance companies, and it is not convincing that additional UCT provisions will change this. It is not only a 'box-ticking exercise' mentality of minimum compliance.[114] This is behaviour that is actively below such standards, and it maintains the burden on the consumer of ensuring that the right thing is being done - rather than on the insurer. It effectively requires consumers to have complex insurance and legal knowledge, to ensure that they are getting the appropriate advice from the very entities they are meant to trust.[115] The reason consumers come to insurers is *because* they do not know the kind of, or exactly how much, damage they will suffer.[116] It is unfair to expect consumers to be ready and able to tackle a legal battle while enduring the mental and emotional toll of the problem they were supposed to be adequately insured against. Insurers need to *want* to change their behaviour, to promote better consumer outcomes. This is evidently not the case.[117] The current regime of an incremental patchwork of legislative amendments simply is not enough to adequately

of its scope and operation".

104 *Joint Committee Report',* op cit., pp. 38-39.

105 *Damaging Loophole,* op cit., p. 284.

106 *ALRC Report 137,* op cit., p. 148.

107 *Damaging Loophole,* op cit., p. 285.

108 Ibid p. 291.

109 *Keeping the (good) faith,* op cit., p. 485.

110 Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework.* Productivity Commission Inquiry Report (30 April 2008) vol. 2, p. 149.

111 CHOICE (the Australian Consumers' Association), "Consumer Advocates Welcome Act Implementing Three Key Banking Royal Commission Recommendations." (undated). https://www.choice.com.au/about-us/media-releases/2020/february/consumer-advocates-welcome-act-implementing-three-key-banking-royal-commission-recommendations.

112 Andrew Schmulow, "Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks." *African Journal of International and Comparative Law* 30, no. 1 (2022) p. 31 ('*Laying the Groundwork*').

113 *FSRC,* op cit., p. 3.

114 *FSRC Interim Report,* op cit., p. 290.

115 Kate Booth, Chloe Lucas, and Christine Eriksen. "Underinsurance is entrenching poverty as the vulnerable are hit hardest by disasters." Web page, *The Conversation*. (2021) https://theconversation.com/underinsurance-is-entrenching-poverty-as-the-vulnerable-are-hit-hardest-by-disasters-152083 ('*Entrenching Poverty*').

116 Ibid.

117 See e.g., Andrew Schmulow, "ASIC, now less a corporate watchdog, more a lapdog." *The Conversation*. (2021). https://theconversation.com/asic-now-less-a-corporate-watchdog-more-a-lapdog-167532 ('*Corporate Watchdog*').

protect consumers. As was discussed by the FSRC, poor corporate culture continues to drive misconduct.[118] The insurance market's 'profits-before-people' culture continues to undermine consumers' confidence.[119]

3. Trust and Confidence

Maintaining profits and facilitating positive consumer outcomes does not need to be at odds and could in fact amplify one other. The current practice of corporate greed is unsustainable in the long-term and comes at the expense of consumer trust and confidence, as well as long-term profit and sustainability. Llewellyn notes that consumer trust and confidence is imperative when considering the length and complexity of these contracts.[120] Thus, consumers should be reasonably able to expect insurers to comply with the law 'over and above what is required'.[121]

Positive consumer outcomes promote consumer confidence, which in turn promotes further engagement and demand in the insurance market. This means an increase in long-term, loyal customers who will *want* to engage with insurers,[122] and purchase more from them. Arguably this will lead to a more stable and reliable insurance market. It is uncontroversial to say that less- or under-insured consumers is bad for everyone, and the economy generally. So, promoting consumer trust and confidence should be at the forefront of insurance providers' objectives. The Australian Government, in responding to the FSRC, said their focus will be on restoring consumer confidence and promoting better outcomes.[123] This has yet to be seen.

4. ASIC and Enforcement

To illustrate the apprehension behind the utility of these UCT measures, we must consider whether there has been adequate enforcement of the duty of utmost good faith by ASIC. The FSRC recommended 'extending ASIC's capacity to take enforcement action' regarding the duty,[124] but it should be questioned why ASIC would need that in the first place? ASIC's history of enforcement has been the subject of considerable criticism,[125] and one could speculate as to whether these additional provisions will be effective. ASIC and APRA were privy to much of the systemic misconduct in the financial services sector that led to the FSRC,[126] yet continually failed to act. There is sustained recognition by both Parliament and ASIC that as the financial services industry grows, consumers will need additional protection.[127] However, without a substantial increase in funding for ASIC, there is unlikely to be an increase in their efficiency.[128] Also, considering that ASIC claimed they would not invoke the duty unless there was 'serious and systemic misconduct',[129] this is indicative of an unwillingness to litigate. This unwillingness was criticised by the FSRC - compounded by the Federal Government's aversion to commit to the Report's recommendations.[130] This illustrates the needs for a fundamental shift in corporate culture, since there is little enforcement of the existing penalties, irrespective of ASIC's powers. This is by no means a recent development. Criticism of ASIC's hesitancy to move on 'persistent early warning signs of corporate wrongdoing' has been acknowledged by Federal Government committees as early as 2014.[131]

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118 *FSRC,* op cit., p. 376.

119 Harlan Loeb, "Principles-Based Regulation and Compliance: A Framework for Sustainable Integrity." *Huff Post*. (2015). https://www.huffpost.com/entry/principlesbased-regulaton_b_7204110.

120 David Llewellyn, "Trust and Confidence in Financial Services: A Strategic Challenge." *Journal of Financial Regulation and Compliance* 13, no. 4 (2005) p. 336 ('*Trust and Confidence*').

121 Ibid.

122 Andrew Schmulow, "Financial services need to wake up to fact that treating customers well is good business." *The Conversation*. (2019). https://theconversation.com/financial-services-need-to-wake-up-to-fact-that-treating-customers-well-is-good-business-121948.

123 Andrew Godwin, "One year on, is our trust being restored?" *Pursuit*. (2020). https://pursuit.unimelb.edu.au/articles/one-year-on-is-our-trust-being-restored.

124 Julie-Anne Tarr, Jeanette Van Akkeren, Amanda-Jane George, and Sue Taylor. "Utmost Good Faith and Accountability in the Spotlight of the Banking Royal Commission - Time to Revisit the Scope, Applicability and Enforcement of the Duty." *Australian Business Law Review* 47, no. 3 (2019) p. 160 ('*Accountability in the Spotlight*').

125 Jason Harris, "Is ASIC the watchdog that no one fears?" *The University of Sydney*. (2019). https://www.sydney.edu.au/news-opinion/news/2019/02/22/is-asic-the-watchdog-that-no-one-fears-.html. ('*Watchdog that no one fears*').

126 Schmulow, Andrew, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority." *Federal Law Review* 49, no. 4, p. 506.

127 Zehra Eroglu Kavame, and K.E Powell. "Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia." *Journal of Banking and Finance Law and Practice* 31 (2020) p. 75.

128 Jason Harris, "Corporate Law Lessons from the Banking Royal Commission." *Australian Law Journal* 93 no. 5 (2019) p. 365.

129 *Damaging Loophole*, op cit., p. 285; Tarr et al., *Accountability in the Spotlight*, op cit., p. 158.

130 *Corporate watchdog,* op cit.

Ⅳ. United Kingdom

The United Kingdom's TCF approach to financial product regulation provides a useful case study. Its discussion and implementation began circa 2001[132] and, as a result, provides a rich set of data from which analysis can be undertaken. The fundamental premise of this regime is to ensure that all firms can consistently demonstrate that the fair treatment of customers is integral to their business model. In this, it is the structure and hierarchy of norms of conduct, utilised by the FCA, that precipitates strong consumer protections. It is argued here that this shift in mindset, from a pure, blackletter-law, legalistic approach, to a hybrid principles-based and outcomes-determined regime, would provide a discernible benefit to retail consumers in the Australian insurance market. For clarity, the two regimes in question could be thought of as sitting on either ends of a spectrum. Here, a shift is proposed along that spectrum, to incorporate governing norms of conduct, rather than suggesting an isolated principles-based regime.

There are six consumer outcomes that underpin the TCF regime, and that form the base expectations of the FCA. They are outcomes that firms must strive to achieve, as distinct from a demonstration of 'processes used'. These outcomes are tabled below.

To assist and guide firm further, there are eleven principles that seek to align business practices with the statutory objectives. These principles are tabled below.

The United Kingdom's TCF regime has been lauded by many,[133] due to its consumer centric approach to financial services regulation. A correctly distilled principle 'seeks to provide an overarching framework that guides and assists regulated entities to develop an appreciation of the core goals of the regulatory scheme,' and allows regulators to police compliance with the spirit of the law, as distinct from legalistic compliance. Simultaneously, there should be an emphasis on 'outcomes sought' rather than on 'processes used', when determining compliance with any principle. The adoption of such a framework describes, in a very succinct manner, the universe of outcomes that the regulatory framework is intending to achieve. That said, especially in a complex area such as financial services regulation, there still is high level regulation required, albeit where possible, this is minimised. The United Kingdom has many rules[134] that govern product suitability, affordability, and advertising. However, most, if not all, of these rules circle back to principle 6 and principle 7 (Table 2). It is this dominance of the principles and outcomes from which the key benefits of a principles-based regime flow. Detailed rules and guidance will stem from the principles, and the principles will be used to interpret and guide the applicability of the rules.

The *Financial Services and Markets Act 2000* ('FSMA') and Insurance: Conduct of Business Sourcebook ('ICOBS') govern, among other things, the conduct of insurance businesses in the United Kingdom. The FSMA and ICOBS are administered by the Financial Conduct Authority ('FCA'), previously known as the Financial Services Authority. It is pertinent to note that the FCA has a varied range of enforcement powers and, under s 206 of the FSMA, the FCA can impose financial penalties, in an amount it considers appropriate, where it determines that an authorised person has contravened a requirement under the FSMA.[135] Guidance is provided in chapter 7 of its Enforcement Guide, which allows firms to understand the FCA's approach to exercising its powers.[136] It is worth noting that in Australia, ASIC (the FCA's equivalent) must pursue action, other than administrative repercussions, through the courts.

The United Kingdom utilises an interesting array of tools in combination, to effectively regulate and enunciate to both firms and consumers, their rights, and responsibilities

131 Andrew Schmulow, Karen Fairweather, and John Tarrant. "Restoring Confidence in Consumer Financial Protection Regulation in Australia: A Sisyphean Task?" *Federal Law Review* 47, no. 1 (2019) 92 (*'Sisyphean Task'*).

132 Financial Services Authority. *Treating Customers Fairly after the Point of Sale*. United Kingdom, 2001; Rosie Thomas. "Regulating Financial Product Design in Australia: An Analysis of the UK Approach." *Journal of Banking and Finance Law and Practice* 28 (2017), p. 100 (*'Regulating Financial Product Design in Australia'*).

133 *Principles of Financial Regulation*, op cit.; *Regulating Financial Product Design in Australia*, op cit.; Julia Black, "The Rise, Fall and Fate of Principles Based Regulation" in LSE Law, Society and Economy Working Papers, no. 17/2010, Law Department, London School of Economics and Political Science, (2010), p. 18.

134 See e.g., Financial Conduct Authority, "Principles for Businesses - FCA Handbook", August 2022, and pursuant to: *Financial Services and Markets Act 2000*.

135 *Financial Services and Markets Act 2000* s 206.

136 Financial Conduct Authority, "Regulatory Guides: EG The Enforcement Guide - FCA Handbook", August 2022, and pursuant to: *Financial Services and Markets Act 2000*.

Table 1. Six outcomes that underpin the United Kingdom's Treating Customers Fairly Regime

Outcome 1	Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
Outcome 2	Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
Outcome 3	Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
Outcome 4	Where consumers receive advice, the advice is suitable and takes account of their circumstances.
Outcome 5	Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
Outcome 6	Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

Table 2. The principles that underpin the United Kingdom's Treating Customers Fairly Regime

1. Integrity	A firm must conduct its business with integrity.
2. Skill, care, and diligence	A firm must conduct its business with due skill, care, and diligence.
3. Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4. Financial prudence	A firm must maintain adequate financial resources.
5. Market conduct	A firm must observe proper standards of market conduct.
6. Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7. Communications with clients	A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.
8. Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9. Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10. Clients' assets	A firm must arrange adequate protection for clients' assets when it is responsible for them.
11. Relations with regulators	A firm must deal with its regulators in an open and cooperative way and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

in this complex area. It is a combination of legislation, black-letter, prescriptive law rules, and non-legislative tools, such as guidance documents, all to be interpreted regarding the overriding principles and outcomes. Regarding insurance specifically, ICOBS 4.1.1A and 6A.6.2 are particularly instructive. The former provides: '[t]o comply with the customer's best interests rule and Principle 7 (Communications with clients) a firm should include consideration of the information needs of the customer …' and additionally, ICOBS 6A.6.2 provides, '[t]he purpose of this section is to support Treating Customers Fairly outcome 6 - 'Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint'. Both sections illustrate how the detailed rules can be, and indeed are, informed by normative principles or outcomes. This allows the reader to easily glean the intent of the legislation, and what the detailed rule aims to achieve,

Critically, legislation and rules are instruments of communication from the regulator/governing body to the regulated, communicating what conduct is acceptable. From Part II above, discussing the Australian experience, one can identify the difficulty a reader will have when trying to understand, not only what is required of them, but also what the underlying intent and norms of conduct are, that the governing body/regulator is trying to communicate. The reader is required to consult multiple Acts and regulations that are themselves complex and, must simultaneously ensure they are mindful of the different and sometimes conflicting definitions utilised. Adding

further complexity are the amendments implemented via multiple Acts that must also be understood, without any guiding principles. Some of this legislation stems from the recommendations of the FSRC and can be thought of as 'Tombstone Legislation'. Tombstone Legislation refers to Acts, regulations and legislative amendments that take place after a significant event, inquiry, or deaths occur, in a particular area. It is reactive and generally follows from recommendations to fix identified failings, after an investigation has been performed. While there is a place for this kind of legislation, more must be done to ensure the current framework is preventative, and not reactive. Retail consumers should not have to wait until a Royal Commission, or an inquiry, to ensure that they are being treated fairly, and that the intent of the law is met.

A. Medical Definitions: an Example

Medical definitions are a critically important aspect of life and total and permanent disability insurance. A key factor in assessing whether a claimant will receive the benefit under their policy depends on whether they meet one of the definitions provided in the policy.[137] When offering insurance, insurers can decide to use broad or restrictive medical definitions to increase or decrease the coverage they will provide. Ultimately this is a business decision and will affect the premium the insurer requires. ASIC has taken the view that reliance on an outdated medical definition, in and of itself, is not a breach of the law, provided the relevant definition is disclosed to the insured.[138] Such a conclusion is clearly irreconcilable with the fundamental precepts outlined by Commissioner Hayne, namely: 'do not mislead or deceive; act fairly; provide services that are fit for purpose; and deliver services with reasonable care and skill' and echoed by the community in what they expect of insurers.[139] It is evident that the levels of black-letter law prescription are excessive and, consequently, leads to detrimental results for retail consumers. Under a TCF regime it is likely that an outdated medical definition would fall foul of principles 1, 2, and 6 and, hence, this would potentially have forced insurers to alter their practices to ensure that outdated medical definitions were not evident in their policies.

The Life Insurance Code requires insurers to review medical definitions every three years, and update those definitions where necessary, to ensure that the definitions reflect current practices and understanding.[140] The code also requires that the review process occurs in consultation with medical specialists and, where updates occur, an insured person affected by such a change should be informed accordingly. This requirement only applies to 'on-sale products' and does not address 'off-sale' products. This is a step in the right direction, however (as at the time of writing), the code still does not have 'enforceable code provisions', contrary to the FSRC recommendation to have that in place by 30 June 2021. Under a TCF framework, insureds would have greater access to redress, even if these were not 'enforceable code provisions', as such conduct would still fall foul of the overarching TCF principles.

Previously, in Australia, one of the fundamental factors that led to a review of a product's definitions were competitor reviews. Where the insurer would review what their competitors were offering and, on that basis, determine whether they should subsequently change their definitions.[141] A TCF regime in the UK, and other jurisdictions such as South Africa, has led to increased competition amongst insurers, whereby some advertise their products on the basis of how fairly they treat their customers. It is this shift in mindset, requiring at each stage of the product life-cycle that the insurer ensure that they are putting the customer first - that they are being treated fairly, that gives rise to better outcomes, without the need for a specific rule requiring a firm to do so.

Ⅴ. TCF in Australia

Having illustrated how a TCF regulatory model works in a twin peaks model like Australia, it is clear that it could provide redress for many of the problems Australia is facing in the insurance market, and the financial services sector generally.

137 *FSRC vol 2,* op cit., p. 318.
138 *FSRC vol 2,* op cit., p. 324.
139 *FSRC*, op cit., p. 9.
140 Financial Services Council, *Life Insurance Code of Practice* (Financial Services Council, 2019), p. 5.
141 *FSRC vol 2,* op cit., p. 325.

A. Inaccessibility

A criticism of the duty of utmost good faith was its inaccessibility to consumers, and the Financial Ombudsman Service's use of it was 'minimal and mixed at best'.[142] Consumers lack the ability to absorb and understand the often voluminous and complex information they are given.[143] If Australia were to adopt a UK-style TCF regime, such practices would contravene Outcome 3 and 4 and Principle 7 (tabled above), which emphasise the importance of information that is appropriate and suitable. In other words, providing information that is easily understandable.

The implication is then that since UCTs are grounded in a blackletter-law approach to insurance, inaccessibility for consumers remains unaddressed. The simple, overarching principles, that inform insurers' conduct in a TCF regime, promote better accessibility to, and understanding of, both insurance and the law. These objectives create 'capable and confident consumers'.[144] Anecdotally we have seen evidence that capable and confident consumers are seldom evident.[145]

B. Trust and Confidence

Capable and confident consumers will necessarily have more trust in their insurers, and the regulators. There is a growing deficit of this trust, largely due to personal experience and a general mistrust of the industry.[146] Australian research indicates that, especially for young people, trust in insurance companies is lagging in comparison to every other institution, including banks.[147] Consumers are aware they lack the technical know-how to understand the complexities of insurance, and so rely on these entities to do the right thing.

Trust and confidence appear, therefore, to be integral to the operation and success of the insurance market. As expressed by the FSRC,[148] the insurance sector has exploited the unique features of insurance in pursuing short-term financial gains, at the cost of consumer trust and confidence. Consumers are keenly aware of their lack of knowledge and, without trust and confidence in the industry, this manifests as irrational decisions that motivate inappropriate purchases,[149] or forgoing purchasing altogether.[150]

This illustrates the appropriateness of a TCF regime in the insurance market. TCF's inherent simplicity allows consumers a far greater understanding of insurance because the information given to them should be clear and appropriate.[151] If the information is understandable, consumers have greater confidence in their insurer. And when they have greater confidence through their personal understanding, this in turn will facilitate greater trust in the insurance market.[152] Research indicates that when consumers are more confident in their knowledge, they are more likely to be insured.[153] As such, it is in the best interests of insurers to promote consumer trust and confidence, because this creates stable, long-term financial gain.

C. Internal Culture

TCF would likely have a significant impact on the internal governance of insurers. Insurers would be likely to continue to creatively comply with legislation, which is why the UCT extensions may not be sufficient for promoting consumer protection. Like the duty of utmost good faith, insurers may find a way around the UCT

142 Law Council of Australia, Consumer Law Committee, *Submission: Extending Unfair Contract Terms Protections to Insurance Contracts.* (2018) p. 16.

143 *Accountability in the Spotlight,* op cit., p. 12; Michael Pelly, "Financial Services Rules 'Too Complex, Incoherent and Inaccessible'." Article, *The Australian Financial Review*. (2022). https://www.afr.com/companies/financial-services/financial-services-rules-too-complex-incoherent-and-inaccessible-20220316-p5a52b. (*'Too Complex'*).

144 *Laying the Groundwork*, p. 28.

145 Booth, Lucas and Eriksen, *Entrenching Poverty,* op cit.; Pelly, *Too Complex,* op cit.; Chloe Lucas, "'They lost our receipts three times': how getting an insurance payout can be a full-time job." News Article, *The Conversation*. (2021). Accessed 22 March 2021. https://theconversation.com/they-lost-our-receipts-three-times-how-getting-an-insurance-payout-can-be-a-full-time-job-157588. (*'Insurance payout can be a full-time job'*).

146 *Entrenching Poverty,* op cit.; Bruce Tranter and Kate Booth. "Geographies of Trust: Socio-Spatial Variegations of Trust in Insurance" *Geoforum* 107 (2019) p. 200 (*'Geographies of trust'*).

147 *Geographies of Trust*, op cit., pp. 204-6. It is worth noting that this is a global trend.

148 See *FSRC,* op cit., pp. 267-318.

149 That is to say: under- or over-sold, or unnecessary insurance policies.

150 *Trust and Confidence,* op cit., pp. 336-7.

151 As seen in outcome 3 from the UK and SA's TCF principles.

152 *Trust and Confidence,* op cit., p. 336.

153 *Geographies of Trust*, op cit., p. 201.

provisions. Despite the FSRC's scathing remarks,[154] the 'profits before people' culture for many firms has not changed.[155] A continuation of the prescriptive, black-letter-law will fail to address the causes, rather than the symptoms, of poor corporate culture.[156]

Entities need to *want* to change and, giving them the flexibility to decide how they do that under a TCF regime, appears to be the best way. For example, Westpac's lack of remorse for their conduct is illustrative of this, having failed to learn from the mistakes that were exposed by the FSRC.[157] The UK's Principle 11 illustrates how this can be remediated: it encourages firms to deal openly and cooperatively with the regulators. This promotes a positive and consistent duty to work in conjunction with the regulators, rather than against them. This is certainly something to aspire to.

D. ASIC and Enforcement

TCF means the emphasis is on entities to decide what works for them,[158] and enables utilising an individualised, self-reflective, norms-based process to do this, rather than strict legalistic compliance. This goes towards mitigating the pressure on the regulator to painstakingly detail what compliance means and encourages firms to go beyond minimum compliance.[159]

Part of the reason why the internal cultural changes within entities is imperative, is that ASIC has repeatedly failed to litigate, even when there have been 'repeated and serious contraventions of the law'.[160] If ASIC had adequately addressed and prosecuted these contraventions, the FSRC likely would not have occurred.[161] TCF takes some of the pressure off the regulator by ensuring that firms are actively working towards positive consumer outcomes, rather than merely asking ASIC what they are allowed to do. In other words, firms will take on a qualitative, positive duty to act in accordance with the principles, rather than satisfying a negative duty not to break the law. However, ASIC's willingness to litigate would nonetheless have an important impact on the deterrence in a TCF regime.

Part of the reason Australia have an excessively legalistic regime is the perceived need for strict regulation, due to a distinct lack of trust and confidence in the industry by consumers.[162] But if TCF means firms will want to raise consumer trust and confidence of their own accord, then arguably, it will reduce the need for regulation in the first place.[163]

E. Efficiency of Legislation

A TCF regime accepts the inherent complexity of the subject matter but seeks to do so without the complex drafting that has hitherto accompanied that.[164] Described as an 'inescapably complex' problem, blackletter-law is on out to the backfoot, in its attempt to keep up with the rate of technology and innovation.[165] This can often make the law reactionary and complex, which gives rise to a perceived need for further legislation and regulation. This complexity can lead to misunderstandings and non-compliance, intentional or otherwise.[166] It is worth noting that entities can often divest themselves of responsibility for misunderstandings and non-compliance, because of ASIC's failure to give them proper information, even though the entity should reasonably have known better. But complexity does not necessarily promote certainty, and can even have the opposite effect, introducing ob-

154 *FSRC,* op cit., pp. 277-318.

155 Ben Butler, "Banking Royal Commission One Year On: Optimism over Changes but Banks Fight Back." *The Guardian*. (2020). https://www.theguardian.com/australia-news/2020/feb/01/banking-royal-commission-one-year-on-optimism-over-changes-but-banks-fight-back.; Charlotte Grieve, "'All About Sales': Nab Sales Targets Risk Customer Welfare." *Sydney Morning Herald*. (2022). https://www.smh.com.au/business/banking-and-finance/all-about-sales-nab-sales-targets-risk-customer-welfare-20220310-p5a3jt.html.

156 *Laying the Groundwork*, op cit., p. 31.

157 *Corporate watchdog,* op cit.

158 Jonathon Edwards, "Treating Customers Fairly." *Journal of Financial Regulation and Compliance* 14 (2006) p. 242.

159 Andrew Schmulow and Shoshana Dreyfus, Submission to the Australian Law Reform Inquiry, "Review of the Legislative Framework for Corporations and Financial Services Regulation" Report 137 (2022) p. 9 ('*Legislative Framework Submission*'); *Trust and Confidence,* op cit., p. 346.

160 *Watchdog that no one fears,* op cit.

161 *Sisyphean Task*, op cit., p. 98.

162 *Trust and Confidence,* op cit., p. 344.

163 Ibid.

164 *Legislative Framework Submission,* op cit., p. 5.

165 *Keeping the (good) faith* op cit., p. 456; Mark Steward, "Financial Services Legislation Advisory Committee Member Interview." By Andrew Godwin. 2022. https://www.youtube.com/watch?v=BxQCaYHb8Sk. ('*FSLAC member interview'*).

166 *FSLAC member interview,* op cit.

scurity and absurdity.[167] Similar to Australia, it was found in the UK that even where there was a plethora of laws and guidance given, there were still instances of a failure to comply.[168] This is due to the obscuring effect that over-prescription can have on compliance.

Complex drafting is not always necessary for a complex subject matter, and a recent inquiry by the Australian Law Reform Commission has shown that where possible, it should be reduced.[169] TCF focuses on the outcomes, or the spirit of the law, rather than the process by which to get there. It encourages proactive measures of compliance by the entities themselves, rather than reactions by the regulators. In accepting this inescapable complexity, and the argument that not everything can be covered by blackletter-law, the norms that inform the legislation can be better understood and applied. And when they can be better understood, they are more easily complied with.[170] As outlined above in the UK context, there should still be prescriptive rules that support the TCF principles - clarification where clarification is required. But this is done by understanding the rules within the matrix of the Outcomes and Principles, rather than an over-reliance on ASIC[171] (or its guidance notes). This is described above, where the combination of Principles, in conjunction with existing legislation, provides for the best way to promote Outcomes clearly and coherently. That is, a handbook of sorts can bring together these ideas and show how the legislation is informed by the Outcomes and go towards promoting positive consumer outcomes.

This framework would bring together the intent and goals of the six Acts, regulatory codes and regulations outlined in Part II above. Since general and life insurance products are regulated by their own regulatory architecture, they are strong candidates for an overarching TCF framework. This would not require laborious work on the part of the legislator, as may be required for chapter 7 of the *Corporations Act*, but rather a simple introduction of overarching norms of conduct. Prescriptive rules would assist in carrying out the objects of the TCF principles - provided they are only created where there is a discernible and certain need. Prescriptive rules must only be created where there is no normative way to interpret a principle in respect of a particular matter (for eg: how should advertised interest rates be calculated? What method is fairest for consumers?). They must not be created simply as a form of convenience for a regulated entity to save its compliance leaders from the burden of thinking for themselves; to mitigate decision-fatigue; or to transfer the risk of compliance failures (due to misinterpretations of the rules) from the entity, back to the regulator. Albeit at the core of this galaxy will remain the Principles, which will represent a legal compulsion. The grouping of the relevant outcomes, principles, and legislation, in the form of an Insurance TCF Handbook (like that of the FCA) would assist both industry and consumers understand their rights, obligations and the underlying intent of the law. Moreover, the TCF regime is not an introduction of new or unfamiliar principles. As Commissioner Hayne noted, they are evident throughout the various pieces of legislation.[172] However, one of the FSRC's conclusions was a need for clarity on the norms that underpin the legislation.[173] A TCF regime could provide this, as it 'ventilates and isolates' these values,[174] that have always been the responsibility of firms, but obscured by the overwhelming volume of legislation and rules.

Ⅵ. Concluding Observations

Consumer protection is imperative for a healthy and stable insurance market. For this, we argue, a TCF regime would be an appropriate next step for Australia. As indicated by this article, there are deficiencies in consumer protection which are not adequately mitigated by recent changes to either the *ICA* or the *ASIC Act.* It is evident in light of the findings of the FSRC however, that change should be comprehensive, and overhaul current behavioural and cultural issues within the market. The UK

167 *Legislative Framework Submission,* op cit., pp. 5-6.

168 James Davidson, *The UK Financial Services Authority's "Treating Customers Fairly" Initiative and Its Potential for Application in the Australian Financial Services Industry*: CCCL Research Paper, 2006, p. 6.

169 *ALRC Report 137*, op cit.

170 Steward, *FSLAC member interview.*

171 Ibid.

172 *FSRC,* op cit., pp. 8-11.

173 *FSLAC member interview*, op cit.; *FSRC,* op cit., pp. 8-10.

174 Andrew Schmulow, *Does Australia Need a Treating Customers Fairly (TCF) Regime for the Financial Industry?* Ross Parsons' Centre Law and Business Webinar 2021. https://www.youtube.com/watch?v=JvF9GXzszaY&t=1s.

TCF regulatory model provides a laboratory from which TCF implementation in Australia could benefit. We are of the view that the benefits of TCF are clear and unambiguous, remedying many of the issues identified in the FSRC.

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