Financial Exclusion and Australian Domestic General Insurance: The impact of Financial Services Reforms

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Doctor of Philosophy in Finance and Economics

2012

CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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Acknowledgments

I acknowledge the advice and guidance I have received from my Supervisors, initially Professor Warren Hogan, and more recently Professor Jock Collins.

I further acknowledge the support I have received from my former colleagues at the School of Finance & Economics, UTS Faculty of Business and the editing and layout support I have received from Tanvi Mehtr

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Thesis Abstract

Consumer access to financial products and services may depend on a variety of factors. Recent evidence reveals that "Financial Exclusionary" effects may exert a particularly adverse impact on people's ability to access financial services and products. Specifically, this Study examines the extent to which recent financial services reforms in Australia have impacted upon those financial exclusionary effects which may preclude access to general insurance products in the domestic market.

Towards this aim, I first generated a profile of financial exclusionary effects applying to current Australian domestic general insurance products utilised by domestic insureds. The profile revealed that these effects occur widely across statute-prescribed insurance policies in the Australian domestic general insurance market. I then examined extent to which internal and external contextual factors arising from interaction with various statutory provisions constrained these effects. I discovered that potential constraints, primarily due to the preclusion of external statutory provisions from general insurance contracts, were minimal. This in turn, could be traced to the existence of insurance specific statutory remedies under the Australian federal insurance legislation designed to provide relief from harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurer conduct.

Subsequently, I identified the general objectives of recent Australian financial services reform legislation from the perspective of potential impact upon financial exclusionary effects. I found that, through an attempt to address structural defects in the application of the reform legislation, the new legislation in fact replicated existing statutory descriptions of several domestic general insurance products which contained financial exclusionary effects, embedding these effects in the definitions central to the reform legislation. I consider the policy implications of my research findings, noting that remedial legislation may be necessary to address those issues identified.

I conclude my thesis with the outcome of a Pilot Study I developed and implemented in order to establish the extent to which my multi-part analytical framework was relevant in determining the financial exclusionary effect profile in domestic general insurance products available in the New Zealand general insurance market. I report on the outcome of these inquiries, which successfully established the probable financial exclusionary effect profile in financial products and services within that jurisdiction.

Thesis Objective

The principal objective of my thesis is to determine the impact of recent Australian financial services reforms on those financial exclusionary effects prevalent in Australian domestic general insurance products.

Thesis Introduction

Here, I set out the structure of my thesis, an outline of the various studies I undertook, and the analytical framework whereby the analysis occurred.

Thesis Structure and Methodology

"Towards an appropriate analytical framework"

In the main, my thesis follows the *"Five Chapter Model"* developed and later expanded by Perry (1995).[1] Largely following Love's example (2001)[2], I have modified the use of this model to accommodate various methodologies used in my multi-part study that reflect the particular focus of inquiries in successive chapters. This framework facilitates a meta-analysis by providing clear links with previous chapter conclusions.

The overall framework of my study is set out in Figure 1.1. The analytical framework consisted in undertaking six discrete sequential studies, of which those focusing on direct/indirect contract or legal-related issues are modelled on Robson (2002).[3] I found that the framework possessed adequate flexibility to accommodate jurisdictional-specific variances encountered during my Pilot Study, reported in Appendix A.

[1] At 3ff
[2] At 4ff.
[3] At pp.163-77, 348-77.

The scope of each study and the methodology followed is as follows:

Chapter One (Research Study #1)

Title: Financial Exclusionary Effects: Dimensions

Scope:

i. "Financial Exclusion" and" "Social Exclusion" and how these constructs can be distinguished from each other.

ii. Identification of the area of impact of "Financial Exclusion"

iii. Identification of how financial exclusionary effects are manifested.

iv. An additional dimension of financial exclusion: *"Vicarious Financial Exclusionary" Effect.*

v. The interaction between Financial Exclusionary effects.

Methodology:

Structured Review involving Analysis of Data addressing the items above

Chapter Two (Research Study #2)

Title: Australian Domestic General Insurance Arena Financial Exclusionary Effects.

Scope:

Analysis of 129 domestic general insurance policy wordings and 6 statute-prescribed *"standard cover"*[4] wordings

[4] Insurance Contracts Act (Cth) 1984, Section 34 and Insurance Contracts Regulations (Cth) 1985, Regulations 1-29.

Methodology:

Data Collection and Analysis

Chapter Three (Research Study #3)

Title: Australian Domestic General Insurance Arena - Financial Exclusionary Effects: Development of an Internal Contextual Constraint Profile.

Scope:

Identification and Analysis of five potential areas of insurance statute-based constraints on the impact of financial exclusionary effects.

Methodology:

Document Analysis (statutory provisions) identifying potential constraints, and review of Chapter 2 Data.

Chapter Four (Research Study #4)

Title: Australian Domestic General Insurance Arena - Financial Exclusionary Effects: Development of an External Contextual Constraint Profile.

Scope:

Identification and Analysis of eight potential areas of non-insurance specific statute-based constraints on the impact of financial exclusionary effects.

Methodology:

Document Analysis (statutory provisions) identifying potential constraints, and review of Chapter 2 Data.

Chapter Five (Research Study #5)

Title: Australian Financial Services Reforms 2000 – 2010:
Legislative Intent and Impact of reforms on financial exclusionary effects - General Domestic Insurance Products and Services.

Scope:

Use of statute-prescribed sources of contemporaneous extrinsic evidence to determine the specific intent and impact of those areas of the financial service reform legislation relating to Australian Domestic General Insurance Products and Services.

Methodology:

Document Analysis – Statutory interpretation:

Appendix A (Research Study #6)

Title: Pilot Study – New Zealand Domestic General Insurance Policies:
Application of Thesis Analytical Framework to an External General Insurance Jurisdiction

Scope:

i. Policy (Contract) Analysis of 22 domestic general insurance policy wordings.

ii. Identification and Analysis of eight potential areas of specific statute-based constraints on the impact of financial exclusionary effects.

Methodology:

i. Data Collection and Analysis.

ii. Document Analysis (statutory provisions) identifying potential constraints, and review of Policy (Contract) Analysis Data.

Chapter Six – Thesis Conclusion

Methodology

i. Provision of a summary of conclusions arising from Research Studies #1 - 6 and an analysis which incorporates the individual findings.

ii. Use the individual Chapter and Appendix A Pilot Study conclusions to develop a comprehensive general Conclusion which addresses the Thesis Objective.

iii. Identification those areas in which an original contribution has been made to the understanding of the overall Thesis Topic and constituent elements, and establishing the relevance of the Analytical Framework in identifying the financial exclusionary effect profile of domestic general insurance products within a jurisdiction external to Australia.

Introduction Figure 1. –Thesis Analytical Framework

Thesis Introduction	**Research Study #1** **(Chapter 1)**	**Research Study #2** **(Chapter 2)**	**Research Study #3** **(Chapter 3)**	**Research Study #4** **(Chapter 4)**	**Research Study #5** **(Chapter 5)**	**Thesis Conclusion(Chapter 6)**	**Research Study #6** **Appendix A**
Development of an appropriate analytical framework	The Dimensions of Financial Exclusion Financial Exclusionary Effects in Australia - Australian Domestic General Insurance Arena	Australian Domestic General Insurance Arena - Financial Exclusionary Effects - Policy (Contract) Analysis	Australian Domestic General Insurance Arena Financial Exclusionary Effects - Internal Contextual Constraint Profile	Australian Domestic General Insurance Arena Financial Exclusionary Effects - External Contextual Constraint Profile	Australian Financial Services Reforms 2000 – 2010 - Legislative Intent and Impact of Reforms on financial exclusionary effects - Australian Domestic General Insurance Arena	Review and Analysis of Chapter Conclusions - Detailed Thesis conclusions	Pilot Study New Zealand Domestic General Insurance Policies - Application of Thesis Analytical Framework to an External Domestic General Insurance Jurisdiction
Structured Literature Review Data collection and Analysis	Structured Literature Review Data Analysis	Data Collection and Analysis	Document (statutory provisions) Analysis of Chapter 2 Data	Document (statutory provisions) Analysis of Chapter 2 Data	Document (statutory provisions) Analysis	Review and Analysis of Introduction and Chapters 1-5 Conclusions	Data Collection and Analysis

Insurance Nomenclature

"Insurance Contracts" and "Insurance Policies"

During the course of my research, it became clear to me that the terms *"Insurance Contract"* and *"Insurance Policies"* were being used interchangeably in academic and technical literature, and in insurance related law reports.

Merkin (1997) has noted that although Common Law does not require an insurance contract to be in writing, in established convention, a contract of insurance:

> *"is generally embedded in a formal document called a policy".*[5]

Clarke (2009) expands this comment by noting that courts often treat "policies" and "insurance contracts" synonymously.[6] Whereas such substitution may be appropriate in a generalised Common Law context, I emphasise the need for consistency of meaning where insurance-related processes have been restructured by legislation. In this study, I use terminology drawn from the Australian Insurance Contracts Act (Cth) 1984 that states:

1. *"Policy document in relation to a contract of insurance, means:*
   (a) a document prepared by the insurer as evidence of the contract...".[7]

2. Derogation from the terms of a prescribed contract *("standard cover")* requires that: *"the insurer (has) clearly informed the insured in writing (whether by providing the insured with a document containing the provisions...of the proposed contract...)".*[8]

Accordingly, keeping in mind the apparent tautology of "policy document" in the Insurance Contracts Act, (ICA) framed by Merkin's definitions (1997) and Clarke's elaboration , I use the term "Insurance Policy" for insurance contract terms and conditions that appear in writing, and not for legislation or other statements involving the terms *"insurance contract"* or *"contract of insurance"*.

The relevance of this definition to the overall scope of my research is fully consistent with the term *" standard cover*", which appears in the ICA Section 35 extract above and forms

[5] At pp.1-31.
[6] At p.1.
[7] s11(1) Interpretation.
[8] S35(2).

the basis of over 77% of the 36.37 Million Australian general insurance contracts that were in force on 30 June 2009.[9]

Chapter One – The Dimensions of Financial Exclusion

Chapter Abstract

This chapter seeks to determine the dimensions of *"Financial Exclusion"* and how financial exclusionary effects when manifested, preclude individuals from effective access to financial products and services.

To start, I established a definitional base for use throughout the study. I identified the current meaning of *"financial exclusion"*, and how it differs from broader societal issues embedded in *"social exclusion*". Using this definition as the basis of my inquiry, I began determining the constituent elements of financial exclusion effects and their extent by reviewing arguments on specific exclusionary effect elements in the literature.

My research identified two additional dimensions of financial exclusionary effects unreported in existing literature. The first consists of the adverse impact of a financial exclusionary effect element on an individual due to the actions of a third party, and of the insurer's denial of an indemnification claim, which precludes the individual's previous recourse to the proceeds of that claim. The second dimension consists of circumstances in which financial product and services providers utilise the interaction between a variety of financial exclusionary effects to distinguish their financial products by means of selective pricing, age and occupation exclusionary effects within specific market sectors.

1.1. Chapter Objectives

In this chapter, I address the fundamental threshold issue of the dimensions of "financial exclusion" through five interconnected issues:

i. I treat the threshold issue of what is meant by "*Financial Exclusion*" and "*Social Exclusion*" and how these constructs may be distinguished from each other.

ii. Thereafter, I identify the area impacted by the effects of financial exclusion.

iii. I establish how financial exclusionary effects typically manifest.

iv. I establish that Financial Exclusionary effects are typically regarded as resulting from direct interaction between the financial services provider and the "excluded" individual, a perspective that overlooks the possible existence of intermediaries interposing between providers of the financial product or services and the consumer.

I therefore seek evidence of other ways in which financial exclusionary effects manifest, namely through "*Vicarious*" processes.

Specifically, I seek to find out whether financial exclusionary effects arising from the intermediary's actions may become distinct from the provider of the financial product or service.

v. My analysis of the financial exclusion literature suggests that each type of financial exclusionary effect tends to operate independently of others. I identify evidence suggesting the existence of an alternative relationship between financial exclusionary effects, by which financial product providers may be able to exploit the existence of different financial exclusionary effects to secure preferred risk-based and market sector related outcomes.

a. Chapter Introduction:

In this chapter, I seek to identify the dimensions of "Financial Exclusions" by addressing five points:

i. What is "*Financial Exclusion*"? What is "*Social Exclusion*"? How does "*Social Exclusion*" differ from "*Financial Exclusion*"?

ii. What is the area of impact of the effects of financial exclusion?

iii. How are financial exclusionary effects manifested?

iv. Do financial exclusionary effects operate in other ways, such as through "*Vicarious*" means arising from the actions of financial services intermediaries that become distinct from the provider of the financial product or service?

v. Is there evidence to suggest that financial products providers utilise the operation of several different financial exclusionary effects to secure risk-based and market-sector related outcomes?

Distinction between "*Financial Exclusion*" and "*Social Exclusion*"

Carbo et al. (2004) regard financial exclusion as:

> *"The inability of some societal groups to access the financial system…it is part of the wider concept of social exclusion and polarisation*"[10].

They advance a similarly overarching definition in a later work (Carbo et al., 2005)[11], though in this instance they depend on Sinclair (2001)[12] who describes regard financial exclusion as:

> *"The inability to access necessary financial services in an appropriate form"*.

[10] At p.1.
[11] At p.5.
[12] At pp.1, 22.

These general definitions draw attention to two significant constituent elements of financial exclusion, namely:

1. The existence of some form of social barrier/s precluding access to financial products and services (as yet not specified) and,

2. That these barriers have links with social exclusion or social marginalisation.

Chant Link et al (2004)[13] were more specific. They described financial exclusion in the Australian context as:

> *"The lack of access by certain consumers to appropriate…financial products and services from mainstream providers"*.
>
> Mainstream, providers include *"regulated and accessible larger providers offering a wide array of financial products in savings, credit and insurance areas"*.[14]

Although Chant Link (2004) seems to offer a viable meaning of financial products and services in an Australian context, I take issue with the definition of the term "*mainstream providers".*

The Chant Link Report (2004), for instance, does not point out that a "*Twin Peak*s"[15] regulatory framework, represented by the respective roles of the Australian Prudential Regulation Authority (APRA) and the Australian Securities & Investments Commission (ASIC), regulates the development and distribution of Australian financial products and services comprehensively and intrusively. This regime is supported on an exception basis by individual Australian State of Territory Fair Trading and related consumer protection legislation.

A review of these regulatory processes suggests that the Australian financial services regulatory framework seeks to be all encompassing, in that there is little differentiation in the statutory approval structure of different financial service providers accompanied by the

[13] At p.58.
[14] Ibid.
[15] A term used by Briault 1999 (citing Taylor, 1995) to describe the Regulatory Agencies duopoly embodying the separation between the regulation of the "soundness" of business (risk or "principles" based prudential regulation) from the regulation of business conduct.

proscribing of the provision such services without holding the necessary statutory approvals to do so.

I argue that Chant Link's (2004) failure to take into account the existence and impact of the Australian financial sector regulatory framework, or relevant socio-economic and socio-legal contextual and/or "environmental" issues at a macro and micro level, presents a systemic issue, which I identify in some areas of the literature.

One instance of this problem appears in Howell (2005)[16] who seeks to address the issue of product access related financial exclusionary effects by proposing the inclusion of a third or "fringe" market sub-sector between the heavily regulated sector and a community or informal (albeit illegal) market. However this proposition does not take into account that the current Australian financial services regulatory framework makes no provisions for such a potential solution.

The Chant Link (2004) proposition envisages such a market sub-sector authorised or licensed to either enable the development and distribution of financial services and products or to secure exemption from application of the legislation[17], legally distinguished from those acting illegally.

Whereas Bryson and Buttle (2005)[18] and others[19] have proposed policy initiatives to permit the development of alternative community funding vehicles, such as Community Development Loan Funds in the United Kingdom, neither Chant Link (2004) nor Howell (2005) provide any indication of the structure of their respective proposals.

1.3.i. "Financial Exclusion" and "Social Exclusion"

Carbo et. al. (2004) definition above suggests that financial exclusion is:

> *"part of the wider concept of social exclusion and polarisation".*

[16] Howell (2005, p.3).
[17] This distinction would encompass sources of financial products such real property mortgage funds accessed from Solicitors Trust Funds.
[18] At p.275
[19] Mullen (2004, p.2); McCarthy (2005, p.1); and Shaw (2005, p.1).

Similarly, in an Australian financial services context, Cabraal et al. (2006)[20] regard Financial Exclusion as :

> *"an important dimension of Social Exclusion"*

These interpretations pose the question of what constitutes *"social exclusion"*?

I suggest that the definition provided by the United Kingdom Financial Services Authority (FSA) is appropriate to a financial products and services context, namely that social exclusion is:

> "*Social marginalisation resulting from a lack of employment opportunities, lack of access to health services, education services, welfare and other community services, law enforcement, housing facilities and financial services.*" FSA (2000).[21]

Nonetheless, there is considerable on-going debate about whether financial exclusionary effects should be regarded as part of the broader process defined above, as a product of the process, or perhaps as contribution to that process. Although Howell (2005), following Chant Link (2004), agrees with the proposition of separation, they also cast doubt on whether financial exclusion is an input or a product of the broader issue, or an input or output dependent on the contextual situation.[22]

[20] At p.5.
[21] At p.8.
[22] At pp.5-7.

1.3.ii. The Area of Impact of Financial Exclusion

The United Kingdom Financial Services Authority[23] views the area of impact of the effects of financial exclusion as ranging across an eight-part array of financial products and services:

- Transactions Accounts
- Savings Accounts
- Financial Counselling Investment Advice
- Credit
- Insurance
- Home Equity/Mortgage Loan
- Superannuation
- Community Enterprise and Management Support

This taxonomy, which is modelled after Kempson and Whyley (1999)[24], was first adopted by Chant Link (2004) for the Australian context, and subsequently by Devlin (2005) for his major UK-based study.[25] It is clear from the literature that financial exclusion extends beyond the United Kingdom, the United States, and other western and developed nations, affecting a broad spectrum of countries and regions.[26]

1.3.iii. The manifestation of Financial Exclusion - Elements

There are various views regarding how financial exclusionary effects manifest. In order to bring some coherence to this issue, I have selected a framework facilitating proper consideration of historical and regional and legislative contextual factors that appear to have impacted upon contemporary definitions of financial exclusion.

[23] Ibid, at p.9.
[24] Ibid at 65ff.
[25] At p.82, Devlin has concentrated on a framework described as, "Current account, savings account, home contents insurance, life assurance and private pension", for survey data management related reasons.
[26] As examined by Aalbers (2005a, 2005b) for The Netherlands; Baker (2001) for Uruguay; Carbo et al. (2005) for Europe; Falatauno et al. (2003) for Europe; Olsen (2001) for Sri Lanka; Panigyrakis et al. (2001, 2002) for Greece; Sharma and Reddy (2002) for Fiji; Solo (2005) for Latin America; and Torrero et al. (2000) for Peru.

I have chosen to use the simplified financial exclusionary effect analytic framework proposed by Kempson and Whyley (1999)[27] that summarises a substantial portion of United Kingdom literature over the previous five years:[28]

a. Product or service ***Access*** denial financial exclusion comprising:
    i. **Geographic** access-based denial financial exclusion
    ii. **Risk**-based access denial financial exclusion.
b. Consumer segment ***Market*** targeting financial exclusion
c. Product or service ***Price*** financial exclusion
d. ***Self-exclusion*** to access by the Consumer
e. Product or service Contract ***Condition*****–Based** financial exclusion

Although this framework has been adopted in major studies by the Financial Services Authority (2000)[29] and Carbo et al. (2004, 2005), and partially by Devlin (2005), acceptance has not been universal. Chant Link (2004)[30], for example, argues that this conventional financial exclusion typology is a collage of inputs, outputs, and self-perceptions, the latter of which resist quantification. Instead, they propose an alternative typology for the Australian context modelled after Bridgeman (1999).

The Chant Link typology consists of 11 elements based on a two-part Access/Utility foundation including:

*"**Access" Exclusion*** encompassing:

- Lack of geographical access
- Lack of personal access due to disability
- Communication based impediments
- Education and information based impediments
- Failure to meet identity evidentiary requirements
- Lack of credit history
- Product or service provider Market segmentation and targeting

"Utility" Exclusion encompassing:

[27] At p.21.
[28] Including Bridgeman (1999), Burchardt (1998, 1999), Burden (1998), Donovan and Palmer (1999), Ford and Rowlingson (1996), Graham (1997), Leyshon and Thrift (1993, 1994, 1995, and 1996), Leyshon, Thrift, and Pratt (1997), Rossiter (1997), and Leyshon, Signoretta, and French (2006).
[29] In which Kempson and Whyley were major contributors.
[30] At pp.38-42.

- Limited financial product or service choice options
- Consumer distrust of product or service provider
- Use by consumers of alternative personal financial management techniques
- Service or product provider pricing or contract condition based anti-selection deterrents

Although some studies of the Australian context refer to the Chant Link (2004) study[31], I have not identified any studies which have subsequently reviewed, considered in detail, and/or adopted this alternative typology.

a.i. Geographic Access-Based Denial Financial Exclusionary Effects

The dimensions of *Geographic Access-Based Denial Exclusionary Effects* have been the subject of extensive review over the past several decades, particularly in the United States. Processes involved in the denial of access to insurance related products and services have been included in this analysis. Inquiries by Leyshon et al. (1993, 1995, 1996, 2004, and 2008) and French et al. (2008) explored the dimensions of physical or location "geographic" based access denial to those financial products or services available in the United Kingdom. In particular, this research has directed attention impact of change processes on traditional product and service distribution avenues. Specifically, the research has noted the "desertification" effects of restructured distribution networks, the movement away from "*over-the-counter"* service to personal customers, and an accompanying reliance on product distribution and premium collection by visits by company staff to Client premises.

Burton et al. (2006) have reviewed how restructured distribution and premium collection strategies relied on *"at-a-distance"* processes such as Call Centre or Internet based services.[32] I am particularly interested in their observation that increased cost directly associated with compliance by Insurers with the Financial Sector reforms, introduced by the UK Financial Services Act 1986, constituted a significant factor in the cessation of "Industrial Branch Insurance" in the United Kingdom. Interaction between these compliance costs and the need for company staff to possess minimum technical education qualifications would appear to have not only adversely impacted staffing levels, but also accelerated corporate decisions to withdraw from this method of product distribution and collection of periodic premium payments.

[31] Howell (2005) at p.5.
[32] At p.195.

Interviews I conducted with several Australian general insurance sector participants revealed a similar general but unquantified concerns about the costs of regulatory compliance.[33]

Subsequent closely linked studies by Leyshon, Pratt, and Thrift (1997), Leyshon et al. (2003), and French and Leyshon (2004) have also explored the effectiveness of re-intermediation strategies introduced to provide product and service access to previously access denied consumers. Likewise, Falatauno and Marsiglia (2003) have identified and examined the desertification effects in Bancassurance practices in Italy and elsewhere in Europe, reporting similar conclusions.

Argent and Rolley (2000) examined this particular exclusionary effect specifically in the context of Australian banks withdrawing from rural Australia, and subsequently replacing rural branches with regional service centres, initially supported by call-centres, and more recently by internet-based banking services. Later, in reviewing this Australian manifestation of the "desertification" of rural banking services, an Australian Federal Parliamentary Inquiry (JCCFS, 2004) briefly considered its adverse impact on access to and pricing of general insurance products required by the rural community.[34] Drawing on evidence from the Post-Implementation Phase of the Australian Financial Services Reforms (2002-2004), the JCCFS Inquiry found that the Reform Agenda had failed to materially alter the impact of physical access denial.[35]

Beck and de la Torre (2006) describe the issue of on-going compliance with increased regulatory requirements resulting from financial service reforms as a vicarious manifestation of a variety of financial exclusionary effects, including that of Access Exclusion. Following Claessens (2006)[36], Beck and de la Torre (2006)[37] further develop the argument previously advanced by Argent and Rolley (2000), namely by identifying those factors underlying the desertification process. They suggest that high compliance costs associated with the implementation and on-going management of financial services reforms, such as "*Know thy Customer*" and anti-money laundering strategies, may preclude financial services providers from incurring the net operational expenses associated with providing services to marginal customers.

[33] Insurer Group B senior management (Chapter Two).
[34] At p.279.
[35] At 335ff.
[36] At 210ff.
[37] At p.19

I focused on identifying the extent of evidence available from the Australian general insurance sector that supports Burton (2006) and Beck and de la Torre's (2006) arguments provided above. Specifically, I reviewed causal factors behind disputes between general insurer and individual claimant or insured that have entered the external dispute resolution (EDR) phase of the Australian domestic general insurance dispute resolution processes. EDR processes exist and operate external to Australian domestic general insurance service providers, who are required to use them under statutory provisions administered by the Australian Securities and Investments Commission (ASIC).[38]

EDR processes and decisions in the seven-year period between 2001 and 2002 and 2007 and 2008 were recently reviewed in an effort to determine whether financial exclusionary effects emerged casually or operationally in disputes that had entered the EDR phase. As early as 2001, for instance, reviews identified that telephone call centre service quality was a dispute causal factor in the insured's statute-based duties of disclosure, and based on whether the general insurer's call centre had understood and correctly implemented instructions from the insured.[39] Likewise, in 2006, the Insurance Ombudsman specifically reported on the interaction between call centre product distribution processes and complex insurance policy wording terms and conditions that had worked to the disadvantage of an insured.[40] In the following year, there were similar instances, also related to non-compliance by general insurer call centres with related statutory compliance requirements.[41]

In 2008, the Insurance Ombudsman Service expanded the range of their concerns in this area to include internet use by Australian general insurers in distributing general insurance product and services. The IOS (2008) commented on disputes emerging in this area as follows:

> *"Increase in the use of Internet marketing of personal insurance policies precluded adequate communication of product conditions, resulting in an increase in rejected claims. This was accompanied by increasing non-compliance with those statutory*

[38] Corporations Law 2001, Section 912A.
[39] Insurance Ombudsman Annual Report (IOS) 2000/2001 – Referees Reports at p.16.
[40] IOS Annual Report 2005/2006 – Dispute Determination #24702 at p.18.
[41] IOS Annual Report 2006/2007 – Dispute Determinations # 25259 and #27798 – Insurance. Contracts Act 1984, Section 32(2) and Corporations Act 2001, Section 1013C(3).

requirements for the insurer to clearly and effectively inform the intending insured of the terms and conditions of the policy being purchased".[42]

I suggest that the above instances reinforce, in an Australian context, the propositions previously made by Burton (2006) and Beck and de la Torre (2006). I also note that the cited IOS (2008) evidence establishes a clear link between media-based access denial financial exclusionary effects and those relating to contract condition-based financial exclusionary effects, which are addressed later in this chapter.

a. ii. Risk-Based Access Denial Financial Exclusionary Effects

In Yaspan (1970)[43], drawing upon evidence from the Kerner Committee and Hughes Panel Reports (1968), into the causal issues leading to the US Urban Race Riots in the mid-1960s, suggested that the denial of customer access to mortgage products and property insurance on racial grounds had contributed significantly to the resultant civil unrest, this linkage being described as (Provider – Insurer) "risk- based access denial".

It was in this period that the phrase "risk based access denial" began to be closely linked with *"Redlining*" an essentially discriminatory practice whereby a financial service provider declined to provide products and services on grounds that were not directly risk-related. Badain's (1980)[44] subsequent careful development of this analysis using a specific urban property insurance focus coincided with the then recent passing of US Federal Legislation[45] to address systemic social exclusionary effects associated with community disinvestment. More recently, Aalbers (2004, 2005) has illustrated the almost universal quality of the financial exclusionary effects of Access Denial by considering the extent of "redlining" practices in the urban Netherlands domestic home mortgage market whilst Dymski and Li (2002) reviewed the success of "ethno banking" in the urban United States as an inclusionary strategy where access denial was prevalent.

I regard the above examples as largely being exceptions, and that most literature on this exclusionary effect fails to identify and assess the impact of access denial based on Insurer adverse risk assessments. For example, whereas Kempson and Whyley (1999)[46], Devlin

[42] IOS Annual Report 2007/2008 – Dispute Determinations #23662 and # 24409 discussed at p.9.
[43] At p.218
[44] At pp.1, 5
[45] Community Reinvestment Act 1977.
[46] At p.21

(2005)[47], and Chant Link (2004)[48], all include risk assessment based access denial as a financial exclusionary effect, they neither elaborate on the dimensions of such denial nor explore underwriting criteria issues and their relationship with contract condition-based financial exclusionary effects. Moreover, whilst Chant Link (2004) was critical of the "conventional" financial exclusion typology including a self-exclusionary effect based on subjective or personal perceptions, the revised typology did not, as would be expected under the circumstances, equally criticise the inclusion of underwriter risk assessment based access denial centred on underwriter risk perceptions.[49]

Furthermore, I also noted reluctance in some studies to address financial exclusionary effects in a broader socio-legal context relevant to the particular circumstances under examination, as illustrated by Klein and Grace's (2001)[50] analysis of "redlining" in a US domestic property insurance market context. Klein and Grave sought to identify the extent to which "redlining" effects were apparent in the Texas, US, domestic property insurance market and concluded there was little evidence of access denial practice in property insurance underwriting in Texas at that time. I note however that this analysis failed to mention Baptiste and Carson's (1996)[51] earlier report of the proscription of "redlining" property insurance related practices in Texas by earlier State specific statutory changes, changes which sought to alter the market context within which such practices operated.

In later years the term "risk based access denial" financial exclusionary effect appears to have lost an overt and narrow linkage with systemic discriminatory practices such as "redlining" and has assumed a broader based meaning relating to more generalised financial service provider's underwriting process of the acceptance or rejection of business on grounds directly related to relevant underwriting criteria prevailing at the time. It is appreciated that these underwriting criteria may in fact retain discriminatory features, such as those examined later in Chapter Four.

[47] At p.82
[48] At p.40
[49] At p.42
[50] At p.583ff
[51] At p.105, Anti-Redlining Statutes.

b. Consumer segment *Market* Targeting Financial Exclusionary effects

Marketing or Market Targeting financial exclusionary effects have been identified by Kempson and Whyley (1999)[52], FSA (2000)[55], Devlin (2005)[56], Chant Link (2004)[57], and by Carbo et al. (2004; 2005)[58]. This financial exclusionary effect was classified as the output of market segmentation strategies of financial products and services providers, whereby product design and distribution practices, to the detriment of less preferred sectors, were directed to preferred market sectors.

In two major UK-based studies, Leyshon et al. (2003)[53] and Burton (2005)[54] identified a correlation between market targeting strategies directed to preferred sectors and the desertification processes following the rationalisation of financial services (including insurance) distribution processes as discussed earlier. Squires et al. (1991) had arrived at similar conclusions in an earlier US-based study.[55]

Likewise, more recently Squires (2003a)[56] has examined racial profiling in its capacity as a general insurance market targeting tool. He concludes that insurer risk-based access denial exclusionary effect strategies may be an effective, legal strategy that could replace the now proscribed "redlining" effects in property insurance underwriting**.** Arguments exploring the effects of "covert" discriminatory effects later appear in Squires and Chadwick (2006)[57], who consider processes encompassed by the generic term "linguistic profiling", and in Squires and Kubrin (2006)[58], who address "racial profiling". In particular, Squires' work in these studies, which span a good 15 years, constitute a central contribution to the understanding of risk assessment access based denial effect discussed earlier.

This issue, of the allocation of particular manifestations of financial exclusionary effects between the principal types, is not regarded as being critical to the outcome of my review and analysis, as I am concerned with the existence of financial exclusionary effects, and not with their order of magnitude.

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[52] At p.2.
[55] At p.48.
[56] At p.77.
[57] At p.12.
[58] Carbo et al. (2004, p.2); Carbo et al. (2005, p.5).
[53] At p.8.
[54] At p.194.
[55] At p.567.
[56] At p.393.
[57] At p.401.
[58] At p.35.

Chapter Two will show there is clear evidence of the existence of this financial exclusionary effect in the structure of current Australian domestic general insurance products accessed by Australian consumers.

Specifically, it was found that domestic general insurance policy terms, conditions, and exclusions were couched so as to expressly disqualify nominated classes of insureds, a measure that it could be argued, empowered classes of potential insureds who were not disqualified.

c. Pricing Financial Exclusionary Effects

The literature shows there are various aspects to product and service pricing financial exclusionary effects. I explore these from a general insurance products and related services perspective in order to identify those relevant to an Australian context.

In the context of the UK, Kempson and Whyley (1999)[59] have directly linked financial products and services *pricing* financial exclusionary effects with customer ability to afford financial services or products. This link has been accepted by the Financial Services Authority FSA (2000)[60], Devlin (2005)[61], and by Carbo et al. (2004, 2005)[62], who have further developed the connection by conducting a cross-country comparative overview of pricing financial exclusionary effects. I argue that Carbo et al.'s analysis raises the threshold question as to what constitutes the "affordability" of general insurance goods and services.

With regards to affordability, Chant Link (2004)[63] adopted a scale in which "affordability" ranged from the perception of a product being unaffordable at any price, due to poverty, through to situation of a product being affordable at any price, probably due to economic privilege. What constitutes "affordability" therefore remains undefined, though Devlin (2005) offers guidance by using an allocation perspective. Devlin argues that people might instinctively feel the need to save for the future to provide for themselves and their families, though they may not have the discretionary income to do so.[64] He later reinforces this statement by referring to the lack of disposable income as an impediment to accessing financial services.[65]

Bundorf and Pauly's (2006) study, which further examined the issue, is directly related to my project. They compared "affordability" of health insurance in the US, where risk protection is a discretionary insurance item of expenditure, with that in countries where a similar insurance indemnity is often non or partly discretionary, and is part of a broader social insurance framework. This latter context, which includes Australia, has also been explored by Skipper and Kwon (2007)[66].

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[59] At p.28.
[60] At p.37.
[61] At p.77.
[62] Ibid.
[63] At p.81.
[64] At p.77.
[65] At p.97.
[66] At p.210.

Bundorf and Pauly (2006)[67] offer an elementary definition of affordability in terms of allocation. Affordability is a determined appropriate share of personal income, which anyone acquiring an insurance product, such as discretionary health insurance products and services, should expect to pay. They clarify that "appropriate share" is a subjective concept[68], suggesting that “affordability” occurs where:

> *"A product or service is affordable to an individual if their income after social acceptable minimum quantities of a product or service is greater than or equal; to the socially defined minimum spending on other goods or service."*

This normative view seeks to link affordability to a relevant measure utilised to determine indices such as poverty levels, thus reinforcing the existing position in Chant Link (2004).

A second dimension of product and service pricing exclusionary effects is outlined by Sacks (1996)[69] who identifies product pricing strategies as a legitimate alternative to proscribed “redlining” property insurance access denial strategies in the United States. Following a similar logic, Squires (2003a) later identifies the same in a market targeting exclusionary effect context. I regard this as being another example of a particular financial exclusionary effect comprising more than one exclusionary element. In this instance, there is interaction between product pricing and market targeting. Dymski and Li (2002)[70] provide supporting evidence for such contentions, though it comes from a suburban US and regional banking context. Connelly and Hajaj (2001)[71] briefly address this issue from a banking services perspective, and distinguish overseas contexts from Australian financial services sector issues. Argent and Rolley (2000)[72], and the subsequent Australian Federal Parliamentary Inquiry (JCCFS, 2004)[73], also frame this issue mainly within an Australian rural banking context. I later develop my analysis of these related issues from an Australian Domestic General Insurance perspective in a post-Financial Services reforms context.[74]

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[67] At p.653.
[68] At p.655.
[69] At p.4.
[70] At p.10
[71] At p.15
[72] At p.183
[73] "Money Matters in the Bush", January 2004.
[74] Chapter 3 "Statute Prescribed Discrimination".

I suggest that a third dimension of pricing financial exclusionary effects is manifested in the impact of cost by the addition of statutory charges to the base cost of financial products or services. This manifestation is relevant to my study, as domestic general insurance products and related services have been the chosen medium through which are imposed a range of statutory charges by Australian Federal, State, and Territory Authorities, resulting in significantly increasing the overall cost of the product or service.

Table 1 below illustrates the impact of this imposition of statutory charges. It sets out rates of statutory charges (2007-2008) imposed on Australian general domestic home building and contents insurance policies, and their impact on the total cost of specific domestic insurance products and services.

Various State and Territory statutory charges (Fire Services Levies and Stamp Duty) have been imposed for several decades, although the Federal Goods and Services Tax (GST) was put into effect only recently in July 2000. This data relates to the period post-March 2004 that marked the formal conclusion of the four-year implementation phase of the Australian Financial Services Reforms containing the full operational scope of these reforms.

Table: 1.1 Retail Insureds - Impact of Statutory Charges - Australian Domestic Home Building & Contents Total Insurance Costs

Region/Jurisdiction	**NSW**	**NSW**	**QLD**	**QLD**	**SA**	**SA**	**TAS**	**TAS**	**VIC**	**VIC**	**WA**	**WA**	**ACT**	**ACT**	**NT**	**NT**
Metropolitan	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**
	Rate		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**	
Basic Premium	na.	100.00	na.	100.00	na.	100.00	na.	100.00	na.	100.00	na.	100.00	na.	100.00	na.	100.00
Fire Services Levy	20%	20.00	nil	0.00	nil	0.00	nil	0.00	20%	20.00	nil	0.00	nil	0.00	nil	0.00
GST	10%	12.00	10%	10.00	10%	10.00	10%	10.00	10%	12.00	10%	10.00	10%	10.00	10%	10.00
Stamp Duty	9%	11.88	7.5%	8.25	11%	12.10	8%	8.80	10%	13.20	10%	11.00	10%	11.00	10%	11.00
Total Insurance Cost		**143.88**		**118.25**		**122.10**		**118.80**		**145.20**		**121.00**		**121.00**		**121.00**
% Charges of Total Cost		30.5		15.43		18.1		15.82		31.13		17.36		17.36		17.36
Country	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**	**%**	**$**
	Rate		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**		**Rate**	
Basic Premium		100.00		100.00		100.00		100.00		100.00		100.00		100.00		100.00
Fire Services Levy	20%	20.00	nil	0.00	nil	0.00	nil	0.00	24%	24.00	nil	0.00	nil	0.00	nil	0.00
GST	10%	12.00	10%	10.00	11%	10.00	10%	10.00	10%	12.40	10%	10.00	10%	10.00	10%	10.00
Stamp Duty	9%	11.88	7.5%	8.25	11%	12.10	8%	8.80	10%	13.64	10%	11.00	10%	11.00	10%	11.00
Total Insurance Cost		**143.88**		**118.25**		**122.10**		**118.80**		**150.04**		**121.00**		**121.00**		**121.00**
% Charges of Total Cost		30.5		15.43		18.1		15.82		33.35		17.36		17.36		17.36
Data: ICA 2008 & State Revenue/Treasury Offices																

The Table above indicates the following:

1. The impact of statutory charges in the period reviewed ranged from 15.4% to 33.4% of the total insurance product or service cost.
2. The impact of the statutory charges varied across States/Territories.

3. The cumulative effect of these statutory charges is discernible in all jurisdictions.

In Australia, from 1997 to 2001, a great deal of attention was paid to the development and implementation of Financial Services sector reforms, including those relating to general insurance products and services. Almost simultaneously, various Australian general insurance sector participants began to review and publically debate the causes of the impact of external socio-economic environmental influences, such as product, distribution and compliance costs on the utilisation level of general insurance products by domestic small and medium sized enterprise (SME) market sector participants.

Whilst the establishment a clear link between the implementation of the Financial Services Reform programs and this emerging public and industry debate could prove beneficial, there is no evidence in technical and academic literature or in media reports from that period (1997-2000) to substantiate such a contention.

Using a relatively small sample comprising 1227 participants, an early General Insurance sector survey (NRMA 2001)[75] reported that 22% of the respondents did not hold domestic home building and contents insurance on the grounds that:

> *"Insurance is too expensive (eg. costs too much, cannot afford premiums)*".[76]

Although the subsequent Chant Link Australian Financial Exclusionary Effects Review (November 2004) does not refer to the NRMA 2001 Survey Report, I argue that an "affordability" link supporting the Chant Link findings is discernible.

Thereafter, a series of individual Australian reviews followed. In their 2002 Report, the Insurance Council of Australia (ICA), for instance, discussing the effect of Government Taxes and Levies on general insurance product pricing, suggested that the addition of statutory charges to Australian general insurance exacerbated extant product pricing exclusionary effects (sic. affordability)[77], specifically that the resulting general insurance product would cost more than a similar product without the statutory charges. The report asserted that the identifiable number of non-insured and underinsured Australian domestic

[75] At p.22.
[76] At p.22.
[77] Refer to Kempson and Whyley (1999).

property insureds reflected the exacerbation of underlying financial exclusionary effects that caused the "non-affordability" of this general insurance product.[78]

Three years later, in 2005, the Centre for Independent Economics (CIE) published a study that sought to further develop the earlier contention that it is inappropriate for Australian general insurance products to be the vehicle for the imposition of Federal and State Taxes and Levies.

This study stood in contrast to an analysis by Trowbridge Deloitte (2003) that had developed the discussion from a more positivist perspective.[79] Based on evidence provided by the ICA report (2002), the CIE (2005)[80] concluded that the policy implications from the imposition of Governmental Taxes and Levies renders the general insurance products of Australian authorised general insurers uncompetitive when compared to those available from alternative insurance service provider categories such as Discretionary Mutual Funds (DMF) and Direct Offshore Foreign Insurers (DOFI).[81]

At the time of my inquiries the position of the Australian DMF was under detailed review by the Australian Government to determine the extent to which if any, the products of such providers attract taxes and levies at levels comparable to those which impact upon those insurance products offered by authorised Australian domiciled general insurers.

Similarly the role of those DOFI providing services to the Australian insurance market has also been under scrutiny to determine firstly, if these providers should fall within a tax and levy environment to that encountered by authorised Australian domiciled general insurers and secondly, whether the DOFI provider should be authorised to provide general insurance products into the Australian general insurance market, being subject to a compliance regime similar to that applicable to their Australian domiciled counterpart.

The comparative uncompetitive position of Australian authorised general insurers has largely to do with avoidance by DOFIs of exposure to both compliance and tax impacts principally on the grounds of domicile. Specifically, Australian domiciled authorised general Insurers are at a disadvantage due to costs of compliance with the Insurer prudential regulatory regime imposed upon them by the Australian Prudential Regulation Authority

[78] At pp.7, 28, 34.
[79] At p.4.
[80] At p.35.
[81] At pp.39, 49.

(APRA). In contrast, DOFIs may be regarded as enjoying a cost advantage, as their premium charges are exempt from Australian Federal and State statutory charges, which could result in additional costs of up to 81.5% of premium.[82] However, the Report conditions this discrepancy by noting that the DMF and DOFI share of the Australian general insurance market was not more than 3.5%.

That DOFI and DMF insurers enjoy only a minor share of the Australian general insurance market indicates that their cost-related advantage in the context of public policy concerns does not exert a significant impact on overall general insurance product pricing profile. Both APRA and Federal Treasury Department data reinforce this conclusion while also indicating that the impact of DOFI and DMF operations is not only largely confined to the Australian corporate insurance sector. It is also generally distinct from domestic and commercial markets, both of which were the target areas of financial services reforms I consider later in my Study..[83]

The CIE Report reiterates earlier ICA arguments[84], that deploying general insurance premium as a vehicle to collect statutory charges has a direct and adverse impact on the affordability of specific general insurance products, resulting in underinsurance and non-insurance among insurance classes affected by these charges. I note however that the CIE Report, like the ICA Report (2002), is silent as to whether financial exclusionary pricing effects are actually embedded in the underlying general insurance product net of the impact of statutory charges including taxes and levies. In other words, neither report addresses the issue as to what extent the basic insurance product would have been deemed to be "affordable" if the statutory charges were not applicable.

The recent Australian Securities and Investment Commission Inquiry (ASIC, 2005) on underinsurance and non-insurance in the domestic dwelling general insurance context does not support the CIE contention and , in contrast does draw attention to systemic defects in the structure and insured value calculations of those general insurance policies relevant to the domestic insured.[85]

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[82] Calculated on the basis of a Victorian commercial property holder deemed to be a *Retail Client* (Federal Corporations Law 2001 s761G), purchasing Victorian property insurance in some instances being subject to the compounded effect of Fire Services Levy (50%) + GST (10%) + State Stamp Duty (10%).
[83] APRA May 2007 and January 2008, Australia Federal Treasury 12 June 2009.
[84] ICA (2002).
[85] At pp.6, 46, 78.

Similarly, a detailed Australian study later undertaken by Tooth and Baker (2007) continued to focus attention on the impact of Federal, State, and Territory statutory charges on domestic insurance product pricing. Using an Insurer perspective, this study focused principally on how the position of the domestic non-insured and under-insured was a direct result of gross product prices in the hands of the prospective Australian consumer.[86] Beyond these indirect instances, I have not discovered any studies dealing with the financial exclusionary effect impact of statutory taxes and levies on general insurance products and related services pricing from the vantage of the insured.

Substantive views dissenting from those put forward by CIE and ICA above have emerged in the period (2001-2007). Stewart and Stewart (2001)[87], for example, suggest that affordability in the context of general domestic insurance products may be conditioned by two factors. The first is concern over the viability of the insurance product. The second is doubt concerning the actual existence of the insurance contract and the payment of claims by the insured should a loss occur.[88] Chalke (2006) provides a similar view. He argues that although affordability is of obvious relevance in product selection, the contemporary Australian domestic general insured is not averse to paying statutory charges embedded in general insurance products. Rather, the insured wants assurance of visible and sound allocation of the resultant revenue.[89]

Goldsmith (2007)[90], when reporting on a later broad-based Australian domestic general insured survey, noted that 48% of survey participants when questioned about the impact of reduced taxes on domestic insurance products and whether they would purchase an expanded product, stated they would:

"Leave the insurance cover as it is".

This figure was less than the 62% Goldsmith reported for a similar question posed to respondents in an Quantum Survey conducted in 2001.[91] In other words, in 2007, fewer respondents (31%) would increase the extent of insurance coverage under such circumstances. This response suggests that the impact of statutory charges may have been influenced by factors beyond basic affordability.

[86] At p.29, from a societal cost of insurance taxes perspective.
[87] At p.40.
[88] At p.32.
[89] At p.85.
[90] At p.21.
[91] Quantum Survey – November 2001

In conclusion, I suggest that my review has not simply drawn attention to the existence of more complex facets of this financial exclusionary element. It has also identified evidence showing that each of the dimensions of this specific exclusionary effect may be influenced by other factors, including covert discriminatory pricing practices.

d. Self-Exclusionary Effects

Kempson and Whyley (1999)[92] recognised that individuals may exercise choice and elect not to utilise a particular financial product or service. Collard, Kempson, and Whyley (2001)[93] term this process *"an unconstrained choice to opt out*", a description accepted earlier by the Financial Services Authority FSA (2000).[94]

Although Devlin (2005) supports this view, he also notes that earlier literature uses the term *Self-Exclusion* as a financial exclusionary effect to describe situations in which an individual does not utilise a particular financial product or service on the basis of a past adverse experience; rejection by a financial service-provider; or simply due to allocation related issues.[95] This view, which suggests a connection between affordability and perceptions regarding availability of discretionary income, could be regarded as further evidence of considerable interaction between individual financial exclusionary elements.

There appears to be some ambivalence and substantially divergent views in the Literature as to the scope of the term "self-exclusion". . Craig and Green (2005), in their study on the use of "*insurance with rent schemes*" in the United Kingdom as a social exclusion community management strategy, restrict the definition of "self-exclusion" to being a reaction to past *"real or perceived barriers"*, such as adverse experiences or a fear of rejection.[96] This definition[97] would appear to effectively discount either the exercise of choice not to utilise general insurance products or the impact of cultural or religious values, which might preclude the use of available products. De la Torre and Beck (2006)[98], following Claessens (2006)[99], emphasise choice as the basis of self-exclusion. They call it "voluntary self-

[92] At p.21.
[93] At p.2.
[94] At p.36.
[95] At p.77.
[96] At p.14.
[97] At p.14.
[98] At p.32.
[99] At 210ff.

exclusion", and suggest that it derives from cultural and religious differences, the latter often being principal determinants, a view also supported by Devlin.[100]

Khorshid (2004) also supports this latter contention through an examination of the impact of strict compliance of Islamic religious law in an insurance context. He distinguishes between acceptance of insurance on religious grounds for the benefit of the community (analogous to Social Insurance)[101] and non-acceptance on religious grounds of a conventional general personal insurance transaction entailing *Riba* (Usury) and *Gharar* (Risk)[102], both of which are unacceptable in Islamic law (*Sharia*).

Chant Link (2004) restricts use of the term "self-exclusion" to situations:

> *"where people decide that there is little point applying for a financial product because they believe they would be refused".* [103]

Chant Link (2004) notes that rejection may result from a mixture of perceptions, realities, cultural beliefs, and education[104], a view that contradicts their own earlier observations I mentioned earlier, about perceptions resisting quantification. I would argue that, in light of lack of evidence to prove otherwise, disengagement deriving from the fear of rejection must be distinguished from the voluntary choice not to engage. Thus I regard the Chant Link position as not being supported by those later studies of Devlin (2005), Craig and Green (2005), de la Torre and Beck (2006), and Claessens (2006).

Chant Link (2004) also take issue with the earlier definition of "self-exclusion" arguing on the grounds that:

> *"It is impossible to identify self-exclusion without asking each individual about his or her perceptions of the likelihood of rejection*"[105].

[100] Ibid and p.78.
[101] Skipper and Kwon (2007) at 210ff.
[102] At 31ff.
[103] At p.38.
[104] Ibid.
[105] Ibid.

In their proposed alternative typology, Chant Link (2004) again deploy a narrow reactive view of self-exclusion when they propose a similar link between "psychological barriers and mistrust of banks". At first glance, such a view would appear to stem from a rationalist notion that choice precludes assessment of the influence of non-economic or behavioural-based choice decisions.[106]

The identification by Devlin (2005)[107], that individual choice need not be motivated by a sole determinant of fear of refusal as being the rationale for decision not to acquire a financial service or product, is supported by Bundorf and Pauly (2006). They identify evidence in the context of private health insurance, where individuals choose to go without health insurance coverage on the basis of a direct resource allocation decision.[108] Perhaps the cautionary note on the strength of the Chant Link propositions (2004) is provided by Sheehan and Renouf (2006). They call into question the sustainability of the emphasis by Chant Link on the fear of rejection as the principal determinant of financial self-exclusionary effects. Specifically they detail focus group based research which identified significant erroneous perceptions faced by group participants regarding the fear of rejection by financial services providers including Australian general insurers.[109]

Devlin (2005) raises an ancillary issue. He suggests that a link may exist between voluntary usage, or non-usage of financial products or services, and the potential customer's educational background. Lack of education, Devlin suggests, may result in a lack of understanding and consequently in reluctance to engage in the use of a financial product or service. This "*confusion exclusion*" might be yet another manifestation of self-exclusion.[110] I suggest that this confusion-based self-exclusionary element indicates a close connection between financial literacy threshold considerations and related remedial strategies

[106] Such as outlined by Kempson and Whyley (1999).
[107] Above
[108] At p.653.
[109] At iv and p.13.
[110] At p.99.

In conclusion, my review of the dimensions of financial self-exclusionary effects suggests that the initial perception, that self-exclusion results largely from a fear of rejection by a financial service provider, may, in fact may be inaccurate. Specifically, I argue that the correlation between fear of rejection and self-exclusion from access might be based on erroneous notions about why and how decisions about financial products and services transactions are made.

I also note that self-exclusion of access to specific financial products or services on cultural or religious grounds may have to do with community perceptions and legal acceptance. There is also substantial evidence to suggest that personal choice, underpinned by allocation factors, might also underpin voluntary self-exclusion. In other words, financial self-exclusionary effects may derive from a variety of voluntary reasons, and not principally from fear.

e. Contract Condition–Based Denial Financial Exclusionary Effects

Contract Condition or condition-based denial financial exclusionary effects have been described by Kempson and Whyley (1999)[111] as instances in which a financial service or product is unsuitable to the particular needs of an individual. This lack of suitability is regarded as being principally due either to a contract term or condition or other Service Provider terms and conditions relating to the provision of financial products or services. This view was subsequently expanded and incorporated by other authors, some of whom were attached to a study commissioned by the Financial Services Authority of financial exclusion in the United Kingdom (FSA, 2000).[112]

In a subsequent UK-based study, Devlin (2005) varied the focus of contract condition-based exclusionary effects by drawing attention to exclusionary effects resulting from:

> *"conditions attaching to the product offering*"[113].

[111] At p.21.
[112] At pp.7 and 9.
[113] At p.77.

This resulted in bundling terms and conditions, such as mandated income levels to support projected financial service related costs with terms and conditions embedded in the actual financial product. Subsequently, this broad view was not supported by Carbo et al. (2007) who preferred a more precise definition composed of several variants of conditions.[114]

An Australian perspective adopted by Connely and Hajaj (2001) is similar to that of Kempson and Whyley (1999), which was modelled after the United Kingdom Financial Services Authority general review[115]. Connely and Hajaj (2001) this exclusionary element as:

> *"Where the conditions attached to financial products make them inappropriate for the needs of some people;"*[116]

From an Australian vantage point, Chant Link (2004) supports this view in their proposed alternative. They regard a utility-based exclusionary effects as being constituted by product choice limitations and financial service provider pricing and conditions.[117] In applying this observation in a Australian domestic general insurance context, Chant Link place principal reliance up on the output of an earlier Roy Morgan Survey (2003a)[118], which reported on the level of understanding of consumers of conditions and exclusions of selected classes of domestic insurance policies.[119] Chant Link however fail to comment further on the overall structure, direction and potential for alternative outcomes of the Roy Morgan Survey, which had briefly examined the significance of insurance policy terms, conditions and exclusions for survey respondents with respect to financial exclusionary effects.

[114] At p.21
[115] FSA (2000) At pp.9, 10.
[116] At p.9.
[117] At p.40.
[118] At p.174.
[119] Home building and contents and motor vehicle insurance.

I support the subsequent view of Pearson (2009) when addressing this issue from an Australian financial products consumer disclosure perspective:

> *"There are very specific information problems for consumers in understanding insurance products. The product is a contract and there are barriers to understanding both the contract and the market in such contracts. In any one area of insurance, contractual terms vary significantly. There are important differences between similar terms, unexpected and idiosyncratic terms, and complex exclusions."*[120]

I suggest however that balance may be brought to the discussion by noting that the Australian Insurance Ombudsman Service (IOS) has reported in successive Annual Reports that the level of domestic general insurance claims approvals as remained constant within a narrow band between 97% and 98% of all claims lodged for the six statute prescribed contract classes.[121]

This in turn suggests that whilst levels of contract condition complexity may exist, the interaction between the consumer insured's knowledge of the scope of the indemnity provided by a specific policy, and the support provided by evidence of contract and product process certainty provided by general and specific financial product and service statutory provisions results in a significant level of understanding of the nature of the general insurance product being accessed by the insured. My comment is

1.3.iv. An additional dimension of Financial Exclusion: Vicarious Exclusionary Effects

A theme common to the majority of the Financial Exclusionary effect literature is that such effects are usually regarded as resulting from direct interaction between the provider of the financial products or services and the "excluded" individual consumer. This theme while explicitly apparent in United Kingdom financial exclusion literature, also finds currency in studies of European and Australian financial exclusionary effects that consider individuals in direct relationships with financial products or services provider as being marginalised by at least one of the financial exclusionary effects identified earlier.

[120] At p.386, following J. Tarr (2001, pp.198, 200).
[121] IOS Annual Reports 2002 to 2009 inclusive refer.

However, my study suggests there exists substantive contemporary evidence of a further and relevant dimension of financial exclusionary effects that warrants consideration.

I define this additional dimension of *Vicarious Financial Exclusionary Effects* as: –

> *The inability to access necessary financial products or services in an appropriate form as a direct result of the actions of a third party, who is a party to the transaction but is not the producer or distributor of the product or service.*

Although I have drawn upon Sinclair's (2001) definition of financial exclusion, I have also expanded it by encompassing those circumstances where the exclusionary effect has resulted directly from the actions of a party other than the provider of financial products or services. Supporting evidence substantiating the extension of the existing definition may be drawn from both Australian and external financial services sectors.

Initial stages of the implementation of the current program Australian Financial Services Reforms Program (FSR) commenced in 2001, followed in March 2002 by a two-year period that saw major changes implemented to financial products and service distribution processes. One part of the reform process required that all financial service product originators and distributors either be holders of an Australian Financial Services (AFS) Licence or authorised by an (AFS) Licensee to undertake such activities.[122]

Related statutory provisions required that (AFS) Licensees providing a financial service to Retail Clients have arrangements in place to compensate persons for loss or damage arising from breaches by AFS Licensees of specific financial services legislative requirements.[123] Such arrangements would include professional indemnity (PI) insurance indemnifying AFS licensees for Client losses arising from breach of professional duties.

[122] Insert FSRA Requirement reference.
[123] Corporations Act 2001, s912B.

Subsequent Australian Federal Government Inquiries and related Treasury Department Discussion Papers in 2002[124] and 2003[125] identified issues and canvassed solutions arising from the implementation of general insurance solutions of compensation for AFS Licensee breaches. The Treasury Discussion Paper (2003) specifically identified issues arising from interaction between the limited scope of basic professional indemnity insurance policy coverage and restrictive policy terms, conditions, and exclusions that could result in an insured being denied indemnity under the policy for either fraud or dishonesty. This, in turn, would preclude the Retail Client from access to compensation for losses arising from such actions.[126]

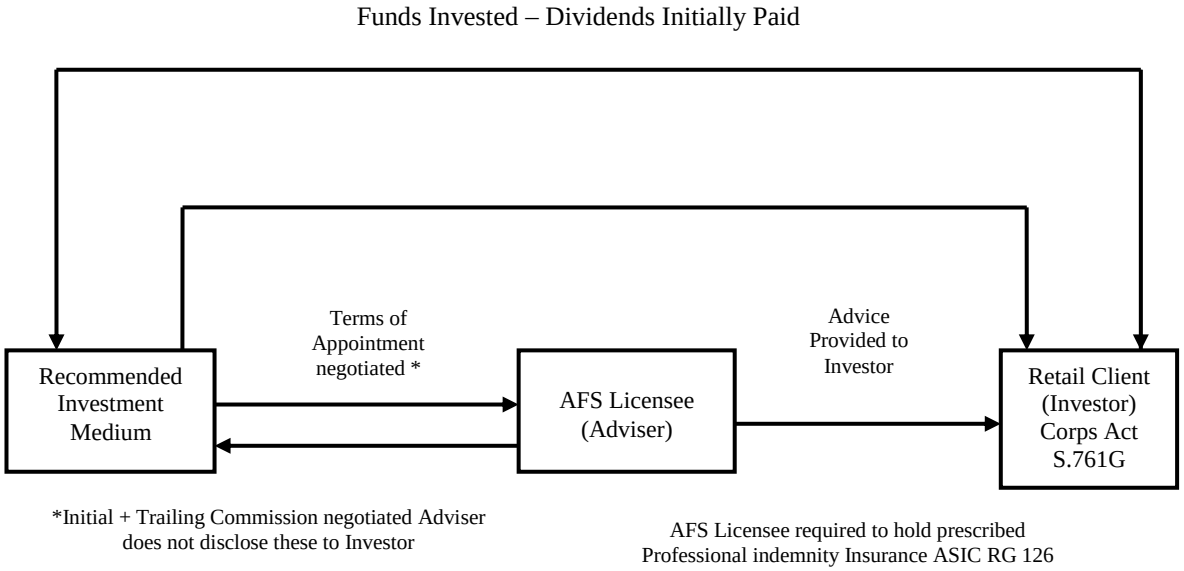
The awareness of potential adverse vicarious consequences of restriction of professional indemnity insurance coverage emerged during the course of a series of ASIC-based inquiries, consultations and reports. The latter sought a solution to the compensation issue arising from ASFS Licensee negligence in complying with the statutory requirements.[127] ASIC determined that professional indemnity insurance accessed from the Australian general insurance market would provide the medium for compensating Retail Clients for the consequences of negligent financial advice.

Although ASIC approved a 24 Month Implementation Phase, which became fully operational in March 2010,[128] the commencement date was subsequently pushed back to 2012. Further ASIC regulatory consultation[129] resulted in Regulatory Guide RG 126 establishing a two-part implementation process, with the second phase resulting in full implementation to be achieved by the date above, which is no longer of relevance.

This additional dimension of financial exclusionary effects is illustrated in Figure 1.1. below. The vicarious financial exclusionary effect emerging in the sequential process appears in Figure 1.2.

[124] Treasury (2002), "Compensation for loss in the financial services sector – issues and options", Australian Treasury Department, Canberra, September 2002.
[125] Treasury (2003), "Compensation for loss in the financial services sector – Position Paper", Australian Treasury Department, Canberra, December 2003.
[126] Above, at pp.50, 76.
[127] ASIC Report Rep 107, December 2006, ASIC Consultation Paper 87, July 2007, followed by ASIC Report 112, November 2007 accompanied by ASIC Regulatory Impact Statement (RG 126) November 2007.
[128] ASIC Regulatory Impact Statement November 2007, at p.34.
[129]

Figure 1.1 Vicarious Financial Exclusionary Effect – Schematic



Assume investment *default event* occurs
Retail Client (Investor) claims compensation from Adviser for negligent investment advice
Adviser denies liability - Practice declared insolvent
Adviser lodges claim with PI Insurer who declines claim

Standard PI Policy exclusion precludes indemnity for negligent investment advice exposures or Corporations Act Ch. 7 breaches resulting from dishonest, fraudulent conduct or malicious acts

"Compensation arrangements are not a mechanism for providing compensation directly to consumers"
ASIC RG 126.13 & 14

Figure 1.2. - Vicarious Financial Exclusionary Effect – Sequential Process

1.	**Corporation A** requires additional working capital and issues mezzanine finance debentures which are non-compliant with the statute mandated security or trust fund requirements.[130]
2.	**Corporation A** appoints Australian Financial Services Licence (AFS) Licensee as Financial Adviser (**Intermediary B**) to market the mezzanine debentures to investors, including those who fall within the category of statute-prescribed "Retail Clients".[131]
3.	**Intermediary B** negotiates with Corporation A both initial and trailing commission for the sales secured. The commission rates are higher than those for debenture-based products elsewhere in the investment market. Intermediary B sells the Corporation A mezzanine debentures to **Retail Investor C**.
4.	**Intermediary B** does not disclose the commission rate levels to investors in the statute-prescribed Financial Services Guide.[132]
5.	**Corporation A** subsequently becomes insolvent, ceases trading, and discontinues distribution of debenture interest payments.
6.	**Retail Investor C** unsuccessfully requests termination of the debenture term due to insolvency and discover that the debentures are non-compliant and not supported by statute-prescribed security mentioned above at 1.
7.	**Retail Investor C** seeks recovery of their losses from Intermediary B for negligent investment advice on the grounds that Intermediary B had knowledge of the unsecured nature of the mezzanine finance debentures issued by Corporation A as indicated by the non-disclosure of the high sales commission rates.
8.	**Intermediary B** ceases trading, declares insolvency, and lodges a claim under their PI policy based on Retail investor C's recovery action.
9.	**Intermediary B's** PI Insurer declines indemnity on the grounds that the policy conditions exclude indemnification for liability resulting from dishonest, fraudulent, or malicious acts.
10.	**Retail Investor C** therefore sustains the direct impact of a vicarious contract condition-based financial exclusionary effect by being unable to access compensation resulting from a successful PI claim by Intermediary B.
11.	**Retail Investor C** remains an unsecured creditor of both Corporation A and Intermediary B.

Subsequent Australian media reports suggest that the issue of vicarious adverse financial exclusionary effects on Retail Clients, arising from the denial of financial services intermediaries professional indemnity insurance claims, remains unresolved.[133]

[130] Corporations Act 2001, s283BH (2) and (3).
[131] As defined by Corporations Act 2001, s761G.
[132] Corporations Regulations 2001, Reg.7.7.07.
[133] As evidenced by the Australian Financial Review, Sydney, "Financial Services – Soaring insurance costs crunch planners", Tuesday, 16 June 2009 at p.47.

1.3. v. The interaction between Financial Exclusionary Effects

In Chapter Two, I identify and examine the existence of financial exclusionary effects in domestic general insurance products available from four Australian general insurers. At the time of my analysis, these insurers collectively held an 81% share of the domestic general insurance market. During the course of my analysis, I examined the manner in which several of the insurers made use of the relationship between various financial exclusionary effects considered earlier in this Chapter, to secure and maintain market share in what is regarded as a highly competitive market.[134] I summarise below the outcome of my analysis:

a. Between 2000 and 2007, at least two of those Australian domestic general insurer group holding companies whose insurance policies were analysed in Chapter Two successfully implemented a general domestic insurance marketing strategy, which involved using specific general insurer subsidiaries within their respective groups to market domestic general insurance products and services to particular sectors within the Australian general domestic insurance market.[135]

b. In one instance the group holding company utilised a subsidiary authorised general insurer to underwrite and distributing three general domestic insurance products (home & contents/motor vehicle & travel insurance) targeting the *"Over 55 Years of Age"* demographic group (without an upper age limit). The premium rating structure for the preferred market sector was up to10% less than that applicable to other sectors. Evidence identified that this rating preference was justified on the grounds that the claims experience of the target market was more favourable than that of other market sectors.

c. Concurrently the marketing strategy of another authorised general insurer subsidiary of the same holding company, was underwriting and distributing three similar general domestic insurance products to a different market sector, that being a more generalised domestic general insurance market comprising insureds ranging from 18 to 65 years old. The underwriting and pricing rating criteria of the second subsidiary insurer were 8+% higher in markets other than that being specifically targeted.

[134] JP Morgan & Deloitte (2005), at p.6, JP Morgan & Deloitte (2008), at p.10.
[135] Insurer C: was acquired by Insurer B: in 2007, with the differentiated underwriting and marketing processes continuing in the post-acquisition period to 2010.

d. Supplementary marketing strategies relating to a number of additional premium discounts were available to customers of the first subsidiary who held more than one policy. Further rewards for Brand loyalty (evidenced by renewal in successive years) resulted in an increase of 15% in policy discounts. The first subsidiary did not offer similar discounts to the under 55 Years of Age group.

I suggest that the market segmentation strategy set out above illustrates the interaction between two financial exclusionary effects, those being "Market "targeting and "Pricing".

A similar targeting strategy involving the same subsidiaries was identified in the terms and conditions of personal travel insurance policies issued by the first subsidiary insurer to their preferred demographic group which contained two condition variances positive to the preferred demographic group in contrast to the adverse impact of similar conditions under a similar personal travel insurance policy, issued by the second subsidiary, as illustrated in the figure below:

Figure 1.3. Comparison in Travel Insurance Policy pre-existing medical condition (PEMC) exclusion conditions in policies issued by two subsidiary insurers of a holding company.

Holding Company Subsidiary	**Policy Coverage Age Range**	**Pre-Existing Medical Conditions (PEMC) coverage limitation**
First Subsidiary Targeted Age Group 55 +years	NIL Maximum Age Limits	No coverage where medical treatment for condition was received in past *30 days* (PEMC 30)
Second Subsidiary Targeted Age Group 18 – 65 years	18 Years Min to 65 Years Maximum	No coverage where medical treatment for condition was received in past *90 days* (PEMC 90)

In the figure above the first subsidiary's PEMC was regarded as being more favourable to the targeted sector (Age 55 + years) than that of the second subsidiary. My analysis indicated that the more restrictive (PEMC) was an effective deterrent to the 55+ years – 65 years age group accessing the second subsidiary's travel insurance policies.

Whilst the example above identifies the interaction between a specific contract condition based financial exclusionary effects selecting against age groups other than those being targeted, I suggest that in the instance of the second subsidiary the fact that intending insureds are provided with the policy terms and conditions prior to the inception of the contract , by way of the statute prescribed Product Disclosure Statement, in turn is an example of the operation of risk-based access denial exclusionary effects being used to select against an untargeted market sector.

From the above two examples involving two domestic general insurance subsidiaries the same holding company, I suggest it is clear that there may be instances of interaction between specific financial exclusionary effects being utilised by insurers to target preferred market groups whilst seeking to deter participation by other than the preferred group. In the case of the specific examples cited above, the financial exclusionary effects involved are summarised below:

Figure 1.4 Summary of interaction between specific financial exclusionary effects

Financial Exclusionary Effect #1	Financial Exclusionary effect #2	Example
Market Targeting	Product pricing	First Subsidiary - Age 55+ years rating preference
Market targeting	Contract condition based	Second Subsidiary – Age 55+ restrictive PEMC condition with cover ceasing at 65 years contained in policy.
Market targeting	Risk based access denial	Second Subsidiary – Age 55+ restrictive PEMC condition with cover ceasing at 65 years advised to intending insureds

1.4. Chapter Discussion

The principal objective in Chapter One was to address the fundamental issue of the dimensions of "*financial exclusion*". I sought to achieve this objective by pursuing five interrelated queries. Conclusions appear below.

1.4.i. "*Financial Exclusion*" and "*Social Exclusion*" and how these constructs may be distinguished from each other.

I identified substantial unanimity regarding the inclusion of "*financial exclusion*" in the broader construct of social marginalisation or "*social exclusion*", which results in individual inability to access necessary financial products or services in an appropriate form. However, I also identified considerable lack of unanimity in views regarding the sources and identity of categories not providing access, with terms such as "*mainstream providers*" or "*regulated and accessible providers*" used to delineate the source of such exclusion. It is important to note that these views are linear, in that they do not appear to consider the regulatory environment within which financial product or service providers operate.

I did not however encounter substantial divergence in views as to what constituted *"social exclusion"*, which involves lack of employment and lack of access to health, education, welfare, law enforcement, housing facilities, and related community services.

1.4.ii. The Area of Impact of Financial Exclusion

I identified considerable agreement between views regarding areas impacted by financial exclusionary effects that encompassed the following financial product and service activities:

- Transactions Accounts
- Savings Accounts
- Financial Counselling Investment Advice
- Credit
- Insurance
- Home Equity/Mortgage Loan
- Superannuation
- Community Enterprise and Management Support

These areas of impact were regarded as having near universal application. They were not regarded as being restricted to specific levels of economic development or to designated socio-economic or cultural groups with purportedly high levels of financial product and services maturity.

1.4.iii.The manifestation of Financial Exclusion - Financial Exclusionary Elements

Despite general consensus on the principal elements of financial exclusionary effects as summarised below, there was some difference of opinion regarding the manner in which financial exclusionary effects manifest and the structure of individual effects:

a. Product or service ***Access*** denial exclusion comprising:
    i. Geographic access-based denial financial exclusion
    ii. Risk-based access denial financial exclusion.
b. Consumer segment ***Market*** targeting exclusion
c. Product or service ***Price*** exclusion
d. ***Self-exclusion*** to access by the Consumer
e. Product or service contract ***Condition*****–Based** exclusion

My earlier analysis identified the structure of each of the above effects and the scope of the application of specific financial exclusionary effects, while also noting that individual effects are generally regarded as operating in isolation. As noted above, I identified considerable difference of opinion on the scope and extent of application of individual financial exclusionary effects. Occasionally, component elements of individual effects were omitted from consideration, or considered irrelevant without substantiation.

1.4.iv.An additional Financial Exclusionary Effect Dimension: Vicarious Exclusionary Effects

I noted that Financial Exclusionary effects are generally regarded as resulting from direct interaction between the provider of financial products or services and the “excluded” individual consumer. Consumers are regarded as individuals who have been marginalised due to financial exclusionary effects resulting from a direct relationship with a financial products or services provider.

The provision of financial products or services often involved an intermediated process, in which a Third Party was interposed in the relationship between the product/service provider and the consumer, the actions of which may have resulted in a financial exclusionary effect.

My analysis of evidence in the period 2000 -2007 supports the addition of a *Vicarious Financial Exclusionary Effect dimension* set out in Figures 1.1 and 1.2 earlier and defined as:

> *The inability to access necessary financial products or services in an appropriate form as a direct result of the actions of a third party who is a Party in the transaction other than the producer or distributor of the product or service.*

I submit that my identification and substantiation of the additional dimension of *Vicarious Financial Exclusionary Effects* may exist, is an original contribution to the understanding of the nature and scope Financial Exclusionary effects, particularly in the general insurance impact area, in that evidence is not available to indicate that the existence of this dimension has been considered previously.

1.4.v. Interaction between Financial Exclusionary Effects

The financial exclusionary effects identified earlier in this chapter are generally as operating in isolation, with little interaction between individual exclusionary effects. My analysis suggests there may be an alternative views. I suggest that the prevalent view may be incorrect and insufficiently substantiated by available evidence. Specifically, I have identified evidence of one Australian domestic general insurer utilising the interaction between a number of financial exclusionary effects to secure market share in the Australian domestic general insurance market, and of the widespread prevalence of similar practices elsewhere in the domestic general insurance market in those insurance products considered later in Chapter Two.

I identify and report on the outcome of an analysis of the sequential process followed by one Australian general insurer group in which the interaction between the following four financial exclusionary effects were used to secure market share, and to apportion that share between subsidiary domestic general insurers. In this instance, a market targeted exclusionary process was used.

I suggest that my identification and analysis of the circumstances in which insurers may exploit the interaction between financial exclusionary effects constitutes an original contribution to the understanding of Financial Exclusionary effects. Specifically, I have identified certain important dimensions of Financial Exclusionary effects, which appear to have been overlooked in existing literature, and have explored the extent to which their application may impact upon domestic general insurance.

I identified that the impact of financial exclusionary effect arising from interaction between individual financial exclusionary effect elements was significant, specifically with regard to the interaction between the following financial exclusionary effects:

Consumer segment ***Market*** targeting exclusion
Product or service ***Price*** exclusion
Product or service contract ***Condition*****-Based** exclusion
Risk-based access denial financial exclusion.

1.5. Chapter Conclusion

Based on the Chapter Conclusion Summaries, appearing above, I suggest that I have successfully secured the principle objective of Chapter One and all of its five component elements of that objective. Through my analysis in Chapter One, I have identified, analysed and reported on the two areas relating to the dimensions and extent of the application of Financial Exclusionary effects in domestic general insurance to which I have made an original contribution. These areas are:

i. The identification and substantiation of the dimension of *Vicarious Financial Exclusionary Effects* may exist in the domestic general insurance area.

ii. The identification and substantiation of the dimensions of the interaction between a variety of financial exclusionary effects in the domestic general insurance area.

Chapter Two – Australian Domestic General Insurance Arena: Financial Exclusionary Effects

Chapter Abstract

My objective was to determine the extent to which financial exclusionary effects could be identified in Australian domestic general insurance policies subsequent to the implementation of the Australian financial service reform regime in 2004.

My analysis covered Australian domestic general insurance policies available from the four Australian general insurers that collectively shared 81% of the Australian domestic general insurance market in the Year 2004 -2005.

My analysis indicated that contract condition-based financial exclusionary effect elements could be identified in all the reviewed insurance policies.

My analysis also indicated that a similar contract condition-based financial exclusionary effect profile was apparent even in those domestic general insurance policies prescribed by statute as "*standard cover*" that delineate the basic policy conditions contained in Australian domestic general insurance policies.

2.1 Chapter Objectives

This chapter has one objective:

To determine the extent to which financial exclusionary effects may be identified in Australian domestic general insurance policies available to domestic general insureds in the post-implementation phase of the Australian financial services sector reforms.

2.2 Chapter Introduction

My review of the literature in Chapter One sought to determine to what extent existing research had identified and analysed the existence of financial exclusionary effects in Australian domestic general insurance products.

My review found that although Connelly and Hajj (2001)[136] had conducted studies, they had also relied mainly on research relevant to the United Kingdom to support their contention that financial exclusionary effects were prevalent in Australian domestic insurance products. In other words, Connelly and Hajaj did not provide evidence from the Australian context to support their contention.

Likewise, although Chant Link (2004)[137] identified Home Building/Home Contents Insurance and "TPPD" Insurance as the main domestic insurance products containing financial exclusionary effects, it relied on earlier survey data[138] and did not provide any other further substantiation.

The ANZ (AC Nielsen, 2005)[139] financial literacy survey also identifies insurance claims process compliance as being an area of impact of general insurance policy related financial exclusionary effects. But it also does not elaborate how this impact is manifested.

More recently, Sheehan and Renouf (2006)[140], in their examination of low income earner access to domestic home and contents and motor vehicle insurance, noted the critical comments of surveyed focus group regarding the impact of financial exclusionary effects, particularly those relating to product pricing and affordability. However, the authors noted the erroneous perceptions of focus groups regarding domestic insurer underwriting processes, which in turn casts doubt on the value of those findings.

I, thus, encountered a significant threshold issue in my research, namely the non-availability of concrete evidence establishing the existence of financial exclusionary effects in domestic general insurance products and services in the Australian context.

It was obvious to me that I would have to undertake a preliminary task before I could develop my research objective of determining the impact of the Australian financial services reforms on domestic general insurance related financial exclusionary effects. This step would involve determining the extent to which financial exclusionary effects were actually identifiable in Australian domestic general insurance policies.

[136] At p.11.
[137] At pp.5, 73.
[138] Principally the Roy Morgan 2003 Survey.
[139] At p.119.
[140] At p.13.

2.3 Methodology and Inquiries

The methodology adopted for this preliminary analysis comprised a seven-part sequential process, as follows:

2.3.i. Selection of Data Collection Period

This part involved the identification of an appropriate period within which to undertake the analysis.

The Financial Services Reform Act (Cth) 2001 and accompanying legislation introduced the Australian financial services reforms (FSR) program. The principal Act came into force on 27 September 2001, with a two-stage Implementation Program, concluding on 11 March 2002 and 11 March 2004 respectively. These specific Commonwealth Statutes and the Corporations Act (Cth) (2001), which incorporated Financial Services Reform legislation, were administered by the Australian Securities and Investment Commission (ASIC). The operations of ASIC are in turn the subject of Commonwealth parliamentary an annual inquiry and report to parliament by the Federal Parliamentary joint Committee on Corporate and Financial Services (JCCFS).

I regarded it desirable that an analysis of Australian domestic general insurance policies be undertaken in the period following the completion of the two-stage Implementation Program above. I therefore selected the 12 month period from 1 July 2004 to 30 June 2005. ASIC, in their Annual Reports for the period 2000-2001 – 2005-2006, advised that the FSR Program had been successfully implemented and became operational without incident. The JCCFS Hearings of ASIC operations from this period came to similar conclusions.[141]

Figure 2.1 below sets out a timeframe of the recent Australian Financial Service Reforms and the relationship to the period during which the domestic general insurance policy data was gathered.

[141] JCCFS Reports of 26 March 2003, 12 May 2005, 19 December 2005, and 15 August 2006.

Figure 2.1 Australian Financial Services Reform (FSR) Timeline: Thesis Policy Survey Period

Stage One: Pre Financial Services Reforms (FSR) – Inquiries and Policy Development		
1997	Wallis Financial System Report	
1997	CLERP Program Commences	
Stage Two: FSR and Insurance Contracts Act (ICA) Cth 1984 Inquiries & Legislative Activity		
2000	FSR 1st Draft Bill 2000 Introduced	
2000	R. v Hughes High Court Decision	
2000	FSR 1st Draft Bill 2000 withdrawn	
2001	FSR 1st Draft Bill 2001 Introduced	
2001	FSR 2001 Legislation enacted	
2002	FSR Stage #1 commences (11 March 2002)	
2003		ICA 1st External Review commences
2004	FSR Stage #2 commences (11 March 2004)	
2004/2005		Thesis Policy Data Survey Period
2004	FSR Review Program commences	
2006	FSR Review Program concludes	
2007		Draft ICA 1st Amendment Bill Introduced
2007		Draft ICA 1st Amendment Bill lapses
2009	Ripoll JCCFS Parliamentary Inquiry FSR Report Tabled	
2010		2nd ICA Review commences (Parliamentary Committee)
2010		2nd ICA Review Report Tabled in Federal Parliament
2010		Draft ICA 2nd Bill Introduced
2010		Draft ICA 2nd Bill lapses
2010		Unfair Contract Terms Discussion Paper circulated
Stage Three: Australian Consumer Law Inquiries and Legislative Activity		
2009		ACL Position Paper circulated Draft ACL Bill Introduced
2010		ACL Legislation enacted
2011		ACL Act commences

2.3.ii. Insurer Group Identification

Here, I identified certain Insurer products, which could be regarded as comparable to domestic general insurance products that were available within the specified period.

My rationale was that the index resulting from analysing these domestic insurance policies that were potentially representative of policies that were generally available to the majority of Australian domestic general insureds.

I identified the principal Australian general insurers from Industry Regulator data. I also noted that a contemporary industry survey identified that those four of those Australian general insurers I had identified:

a. Collectively shared 81% of the Australian "Personal Lines" or domestic general insurance market, and

b. Had domestic general insurance operations in most Australian States and mainland Territories.[142]

These factors provided an adequate foundation upon which to develop my review, including steps to secure anonymity and preclude brand recognition.

It was important to ensure that the domestic general insurance products under study were directly relevant to and accessed by insureds that may exposed to financial exclusionary effects. This necessitated establishing that the products applied to individuals and small-scale enterprises, which did not access commercial general insurance products available to larger corporate entities.

Statute-prescribed *"standard cover"* contracts, referred to earlier, are comprised of terms and exclusions of specific categories of general insurance policies, all of which are specified in Regulations attached to the Insurance Contracts Act 1984 (Cth). Specified policy categories have one common factor. By their terms and conditions, *standard cover*" relate to domestic general insurance products relating to private dwellings and contents, private motor vehicles, personal sickness and accident, and consumer credit and travel risk exposures. These "*standard cover*" are relevant to individuals or smaller organisations.

[142] JP Morgan and Deloitte (2004) at pp.6, 13.

Although the above satisfies the requirement of the relevance of the insurance product to the financial exclusionary effect construct, there still remains the separate issue of the category within which individuals would be placed under the Australian financial services reform (FSR) structure. Defining this issue necessitates a review of those aspects of the FSR relating to the categorisation of general insureds amongst other product consumer categories.

FSR provisions now contained in the h Corporations Act 2001 clearly state that insurance services and products fall within the scope of the legislation.[143] Legislation identifies two categories of consumers of these service and products. A "*Retail Client"* is an individual or small business that utilises a specified general insurance product.[144] All other consumers are categorised as *"Wholesale Clients",* to whom different consumer regulatory processes may apply.[145]

It is significant that the general insurance products relating to *"Retail Clients"* specified above include 6 insurance product types, the scope of which is specified by the Statute.[146] A review of these specified general insurance products suggests they are generally similar to "s*tandard cover*", details of which appear in the Insurance Contracts Regulations 1985.(Cth)[147]

I therefore suggest that it follows that the insured class accessing domestic general insurance policies may be regarded as *"Retail Clients"* falling within the scope of the Financial Services Reform regime considered later.

2.3.iii. Data Collection - This stage involved sourcing general insurance policies relevant to the insured class identified above. I accessed a total of 156 individual general insurance policies on issue in the financial Year 2004-2005 by the four general Insurers identified in 2. above.

A preliminary review indicated that 37 of the policies initially selected were for general insurance products, which did not fall within the scope of the domestic insured/"Retail Client" categorisation in 3. above, and were therefore excluded from further consideration.

[143] Section 764A (1) (d) includes insurance products within a category of financial risk products defined in Section 763C (a) and (b).
[144] Section 761G (5) (i) (a) or (b).
[145] Section 761G4.
[146] Corporations Regulations 2001, Reg. 7.1.11-7.1.17.
[147] Insurance Contracts Regulations (Cth) 1985, Regulations 1-28.

Table Two.1 sets out the distribution of policies by *"standard cover*" type, all of which fall within the definitional scope of being accessed by "Retail Clients" under the Financial Services Reform regime..

Table 2.1 Distribution of Insurance Policy Class by Insurer

Insurance Policy Class[148]	Insurer Group #A	Insurer Group #B	Insurer Group #C	Insurer Group #D	Total
Motor Vehicle	12	7	11	2	32
Home Building and/or Home Contents	10	8	11	8	37
Sickness and Accident	1	1	0	3	5
Consumer Credit	0	2	0	2	4
Travel	5	0	1	3	9
Multi-Line	14	16	3	9	42
Total	42	34	26	27	129

My preliminary review identified three immediate questions seeking explanations:

1. Is it correct that three of the four insurers did not offer policies in particular policy classes?

> At the time of data collection (2004-2005), several of the Insurers did not offer personal risk policies covering personal sickness and accident, consumer credit, and travel related risk exposures other than where those policy classes included in "Multi-Line" policies.
>
> My analysis suggested that decisions on these matters were principally based on corporate marketing strategies, rather than on more risk specific underwriting issues.

[148] Also refer to Table 2.18.

2. What are "Multi-line" insurance policies and why are these policy types included in the review which is directed to those domestic general insurance products accessed by domestic insureds?

> My analysis identified that Multi-line Policies were those containing a number of "covers" or policies, and marketed to specific market segments such as the Professions, Trades, and Business or Rural Business. Each of these policies included at least one of the *"standard cover"* policy types.

3. Why does the Table show that individual Insurers may have a substantial number of specific cover types, such as Insurer #A having 12 different Motor Vehicle insurance policies?

> My analysis of individual policies indicated that that the variation in the number of different policy variants reflected the interaction between market segmentation and brand recognition factors within various Australian States and Territories.

To illustrate the point, it was clear from my analysis that Insurer #A marketed a similar personal motor vehicle insurance policy under eight different brands on the basis of brand recognition influences in eight different Australian regional insurance markets. In this particular instance, five of those policies were marketed under the brand of specific motoring associations with whom Insurer #A had appeared to have formed commercial alliances. The remaining two motor vehicle policy types were targeting specific motor vehicle owner sub-sectors, such as vintage cars or private car collections.

2.3.iv. Establishing a Benchmark - This stage involved establishing a benchmark against which the selected financial exclusionary effects could be compared and evaluated**.**

I considered it desirable to establish a standard against which the outcome of an analysis of the financial exclusionary effect elements in a specific domestic general insurance policy could be compared. The need for such a standard to be directly relevant to the subject under consideration resulted in the selection of "*standard cover*" as the benchmark. These prescribed contracts were also reviewed to identify the existence of financial exclusionary effect elements. The review process adopted for "*standard cover*" was identical to that used for the Insurer Group policies.

2.3.v. Selection of the Financial Exclusionary effect elements for use in the Analysis.

This final stage involved selecting specific financial exclusionary effect elements, the effects of which could be analysed in the context of the selected general insurance products. I used those five financial exclusionary effects identified earlier in Chapter One:

- Product or service ***Access*** denial exclusion, including geographic access denial and risk-based access denial
- Consumer segment ***Market*** targeting exclusion
- Product or service ***Price*** exclusion
- ***Self-exclusion*** to access by the Consumer
- Product or service contract ***Condition*** exclusion

From the above, I selected Risk-based **access** denial and Product or service contract ***Condition*** exclusion as the medium through which to identify the existence of financial exclusionary effect elements in the general insurance products selected on the basis outlined above. The selection of these specific financial exclusionary effect took into account the following:

i. The financial exclusionary effect either was the result of the pre-contract underwriting assessment and selection process or as the product of either a part or interaction between parts of the policy documents, such as insuring agreements, declarations, exclusions, conditions, and policy excess.

ii. The existence of these factors was capable of being determined by an analysis of the policy wording as set out in the Product Disclosure Statement .

iii. As will become apparent later in the study, these specific financial exclusionary effects have been identified as a potential reason for either pre-contract denial of cover, or subsequently the rejection of general insurance claims, with available data indicating incidence and trends.

2.3.vi.. Development of the Analytical Framework - This part involved preparing an analytical framework appropriate to the nature of the materials being reviewed, and undertaking a pilot study to determine the suitability of the framework. I developed a sixteen question-based five-level Likert questionnaire to ascertain the extent to which financial contract condition exclusionary effects would be identified in the selected general insurance policies. The items are set out in Figure 2.2:

Figure 2.2. Risk Based access denial and Condition-Based Financial Exclusionary Effects – Policy Survey Questions

1. **Insuring Agreements;**
Scope of Cover Age: The Age-related insuring agreement conditions likely to adversely impact a claim

2. **Insuring Agreements**:
Scope of Cover Gender: The Gender-related insuring agreement conditions likely to adversely impact a claim

3. **Insuring Agreements**:
Scope of Cover Occupation: Occupation-related insuring agreement conditions likely to adversely impact a claim

4. **Insuring Agreements**:
Scope of Cover Domicile-related insuring agreement conditions likely to adversely impact a claim

5. **Insuring Agreements**:
Personal Interest not insured related insuring agreement conditions relating to proof of interest likely to adversely impact a claim

6. **Policy Exclusion**:
Perils or Activity exclusion - Cause of loss-related policy exclusions likely to adversely impact a claim

7. **Policy Exclusion**:
Property - Not included under scope of cover-related policy exclusions likely to adversely impact a claim

8. **Policy Exclusion**:
inherent vice or vermin-related policy exclusions likely to adversely impact a claim

9. **Policy Exclusion**:
Extraordinary hazards Adverse selection-related policy exclusions were likely to adversely impact a claim

10. **Policy Exclusion**:
Moral/Morale Hazards related policy exclusions were likely to adversely impact a claim

11. **General Conditions**:
Non-compliance with claims reporting/evidence requirements related policy conditions likely to adversely impact a claim

12. **General Conditions** :
Non-Compliance with assistance requirements related policy conditions likely to adversely impact a claim

13. **General Conditions**:
Non-compliance with other policy specific conditions such as Dual Insurance likely to adversely impact a claim

14. **Excess:**
The Standard Policy Excess likely to impact upon the cost to the insured of a claim

15. **Excess:**
Risk specific such as Insured driving record/Inexperienced driver excess which is likely to impact upon the cost to the insured of a claim.

16. **Excess:**
Insured or driver specific age related policy excess which is likely to impact upon the cost to the insured of a claim

The distribution of these questions within the conventional general insurance policy framework, and that for the "*Standard Cover*" framework was as follows:

Figure 2.3 General Insurance Contract Elements – Conventional General Insurer Policy[149]

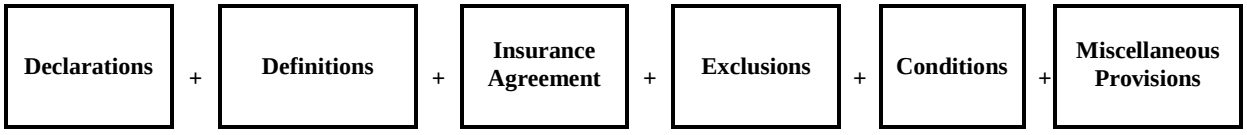


Figure 2.4 Insurance Policy Elements – *"standard cover"* Prescribed Contracts[150]

2.3.vii. Pilot Study

A small preliminary or "Pilot Study" was undertaken to determine the suitability of the Condition Financial Exclusionary Effect Element Questions and the adequacy of the reporting structure for recording the output of the process. This preliminary study involved applying the 16 Questions to the following:

a. Each of the" *standard cover*" as set out in Part II (Standard Cover) of the Insurance Contract Regulations 1985, Regulation 5-28, and

b. An example of each of the six insurance policy types drawn at random from Insurer 129 insurance policies accessed in Year 2004-2005.

An analysis of the output of this study indicated the questions and reporting structure were appropriate to the specified task.

[149] Following Rejda (2003) and (2010)
[150] Insurance Contracts Act (1984) s34 and Insurance Contracts Regulations (1985) Regulations 2,5 – 28 refer

2.4 Analysis Introduction

The output from the systematic process of the application of each of the sixteen questions to each of the *standard cover(s)* and the individual insurance policies was tabulated in a spread sheet from which the sixteen Element Summaries were prepared below.

Each of the Element Summaries reports on the output from the application of the questions to each *standard cover* and the 129 individual insurance policies (the output for the latter being shown as a total). The assessment of the incidence of the specific element was shown as "1" where it was considered to occur, indicating a "Very Unlikely" response to the specific question.

Thus, by way of an example, the Table below reports on the outcome of the application of Question 1 regarding the extent to which the Policy Insuring Agreement had an insured or insured person age-specific requirement.

In this instance, the assessed responses for the five "*standard cover*" stated that it was "Very Unlikely" that this specific Element would have an adverse impact on the satisfactory outcome of an insurance claim made under an insurance policy containing those specific terms as set out in the "*standard cover*".

However, a different profile emerges from the application of the same question to each of the 129 Insurer Policies, where the incidence of the Exclusionary Effect Element was found to be between 48% and 100% of the majority of the policies that were reviewed.

2.4.i. Contract Condition Financial Exclusionary Effect Element # 1

Table 2.2. Contract Condition Financial Exclusionary Effect Element # 1

Policy Part: Insuring Agreement Element: Scope of Cover - Age	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	25	78%
Insurer A,B,C, and D Policies - Home Building &/or Home Contents Insurance	37	3	8%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	7	78%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	20	48%

Note: The nil contract Condition Financial Exclusionary Element Effect incidence reported for these *standard cover(s)* reflects the fact that the *standard cover* do not prescribe those policy terms found in the General Conditions and Policy Excess Terms of conventional insurance policies.[151]

This Exclusionary Effect Element (64 Insurer Policies, representing 50% of those policies reviewed) is widely distributed across five of the six personal lines policy classes. The excepted policy class (Home Building and/or Home Contents) had three instances where there was an age limit on the maximum age of insured personnel/residents who were engaged in domestic residential strata management activities.

The minimum age of insured persons was stated in a variety of terms, such as "junior persons" or "under 18 Years of age", whereas maximum insured age was stated at "over 60 years of age" or "60 years on next birthday".

The effect of age-related benefit constraints is illustrated in those Insurer policies where an accidental death benefit is payable to the estate of a named insured under a motor vehicle insurance policy where the named insured was killed while driving the insured vehicle. Under these circumstances the death benefit is frequently payable only in circumstances where the named insured was at least 25 years old at the time of the accident, precluding the

[151] Refer to the earlier schematic diagrams.

availability of this policy benefit to those under the age of 25 years killed under similar circumstances.

The total exclusion of insurance cover on the basis of age limits under the personal risk based policies such as Sickness and Accident and Consumer Credit insurance policies is regarded as representative of the financial exclusionary effect element incidence found in these insurance policy classes.

The significant level (48%) of those multi-line insurance policies containing age-related constraints on coverage is principally due to the fact that such multi-line policies frequently contain sickness and accident coverage for insured parties.

Table 2.2. (Element #1) Statistical Analysis

The objective of the analysis was to test the existence of significant difference in element incidence between insurers. An exact chi-square test was used for each element (Tables 2.2 – 2.17). A *p*-value < .05 indicates there is a significant difference.

For Table 2.2. (Element #1), the chi-square statistic was 47.97 with an exact p-value < .0001.

Therefore, a significant difference exists among the insurers for Element #1.

A review of the contribution of each individual insurer group to the overall chi-square result indicated the element incidence in the motor vehicle insurance group is significantly higher than the other insurers, and that home building/contents insurance is significantly lower.

2.4.ii.Contract Condition Financial Exclusionary Effect Element # 2

Table 2.3. Contract Condition Financial Exclusionary Effect Element # 2

Policy Part: Insuring Agreement Element: Scope of Cover - Gender	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	2	6%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	0	0%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	3	75%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies – Multi-Line Insurance	42	13	31%

Note: The nil contract Condition Financial Exclusionary Element Effect incidence reported for these *standard cover(s)* reflects the fact that the *standard cover* do not prescribe those policy terms found in the General Conditions and Policy Excess Terms of conventional insurance policies.[152]

The incidence of this exclusionary effect element was principally because coverage exclusion was unavailable for insurance policy claims arising from pregnancy or childbirth, on the conventional assumption that such conditions are female gender specific.

Substantial variance in the distribution of the incidence of this exclusionary effect element across the various insurer insurance policies appears determined by the fact that the majority of personal risk insurance policies (Sickness and accident, Consumer Credit, and Travel insurance) contained specific exclusions from coverage of pregnancy or childbirth related claims, again regarded as being reflective of the financial exclusionary effect element incidence found in these insurance policy classes.

While the level (31%) of multi-line insurance policies containing gender-related constraints on coverage is less than the age-related constraints considered earlier, the coverage

[152] Refer to the earlier schematic diagrams.

constraint is principally due to the fact that such multi-line policies frequently contain sickness and accident coverage for insured parties.

Table 2.3. (Element #2) Statistical Analysis

For Table 2.3. (Element #2), the chi-square statistic was 66.80 with an exact *p*-value < .0001. Therefore, a significant difference exists amongst the insurers for element 2. A review of the results showed that Sickness and Accident, Consumer Credit, and Travel insurers were significantly higher.

2.4.iii. Contract Condition Financial Exclusionary Effect Element #3

Table 2.4. Contract Condition Financial Exclusionary Effect Element #3

Policy Part: Insuring Agreement Element: Scope of Cover - Occupation	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	100%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	100%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	31	97%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	39	93%

Note: The nil contract Condition Financial Exclusionary Element Effect incidence reported for these *standard cover(s)* reflects the fact that the *standard cover* do not prescribe those policy terms found in the General Conditions and Policy Excess Terms of conventional insurance policies

Occupation coverage constraints were identified in 97% of the Insurer policies reviewed. The scope of this constraint varied considerably between and within insurance policy classes. Variance in the application of this constraint went from policy coverage being denied to professional sports players, professional racing, and car/road trial and endurance racing drivers to being applied to specifically designated occupations, such as farming.

The application of this coverage constraint to Insurer Home Building and/or Home Contents insurance policies usually arose from the policy Insuring Agreement specifying either the occupation of the named Insureds or the proposed function of the insured premises.

The near absolute application of the policy coverage occupation constraint under Multi-Line insurance policies is not regarded as being unusual given that these insurance policies, as discussed earlier, essentially comprised a suite of diverse insurance covers aimed at specific market sectors, such as professional occupations, business insureds, trade persons, and rural farming.

Table 2.4. (Element #3) Statistical Analysis

The Table 2.4. (Element #3) chi-square statistic was 4.04 with an exact *p*-value = .4094. Therefore there is no significant difference between the insurers for Element #3.

2.4.iv. Contract Condition Financial Exclusionary Effect Element # 4

Table 2.5. Contract Condition Financial Exclusionary Effect Element # 4

Policy Part: Insuring Agreement Element: Scope of Cover - Domicile	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	36	97%
Insurer A,B,C, and D Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	8	88%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

Note: The nil contract Condition Financial Exclusionary Element Effect incidence reported for these *standard cover(s)* reflects the fact that the *standard cover* do not prescribe those policy terms found in the General Conditions and Policy Excess Terms of conventional insurance policies.

Domicile coverage constraints were identified in 99% of the reviewed Insurer policies, the exception being a travel insurance policy, which did not state any domicile constraints. There was an apparent variance between the domicile-related coverage constraints of insured assets (buildings and chattels) being Australia domicile-specific, and rarely New Zealand domicile-specific, and the domicile constraints of those insurance policies covering personal risk exposures.

Personal risk insurance policies, such as those relating to sickness and accident, consumer credit, and other similar provisions contained in multi-line insurance policies, mainly required the insured person to be an Australian resident. Inquiries put to Insurers regarding the rationale for such coverage constraints drew attention to the fact that Australian permanent residency and domicile permitted the insured to access the Australian Health Insurance Program. This status resulted in any applicable insurance coverage converting to an insurance cover providing benefits where the named insured was not indemnified under the National Health Insurance Program.

Travel Insurance coverage constraints limit this domicile requirement to Australian permanent residents and to individuals who resided in Australia when coverage began. This additional domicile-related requirement effectively ensures that policy insurance coverage for medical related expenses is capped either by a specified time period, or by return to Australia, when the insured falls within the coverage scope of the Australian Health Insurance Scheme, thus capping the on-going exposure of the Insurer program by external insurance cover.

I further noted that coverage constraints under several of the personal risk policies involved interaction between constraints relating to age-related and domicile-related coverage. There were instances identified where policies precluded coverage for persons who were over 70 years old and not permanent residents domiciled in Australia.

Table 2.5. (Element #4) Statistical Analysis

The Table 2.5. (Element #4) chi-square statistic was 7.02 with an exact *p*-value = .2148.

Therefore, there is no significant difference between the insurers for Element #4.

2.4.v. Contract Condition Financial Exclusionary Effect Element # 5

Table 2.6. Contract Condition Financial Exclusionary Effect Element # 5

Policy Part: Insuring Agreement Element: Scope of Cover - Personal Interest not Insured - Proofs	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	31	97%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

Insurable interest coverage constraints were identified in 99% of the Insurer policies reviewed. They existed due to proof of ownership or evidence of identification of an asset for assessment, the absence of which could prejudice the satisfactory finalisation of an insurance claim. A single exception to this general requirement was noted in a motor vehicle insurance policy that did not state any constraint as to interests insured.

A common feature of property insurance policies and personal property insurance coverage under multi-line policies was a requirement relating to minimum proofs of ownership and value by specific categories of insured items such as jewellery, other personal valuables, electronic media collections, works of art sub-categories, bullion, and domestic household and personal electrical equipment items. Most categories had varying proof requirements according to property item value.

There was little variation between proof requirements for home contents, accidental loss, and damage of personal effects away from an insured dwelling and personal effects insured under a travel insurance policy.

Table 2.6. (Element #5) Statistical Analysis

The Table 2.6. (Element #5) chi-square statistic was 3.05 with an exact *p*-value = .3876.

Therefore, there is no significant difference between the insurers for Element #5.

2.4.vi. Contract Condition Financial Exclusionary Effect Element # 6

Table 2.7. Contract Condition Financial Exclusionary Effect Element # 6

Policy Part: Insuring Agreement Element: Scope of Cover - Perils or Activity	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	1	100%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	1	100%
Standard Cover - Sickness and Accident Insurance	1 (Part)	1	100%
Standard Cover - Consumer Credit Insurance	1 (Part)	1	100%
Standard Cover - Travel Insurance	1 (Part)	1	100%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	30	94%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

Both, the *standard cover* and Insurer Policies, specified the individual's insurable activities or the function of the dwelling or chattel by delineating permitted activities and precluded activities, specified and generic, such as "professional sports". Both specification methods exerted a similar effect, namely, to render the activity uninsurable under the policy.

My analysis suggests that such activity coverage constraints were designed to conform with various activity provisions contained in the *standard cover*. This is illustrated under a motor vehicle insurance where cover was denied where the insured vehicle was being used for a race, road trial, test, or contest. Similar insurance policy activity coverage constraints occur in the context of home building and/or home contents insurance where a part of a dwelling is used for a business activity other than that approved by the Insurer.

A public policy activity-based coverage constraint was apparent where property insurance coverage was denied for the consequences of an illegal act, such as using insured property for an illegal purpose or driving a motor vehicle while disqualified, unlicensed, or intoxicated by drugs alcohol. Similarly, personal risk policies such as sickness and accident policies may also preclude coverage for losses arising from participation in specified sporting activities including professional sports.

As with other insuring agreement coverage constraints, multi-line policies also specified activities to which coverage was limited or not provided.

Table 2.7. (Element #6) Statistical Analysis

The Table 2.7. (Element #6) chi-square statistic was 6.158 with an exact *p*-value = .3206.

Therefore, there is no significant difference between the insurers for Element #6

2.4.vii.Contract Condition Financial Exclusionary Effect Element # 7

Table 2.8 Contract Condition Financial Exclusionary Effect Element # 7

Policy Part: Exclusion Element: Property not included under scope of cover	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	1	100%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	1	100%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	1	100%
	Policies Insurer g *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	0	0%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	0	0%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

This risk access denial and condition-related financial exclusionary effect element relates to those instances where insurance claims involving certain items are specifically stated as not being covered under the policy. Property related instances of this exclusionary effect are those occurring where the value of a specific property item exceeds a specified policy threshold, which becomes a policy trigger for a further asset value declaration.

More generic instances of this exclusionary effect element were those relating to aircraft and motor vehicles being excluded from coverage under a domestic home building and/or contents insurance policy. Similarly these insurance policies appeared to impose specific coverage constraints on the type and value limit of sporting equipment insurable under the policy.

Personal risk exposures insured under standard cover or Insurer sickness and accident or consumer credit insurance policies do not appear to fall under the scope of this coverage exclusion, mainly on the grounds that exclusion relates specifically to property.

Standard travel insurance cover and Insurer travel and multi-line insurance related coverage constraints appear to relate specifically to those property specific coverage components that are distinct from personal risk components, such as travel cancellations due to accident or illness.

Table 2.8. (Element #7) Statistical Analysis

The Table 2.8 (Element #7) chi-square statistic was 129.00 with p-value < .0001. Therefore, a significant difference exists among the insurers for Element #7. Sickness and Accident and Consumer Credit insurers were found to be significantly lower than expected.

2.4.viii. Contract Condition Financial Exclusionary Effect Element # 8

Table 2.9. Contract Condition Financial Exclusionary Effect Element # 8

Policy Part: Exclusion Element: Inherent vice or vermin	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	1	100%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	1	100%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	1	100%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	0	0%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	0	0%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

This risk-based access denial or condition-related financial exclusionary effect element relates to instances where property loss relates directly to the tendency of material to deteriorate internally due to the essential instability of constituent components or interaction between components, such as mould, decomposition, fibre deconstruction, spontaneous combustion[153], and the action of vermin and other animals. It was also apparent that this exclusionary effect element was frequently linked to policy coverage exclusions arising from wear and tear, rust, or corrosion

Similar to other instances of exclusionary effects, *standard cover* and Insurer travel and multi-line insurance coverage policy exclusions also related specifically to property policy component coverage, and clearly extended to include other policy components.

[153] More completely described by Kelly and Ball (2001) at 15.0110.55.

Table 2.9. (Element #8) Statistical Analysis

The Table 2.9 (Element #8) chi-square statistic was 129.00 with p-value < .0001.

Therefore, a significant difference exists among the insurers for Element #8. Sickness and Accident and Consumer Credit are significantly lower.

2.4.ix. Contract Condition Financial Exclusionary Effect Element # 9

Table 2.10. Contract Condition Financial Exclusionary Effect Element # 9

Policy Part: Exclusion Element: Extraordinary Hazards - Adverse Selection	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	1	100%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	1	100%
Standard Cover - Sickness and Accident Insurance	1 (Part)	1	100%
Standard Cover - Consumer Credit Insurance	1 (Part)	1	100%
Standard Cover - Travel Insurance	1 (Part)	1	100%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

Unlike some of those exclusionary effect elements previously considered, this condition financial exclusionary effect element was found to apply equally to property and personal risk related exposures. The scope of this exclusionary effect was found to be substantial in the context of both the *standard cover* and the Insurer Policies in all classes.

Property related application of this exclusionary effect appeared to be directly related to lawful deliberate acts or omissions or acts involving reckless disregard for the consequences by the named insured or related parties. The argument may be advanced that such individual or group behaviour may have resulted from the knowledge that insurance could perhaps

provide an indemnity for any resultant financial or pecuniary loss arising from that behaviour.

The exclusionary effect element under personal risk *Standard Cover* (Sickness and Accident, Consumer Credit, or Travel) or under similar Insurer policies (including multi-line policies) related mainly to professional sporting activities, specific flying-related activities, or to a wide range of non-professional sporting activities. Likewise, these *Standard Cover* and Insurer policies contained specific policy exclusions relating to claims resulting from pre-existing medical conditions (PEMC).

The PEMC manifestation of this exclusionary effect in Standard Cover-Travel insurance is illustrated by an exclusion precluding indemnification for financial loss arising from:

> *"a sickness, disease or disability to which a person was subject at any time during the period of 6 months before the contract was entered into and continues to be subject to after that time."*[154]

Similar PEMC coverage exclusions were found in all Insurers Sickness and Accident, Consumer Credit, Travel Insurance policies with the pre-contract exclusion period extending to 12 months in one instance, whereas other (travel) policies mitigated the exclusionary effect by specifying that the PEMC period relate directly to the travel commencement date.

I noted a close interrelationship between PEMC exclusionary effect provisions and earlier exclusionary effect elements involving insured age and domicile, where the PEMC period was extended from 30 days to 90 days for Australian residents 70 years old and older.

Table 2.10. (Element #9) Statistical Analysis

No Table 2.10. (Element #9) chi-square analysis is possible as the Element #9 incidence is 100% for all insurers.

[154] Insurance Contracts Regulation 27 (c)(1)(B).

2.4.x. Contract Condition Financial Exclusionary Effect Element #10

Table 2.11. Contract Condition Financial Exclusionary Effect Element #10

Policy Part: Exclusion Element: Moral and Morale Hazards/Non-Disclosure	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	1	100%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	1	100%
Standard Cover - Sickness and Accident Insurance	1 (Part)	1	100%
Standard Cover - Consumer Credit Insurance	1 (Part)	1	100%
Standard Cover - Travel Insurance	1 (Part)	1	100%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

To some extent, the scope of Element #10 was found to be similar to Element #9, in that it applied equally to property and personal risk related exposures, and substantially in both *standard cover* and Insurer Policies in all classes. However, Element #10 differed from Element #9 in that it relates to a number of statutory obligations on the part of an intending insured to properly disclose materials facts relating to the proposed contract.

The insurance-related impact of moral and/or morale hazards may involve interpretations of the meaning of these terms that may differ from those prevailing in other financial service sectors. In my review, I have used the taxonomy proposed by Baranoff (2004)[155] when considering intangible hazards in contrast to physical hazards. These comprise:

[155] At p.19.

> *"Moral hazards involve dishonesty on the part of an insured and involve conditions that may encourage the insured to intentionally cause a loss for gain. In contrast, morale hazards whilst not involving direct dishonesty, may involve indifference to the fact that the consequences of an act may result in a loss whether that risk exposure is insured or not."*

A review of *the standard cover* provides substantial evidence of moral hazard based risk access denial or condition financial exclusionary effects manifest in denial of coverage for claims arising from a motor vehicle being used for:

> *"an unlawful purpose", or*
> *"not authorised under the law..", or*
> *"under the influence of intoxicating liquor or of a drug".*[156]

Instances of morale hazard may be identified in the *same standard cover* as:

> *"the unroadworthy or unsafe condition of the motor vehicle...being a condition that was known to the insured, at the time of the occurrence of the loss…", or*
>
> *"damage occurring as a result of the insured failing to take steps that are...reasonable for the security of the motor vehicle after accidental damage has occurred to it".*[157]

Similarly structured exclusions may be identified in other property-related *standard cover(s)* relating to personal risk exposures, such as sickness and accident, consumer credit, and to the personal risk coverage components of Travel Insurance *standard cover*.

The review of the individual insurance policies of each Insurer revealed similar but more broad-based exclusionary effects in all policies.

The review also noted that each Insurer's insurance policies conformed to the statutory requirement that intending insureds should be advised of their statutory responsibilities relating to the disclosure of material facts[158], and of adverse consequences arising from non-disclosure.[159] I noted that in all instances of those policies that were accessed, there was clear reference in the supporting documentation to the effect that non-disclosure of material facts could result in either cancellation of the particular insurance policy or denial of a related insurance claim.

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[156] Insurance Contracts Regulations 1985, Regulation 7.(e).
[157] As above, at Regulation 7(f).
[158] Insurance Contracts Act 1984, Section 21.
[159] Insurance Contracts Act 1984, Section 22.

Table 2.11. (Element #10) Statistical Analysis

No Table 2.11. (Element #10) chi-square analysis is possible as Element #10 incidence is 100% for all insurers.

2.4.xi. Contract Condition Financial Exclusionary Effect Element #11

Table 2.12. Contract Condition Financial Exclusionary Effect Element #11

Policy Part: General Conditions Element: Non-compliance with claims reporting - evidence requirements	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

The General Conditions of Insurer insurance policies that were accessed and reviewed clearly referred to the insured's obligations to comply with requirements relating to reporting policy related loss events in accordance with the policy provisions and securing appropriate evidence to confirm the report of that loss event.

The reporting and evidence related requirements appeared to vary according to the scope of the individual policy. They ranged from medical evidence confirming the nature and extent of illness or disability through to police reports relating to property related personal effects loss as a result of theft. The policy documentation established that non-compliance with specified reporting and evidence requirements could result in denial of any related insurance claim.

Table 2.12. (Element #11) Statistical Analysis

No Table 2.12. (Element #11) chi-square analysis is possible as the Element #11 incidence is 100% for all insurers.

2.4.xii. Contract Condition Financial Exclusionary Effect Element # 12

Table 2.13. Contract Condition Financial Exclusionary Effect Element # 12

Policy Part: General Conditions Element: Non-compliance with assistance and recovery requirements	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C , and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	9	100%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	42	100%

The General Conditions of Insurer insurance policies that were accessed and reviewed clearly referred to the insured's obligations to comply with requirements relating to providing assistance to the Insurer in the resolution of any claim arising under the policy, and similarly providing on-going (post-claim settlement) assistance to the Insurer in the recovery of all claims-related costs by way of Common Law right of subrogation.[160]

As with Exclusionary Effect Element #11 considered earlier, the policy documentation made it clear that non-compliance with the specified assistance and recovery support requirements could result in the denial of any related insurance claim. I take issue with this compliance requirement in the context of an Insurer exercising their right of subrogation given that any

[160] As modified by the Insurance Contracts Act 1984, part VIII, Sections 65-68.

such action may commence only following the full and unconditional settlement of the Insured's claim under the relevant policy.[161]

Table 2.13. (Element #12) Statistical Analysis

No Table 2.13. (Element #12) chi-square analysis is possible as the Element #12 incidence is 100% for all insurers.

2.4.xiii. Contract Condition Financial Exclusionary Effect Element #13

Table 2.14. Contract Condition Financial Exclusionary Effect Element #13

Policy Part: General Conditions Element: Non-compliance with other policy specific conditions (dual Insurance/Driver disqualified/Intoxicated	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	29	91%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	36	97%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	5	100%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	4	100%
Insurer A,B,C, and D Policies - Travel Insurance	9	8	89%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	34	81%

The General Conditions of Insurer insurance policies that were accessed and reviewed also contained clear reference to the obligations of the insured to comply with requirements relating to insurance policy specific conditions, such as:

- The insured immediately advising the Insurer of the existence of another insurance policy providing a similar range of indemnities

- Compliance with a requirement to cancel such a policy within 21 days where the policy relates to sickness and accident insurance cover

[161] Kelly and Ball (2001 -) at 9.0090.

- To not permit another person to drive an insured vehicle while intoxicated or under the influence of drugs.

As with Exclusionary Effect Elements #11 and #12 considered earlier, the policy documentation made it clear that non-compliance with the specified requirements could result in denial of any related insurance claim.

Table 2.14. (Element #13) Statistical Analysis

The Table 2.14. (Element #13) chi-square statistic was 6.99 with an exact *p*-value = .2210.

Therefore, there is no significant difference between the insurers for Element #13.

2.4.xiv. Contract Condition Financial Exclusionary Effect Element #14

Table 2.15. Contract Condition Financial Exclusionary Effect Element #14

Policy Part: Excess Element: Standard	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	32	100%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	37	100%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	0	0%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	0	0%
Insurer A,B,C, and D Policies - Travel Insurance	9	8	89%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	41	98%

The review of Insurer insurance policies revealed that all property and financial loss policies contained provisions relating to the payment of a Standard or Basic Excess by the Insured. This policy condition, using terminology relating to domestic "personal lines" insurance, required the insured to pay a portion of the loss as stipulated in the policy, with the Insurer paying the balance of the amount claimed.[162] Similar Claims Excess payment provisions were not identified in personal risk policies including sickness and accident insurance, consumer credit insurance, and in two other specific policies.

As will be noted from contract Condition Financial Exclusionary Elements #15 and #16 that will follow, other specific policy condition related Excess may also apply to claims made under property related policies, the sum of which may amount to a significant condition financial exclusionary effect.

Table 2.15. (Element #14) Statistical Analysis

The Table 2.15. (Element #14) chi-square statistic was 105.09 with and exact p-value < .0001.

Therefore, a significant difference exists among the insurers for Element #14. Specifically, Sickness and Accident and Consumer Credit insurers are significantly lower.

[162] Kelly and Ball (2001-) at 8.0130.1.

2.4.xv. Contract Condition Financial Exclusionary Effect Element #15

Table 2.16. Contract Condition Financial Exclusionary Effect Element #15

Policy Part: Excess Element: Risk Specific (Insured record/Driver record)	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	27	84%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	25	68%
Insurer A,B,C, and D-Policies - Sickness & Accident Insurance	5	0	0%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	0	0%
Insurer A,B,C, and D Policies - Travel Insurance	9	5	56%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	31	74%

Following from Element #14 earlier, other Insurer property insurance policies may require an Excess payment in addition to the Standard or Basic Excess considered earlier.

The first of these additional Excess payments was generally found in those motor vehicle insurance policies that were reviewed. These typically related to insured risk specific issues, such as the insured's driving record, vehicle specifications such as make and model, or applied when a claim resulted from an accident in which someone other than the insured was driving the vehicle. An additional policy Excess may also have been payable in cases where the other person driving the insured vehicle at the time of the accident had not been declared a nominated driver.

Table 2.16. (Element #15) Statistical Analysis

The Table 2.16. (Element #15) chi-square statistic was 24.45 with exact *p*-value < .0001.

Therefore, a significant difference exists among the insurers for Element #15. Sickness and Accident and Consumer Credit insurers are significantly lower.

2.4.xvi. Contract Condition Financial Exclusionary Effect Element #16

Table 2.17. Contract Condition Financial Exclusionary Effect Element #16			
Policy Part: Excess Element: Insured or Driver Specific Age Excess	Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Standard Cover - Motor Vehicle Insurance	1 (Part)	0	0%
Standard Cover - Home Building and/or Home Contents Insurance	1 (Part)	0	0%
Standard Cover - Sickness and Accident Insurance	1 (Part)	0	0%
Standard Cover - Consumer Credit Insurance	1 (Part)	0	0%
Standard Cover - Travel Insurance	1 (Part)	0	0%
	Policies Insurer *(n)*	Element Incidence *(n)*	*Element Incidence as % of Policies*
Insurer A,B,C, and D Policies - Motor Vehicle Insurance	32	28	88%
Insurer A,B,C, and D Policies - Home Building and/or Home Contents Insurance	37	3	8%
Insurer A,B,C, and D-Policies - Sickness and Accident Insurance	5	0	0%
Insurer A,B,C, and D Policies - Consumer Credit Insurance	4	0	0%
Insurer A,B,C, and D Policies - Travel Insurance	9	2	22%
Insurer A,B,C, and D Policies - Multi-line Insurance	42	21	50%

.

In addition to those policy excess payments required under an Insurer policy, the review identified an additional Excess payment required by Insurer motor vehicle insurance policies. This additional Excess specifically related either to the age of the named insured or to person driving the insured vehicle at the time of an accident resulting in a claim under the policy.

This policy Excess payment appeared to be required specifically where the driver (either the insured or another person) involved in the accident was under 25 years of age My analysis identified that this specific age based excess was risk-related and reflected the adverse accident profile of under 25 year old drivers when contrasted with that of most other driver age groups.

Table 2.17. (Element #16) Statistical Analysis

The Table 2.17. (Element #16) chi-square statistic was 53.76 with an exact *p*-value < .0001. Therefore, a significant difference exists among the insurers for Element #16.
The element incidence in the Home Building/Contents was found to be significantly lower, and the Motor Vehicle insurance group was found to be significantly higher than the other groups.

2.5 Chapter Discussion

The analysis of the incidence of contract condition financial exclusionary effect elements across statute-prescribed *standard cover(s)* and insurance policies accessed from the four Insurers suggests that these elements prevail widely across the five principal Australian domestic general insurance classes.

Table 2.17 following, provides a summary of the contract condition financial exclusionary effect Element Incidence for the Statute-Prescribed *standard covers(s)* and the Insurer policies.

Table 2.18. Contract Condition Financial Exclusionary Effect Element Incidence Summary

Element #	Insurer Policies			Statute-Prescribed *standard cover*		
	Policies *(n)*	Element Incidence *(n)*	Element Incidence % of Policies	Cover *(n)*	Element Incidence *(n)*	Element Incidence % of Cover
1	129	64	50%	5	0	0%
2	129	32	25%	5	0	0%
3	129	125	97%	5	3	60%
4	129	127	98%	5	0	0%
5	129	129	100%	5	0	0%
6	129	127	98%	5	5	100%
7	129	120	93%	5	3	60%
8	129	120	93%	5	3	60%
9	129	129	100%	5	5	100%
10	129	129	100%	5	5	100%
11	129	129	100%	5	0	0%
12	129	129	100%	5	0	0%
13	129	116	90%	5	0	0%
14	129	118	91%	5	0	0%
15	129	88	68%	5	0	0%
16	129	54	42%	5	0	0%
Total	2064	1620	78%	80	24	30%

Although the statute-prescribed *standard cover* displayed an overall Element Incidence of 30%, the Insurer policies Element Incidence was 78%.

While analysing the individual Element Incidence, I noted that due allowance should be made for instances in which a "nil" risk-based access denial or contract condition financial

exclusionary element effect incidence reported for these *standard cover(s)* may reflect the fact that the *standard cover* does not prescribe those policy terms found in the General Conditions and Policy Excess Terms of conventional insurance policies.

Table 2.19. below sets out the distribution of risk access-based denial and contract condition-based financial exclusionary effect elements across Insurer policy classes considered in my Review in this Chapter.

Table 2.19. Figure 3.1.i Chapters 3 & 4 Establishing a Financial Exclusionary Effect Constraint Profile – Australian Domestic General Insurance Products
Insurance Contract Structure
Distribution of Exclusionary Effect Elements Incidence across Insurer Policy Classes

Insurer Policy Class	Policies *(n)*	Element Incidence Total	Total possible Element Incidences	Element Incidence % of Policies
Motor Vehicle	32	459	512	90%
Home Building and/or Home Contents	37	473	592	80%
Sickness and Accident	5	59	80	74%
Consumer Credit	4	43	64	67%
Travel Insurance	9	128	144	89%
Multi-line	42	577	672	86%

The Table above indicates a clear distinction between the Exclusionary Effect Element Incidence profile of property-related insurance policies, Motor Vehicle Insurance, Home Building and/or Home Contents Insurance, and those personal risk policies such as sickness and accident and consumer credit. The property insurance average Element Incidence is 85% as compared to the 65% for personal risk policies. Travel Insurance policies and Multi-Line Insurance policies were not considered in the above analysis, as both Class types comprise a mixture of property insurance and personal risk covers.

Although the analysis above provides the impression that the lower Exclusionary Effect Element Incidence of personal risk policies results in a lesser Exclusionary Effect level, a review of the nature of the personal risk exclusionary effect profile indicates that it contains substantial exclusionary effects relating to age, gender, domicile, and occupation, all of which precluded cover over a substantial range of risk exposures.

2.6. Chapter Conclusion

My Chapter Objective was to determine the extent, if any, to which financial exclusionary effects could be identified in Australian domestic general insurance policies subsequent to the implementation of the Australian financial service reform regime in 2004.

My analysis of 129 domestic general insurance policies issued by Australian Insurers with an 81% share of the domestic insurance market in Year 2004-2005 indicated that risk access-based denial and contract condition-based financial exclusionary effect elements could be identified in all the policies reviewed.[163]

My analysis further indicated that a similar financial exclusionary effect profile was also apparent in domestic general insurance policies prescribed by statute as "*standard cover*" that were used to delineate the basic policy conditions contained in Australian domestic general insurance policies, from which, as will be discussed in Chapter Three, derogation was permitted, though only under specific statute-based conditions.

One outcome of my analysis has been to be able to establish a process whereby the scope and conditions of Australian domestic general insurance policies may be systematically reviewed to identify the extent to which condition-based financial exclusionary effects may be classified and compared against relevant indices. In this instance, the index would be the financial exclusionary effect profile of statute-prescribed insurance policy conditions set out in the "*standard cover*" provisions of the Insurance Contracts Act 1984 Cth)

[163] Table 2.18 earlier.

According to my analysis, the variance between the risk access-based denial and contract condition-based financial exclusionary effect profile of Insurer policies, and the lesser incidence of these financial exclusionary effects of the statute-prescribed "*standard cover*", appeared to be caused mainly due to the structure of the "*standard cover*" that did not include the general conditions and miscellaneous provisions contract sections found in all the Insurer policies reviewed. I noted that these requirements, which preceded acceptance by an insurer of a claim under those policies, included multi-part excess payments and claims notification obligations of the insured and the insured's duties. These obligations involved fully cooperating with the insurer and mitigating the potential for a loss to occur and taking requisite steps to contain the actual loss in the post-loss scenario.

Further, I note that during the course of my analysis in Chapter Two, I have identified, analysed, and reported on two areas to which I have made an original contribution relating to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, particularly in the domestic general insurance impact area.

These areas are:

i. The development and implementation of an appropriate analytical framework in order to identify, analyse, and report on the dimensions of *risk-based access denial and contract condition-based financial exclusionary effects* in Australian domestic general insurance policies.

ii. The application of the analytical framework above in identifying and analysing the dimensions of *risk-based access denial and contract condition-based financial exclusionary effects*, and in comparing the financial exclusionary effect profile of the two following entities:

    a. One hundred and twenty nine individual Australian domestic general insurance policies utilised by Australian domestic general insurers holding 81% of the 2004-2005 domestic insurance market, and

    b. Six "*standard cover"* insurance contracts prescribed by the Insurance Contracts Act (Cth) 1984

Chapter Three - Australian Domestic General Insurance Arena: Financial Exclusionary Effects – Development of an Internal Contextual Constraint Profile

Chapter Abstract

In Chapter Two I identified the existence of risk-based access denial and contract condition-based financial exclusionary effects in general insurance policies principally accessed by Australian domestic general insureds and in "*standard cover(s)*", the structure of which underpins the majority of general insurance products accessed by that market sector. Chapter Three seeks to establish the perimeters of the specified financial exclusionary effects and to determine whether they operate without constraint.

I begin by reviewing the output contained in Chapter Two using an analytical framework that focuses on internal contextual factors of general insurance policies that may impact certain aspects of financial exclusionary effects relating to Australian domestic general insurance products and services.

My analysis identified statute-based conditions internal to Australian domestic general insurance policies that may directly impact the scope of specific financial exclusionary effects. This, in effect, establishes a "*constraint profile*" within which such effects generally operate. However, I identified evidence suggesting that these internal contextual factors have been largely ineffectual in constraining those general insurer actions, which may be regarded as being "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" due to their interaction with other statutory provisions, the use of which by insurers may protect them from sanctions.

3.1 Chapter Objectives

This chapter has two related objectives:

1. To identify and report on the existence of the extent of those contextual factors internal to general insurance policies that may constrain the impact of the risk-based access denial and contract condition-based denial financial exclusionary effects identified in the Australian domestic general insurance policies most commonly utilised by domestic insureds.

2. To establish a "constraint profile" that identifies the scope of those constraints identified in Objective 1. above.

3.2 Chapter Introduction

The outcomes identified in Chapter Two suggest that risk-based access denial financial exclusionary effects and contract condition-based financial exclusionary effects may be clearly identified across the Australian domestic general insurance products generally accessed by retail domestic insureds in the Australian domestic general insurance sector, such as *"standard cover(s)"*, which are statute-prescribed. In this chapter, I seek to establish whether there are perimeters within which these financial exclusionary effects would appear to operate, and to determine whether they operate without constraint.

In this chapter and in Chapter Four, I set out to identify those internal and external contextual factors relating to domestic general insurance policies that may impact upon the application of these two manifestations of financial exclusionary effects.

Figures 3.1.i.-vii. below set out the scope and distribution of these two financial exclusionary effects across the Australian domestic general insurance policies examined in Chapter Two[164]. A review of this data suggests that these two financial exclusionary effects are widely distributed across both statute-prescribed "*standard cover(s)*" and domestic insurance covers available from Insurers, which, at the time of my inquiries, collectively held an 81% share of the Australian domestic insurance market.

Figure 3.1.i.	**Chapters 3. and 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products**
Area of Impact: **Coverage Exclusion Examples**:	Insurance Contract Structure Statutory provisions permit variation of "*standard cover*" insurance contract terms and conditions, subject to prior written notice of this right of derogation being provided to the intending insured.

Domestic General Insurance Product	**Insurer Group cover provisions examples as identified in Ch.2 Data**	**Statute prescribed "*standard cover*" provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	**X**[165]	**X**
Motor Vehicle	**X**	**X**
Sickness and Accident	**X**	**X**
Consumer Credit	**X**	**X**
Travel	**X**	**X**

Figure 3.1.ii.	**Chapters 3. and 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products**
Area of Impact: **Coverage Exclusion Examples:**	Individual/Occupation/Activity: Race Personal Medical and hospital expenses excluded for non-Australian permanent residents aged 70+ years

Domestic General Insurance Product	**Insurer Group cover provisions examples As identified in Ch.2 Data**	**Statute prescribed "*"standard cover"* provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	nil	nil
Motor Vehicle	nil	nil
Sickness and Accident	nil	nil
Consumer Credit	nil	nil
Travel	**X**	nil

Note: "X" in the Tables above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact.

[165] Identified from Chapter Two's comparison of "*Standard Cover*" conditions and exclusions against those contained in similar insurance coverage type provided by Insurers.

Figure 3.1.iii.	**Chapters 3. & 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products**
Area of Impact:	Individual/Occupation/Activity: Age
Coverage Exclusion Examples:	Additional claim Excess Driver under 25 years of age (U25) Coverage excluded for U25 Driver Coverage exclusion for unskilled male worker age 60+ years Coverage excluded for insured age 60+ years Coverage limitation travel insured age 70+ years

Domestic General Insurance Product	**Insurer Group cover provisions examples as identified in Ch.2 Data**	**Statute-prescribed *"standard cover"* provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	nil	nil
Motor Vehicle	**X**	nil
Sickness and Accident	**X** **X**	nil
Consumer Credit	**X**	nil
Travel	**X** **X**	nil

Note: "X" in the Table above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact

Figure 3.1.iv.	Chapters 3. & 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products
Area of Impact:	Individual/Occupation/Activity: Disability
Coverage Exclusion Examples:	Medical and hospital expenses exclusion – Pregnancy and Childbirth Pre-Existing sickness, disease, or disability 180 days[166] Coverage exclusion Pre-existing medical condition 30, 60, 90, and 180 days

Domestic General Insurance Product	**Insurer Group cover provisions examples as identified in Ch.2 Data**	**Statute-prescribed "*standard cover*" provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	nil	nil
Motor Vehicle	**X**	nil
Sickness and Accident	**X**	
	X	nil
Consumer Credit	**X**	
	X	nil
Travel	**X**	**X** (PEMC 180 Days)

Note: "X" in the Table above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact.

[166] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 27(1)(i)(B).

Figure 3.1.v.	Chapters 3. & 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products	
Area of Impact:	Individual/Occupation/Activity: Gender	
Coverage Exclusion Examples:	Medical and hospital expenses exclusion – Pregnancy and Childbirth Coverage exclusion Pre-existing medical condition up to 180 days[167]	
Domestic General Insurance Product	**Insurer Group cover provisions examples as identified in Ch.2 Data**	**Statute-prescribed "*standard cover*" provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	nil	nil
Motor Vehicle	**nil**	nil
Sickness and Accident	**X** **X**	nil
Consumer Credit	**X** **X**	nil
Travel	**X**	nil

Note: "X" in the Table above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact.

[167] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 27(1)(i)(B).

Figure 3.1.vi.	**Chapters 3. & 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products**
Area of Impact:	Individual/Occupation/Activity: Activity
Coverage Exclusion Examples:	Use of residential premises for business, trade, or profession [168][169] Use of motor vehicle for racing, rally, hill-climb[170] Injury arising from professional sporting activities[171][172][173]

Domestic General Insurance Product	**Insurer Group cover provisions examples as identified in Ch.2 Data**	**Statute prescribed "*standard cover*" provisions examples as identified in Ch.2 Data**
Home Building, and/or Home Contents	**X**	**X**
Motor Vehicle	**X**	**X**
Sickness and Accident	**X**	**X**
Consumer Credit	**X**	**X**
Travel	**X**	**X**

Note: "X" in the Table above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact.

[168] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 11(d)(iv).
[169] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 15(d)(iv).
[170] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 7(e)(i).
[171] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 19(a)(iv)(E).
[172] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 23(a)(v)(E).
[173] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 27(a)(iv)(E).

Figure 3.1.vii.	Chapters 3. & 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products
Area of Impact:	Individual/Occupation/Activity: Occupation
Coverage Exclusion Examples:	Use of residential premises for business, trade, or profession [174][175] Injury arising from professional sporting activities[176][177][178]

Domestic General Insurance Product	Insurer Group cover provisions examples as identified in Ch.2 Data	Statute prescribed Standard cover" provisions examples as identified in Ch.2 Data
Home Building, and/or Home Contents	**X**	**X**
Motor Vehicle	**X**	**X**
Sickness and Accident	**X**	**X**
Consumer Credit	**X**	**X**
Travel	**X**	**X**

Note: "X" in the Table above indicates that the Chapter Two analysis identified evidence of financial exclusionary effects in this specific area of impact.

[174] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 11(d)(iv).
[175] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 15(d)(iv).
[176] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 19(a)(iv)(E).
[177] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 23(a)(v)(E).
[178] Statute-based exclusion: ICA Regulations (Cth) 1985, Reg: 27(a)(iv)(E).

3.3 Methodology and Inquiries

An analytical framework was established within which to review those contextual factors likely to impact upon the nominated financial exclusionary effects. In this chapter, the framework is applied to internal contextual constraints that may potentially constrain the extent of specific financial exclusionary effects in the Australian domestic general insurance products identified and analysed earlier in Chapter Two. This framework will also be used in Chapter Four to analyse external contextual constraints with a constraint potential similar to those under review in this chapter.

This framework was developed to incorporate the six elements that follow in Figure 3.2. below:

Figure 3.2.	**Chapters 3. and 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products – Statute-Based Constraints? Contextual Factor Analytical Framework**

Framework Element	**Description**
Contextual Factor	Statute and Principle identified
a. Statutory Provision	Statutory provision described and referenced in a footnote.
b. Relevance of Provision as a constraint	Overview of reasons why the selected statutory provision may be regarded as a constraint on the scope and application of either or both risk-based access denial or contract condition-based financial exclusionary effects.
c. Discussion	Consideration of the principle involved, application, and impact, supported by analysis of relevant factors that may positively or negatively impact the potential constraint.
d. Recent Developments	An outline and analysis of developments that have taken place subsequent to the enactment of the particular statutory provision. Included are references to court decisions interpreting the principle's scope, review inquiries, enacted or proposed amendments, including analysis of accompanying Explanatory Memoranda.
e. Current Status	An outline of the current status of the provision under review, including the extent to which either review or proposed statutory modifications are underway, so as to provide an indication of the dynamic status of the factor.
f. Conclusion	A summary of analysis outcomes, emphasising the interaction between the provision under review and other relevant factors. An assessment of the extent to which a "*constraint profile"* may be identified and the relevance of the constraints is provided.

Included in the Figure 3.2. Framework are Elements *d. Recent Developments* and *e. Current Status.* These Elements have been included to include consideration of the significant developments which occurred in the period 2003 to 2011 as illustrated earlier in Figure 2.1. I suggest that the developments which were initiated but not fully concluded in this period are reflective of considerable alterations to government Policy in the areas under review.

The relevance of the analysis in Chapters Three and Four of the organisational or operational context within which an activity is undertaken, follows Johns (2001)[179] and Johns (2006)[180]. The selection of the contextual factors followed principles defined in the recently established International Standards, ISO 73:2009[181], which augment the framework set out in ISO 31000:2009 and 31010:2009.[182]

My selection of this framework was based on the international relevance of the methodology, and also on the direct relevance of the framework to an Australian context. Specifically, I use the framework to underpin Australian corporate risk analysis, initially by way of AS NZS 4360:2004, which, in turn, has formed the basis for the more recent risk management standard AS/NZS - ISO 31000:2009.[183]

My inquiries identified five groups of Australian statutes that appear to exert a direct impact on the development, distribution, and operation of Australian domestic general insurance products. These products are utilised by domestic general insureds, and possibly constrain the impact of contract condition-based financial exclusionary effects, or risk-based access denial financial exclusionary effects in the pre-contractual underwriting and/or risk classification phase. These statutes, which do not represent an exhaustive list, are set out in Figure 3.3 below. In this chapter, I confine my analysis to the potential constraints residing in the first group, namely the principal Australian insurance contract legislation, or the internal context within which the proposed contract/concluded contract functions. Later, in Chapter Four, I address the existence of potential constraints in the external context, within which the proposed contract/concluded contract functions.

[179] At pp.36, 38.
[180] At pp.388-89.
[181] At 3.3.1.
[182] At pp.12-13.
[183] At pp.15-16.

Figure 3.3.	Chapters 3. and 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products – Statute-Based Constraints?

Statute	Stated Purpose of Statute
Insurance Contracts Act 1984 (Cth)	*"An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes".*[184]
Principal Commonwealth Anti-Discrimination Legislation: Racial Discrimination Act 1975 (Cth) Sex Discrimination Act 1984 (Cth) Disability Discrimination Act 1992 (Cth) Age Discrimination Act 2004 (Cth)	*"Australian Human Rights Commission Legislation – Promotion of equality and eliminate stated discriminatory practices"*[185]
Corporations Act 2001 Chapter Seven	*"Object of Chapter:* *The main object of this Chapter is to promote:* *(a) Confident and informed decision-making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and service; and* *(b) Fairness, honesty and professionalism by those who provide financial services; and* *(c) Fair, orderly and transparent markets for financial products; and* (d) *The reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities".*[186]
Australian Securities and Investment Commission Act 2001 (Cth) [ASIC Act]	Objectives include: *"...maintain, facilitate and improve the performance of the financial systems…in the interests of commercial certainty...and promote the confident and informed participation of investors and consumers in the financial system".*[187]
Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 (Cth), and Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010	*"This Act establishes key elements of a single, national consumer law framework and, in doing so, promotes consistency and protections across all Australian Jurisdictions..."*[188] *(and) "will include provisions that address the use of unfair contract terms in consumer contracts*".[189]

[184] Insurance Contracts Act 1984 (Cth) Preamble.
[185] AHRC Year 2008/2009 Annual Report at 1.5 and at 1.5.2 – 1.5.5.
[186] Corporations Act 2001 (Cth) 760A, incorporating into the Act the provisions of the Financial Services Reform Act 2001 (Cth).
[187] ASIC Act 2001 (Cth) Section 1(2) (a) and (b).
[188] House of Representatives Bill Explanatory Memorandum 2009, at p.4.
[189] Ibid, at p.11.

My principal focus in Chapters Three and Four is to present evidence that contests the representation of financial exclusionary effects in relevant literature, namely that financial exclusionary effects are without boundary and may be presumed to apply in a manner that is not conditioned by externalities, such as laws and socio-economic influences.

These selected principal contextual factors underpinning insurance risk-based access denial and contract condition-based denial financial exclusionary effects appear below in the sequence of their review:

Chapter Three – Internal Contextual Factors

- Contract Structure based exclusionary effects

Chapter Four – External Contextual Factors

- Individual/Occupation/Activity, comprising:
  - Race-based exclusionary
  - Age-based exclusionary
  - Disability-based exclusionary
  - Gender-based exclusion
- Financial products and services implied warranties related exclusionary effects
- Financial Services Reforms comprising:
  - Insurance product disclosure related exclusionary effects
  - Alternative Dispute Resolution related exclusionary effects
- Unfair Contract Terms related exclusionary effects

In each instance, I review Reports and Explanatory Memoranda that are available that accompanied the legislation, either at the time of establishment or during the course of subsequent statutory reviews. In all instances of legislative change examined in my inquiries I noted that the Federal Government at the time of the introduction of the proposed legislation, was the Party who introduced the legislation into parliament. Instances were not identified where the proposed legislation was either sponsored by the Opposition Party(Parties) at the time, or was introduced as a Private Members Bill.

I regard the Explanatory Memoranda as providing a clear view of the Sponsoring Government Agency's reasons for the introduction of the legislation, in turn reflecting the intention of that Agency & thus the Policy of the Government relating to the specific content of the proposed legislation. This Policy linkage is discussed in detail later in Chapter Five.

The principal focus of my inquiries was to identify those provisions, the effect of which may preclude the existence or operation of either general insurance contract condition-based financial exclusionary effects or, in those instances where an insurance contract had not yet been concluded, instances of risk-based access denial financial exclusionary effects, as earlier identified.[190]

I have confined my inquiries to insurance contractual or underwriting related issues, rather than extending inquiries to broader overt, covert, or vicarious consumer rights related issues, including such as those relating to unconscionable conduct on the part of financial service providers, including authorised general insurers.

Two procedural matters determined the overall dimensions of my review:

1. I have confined my review in this chapter to Commonwealth statutes relevant to the Australian domestic general insurance sector. The initial scoping out and development of the framework for this chapter considered a broader review of the relevant legislative provisions drawn from all nine principal Australian jurisdictions, comprising:

Federal (Commonwealth)	New South Wales
Australian Capital Territory	Victoria
Northern Territory	Tasmania
Queensland	South Australia
	Western Australia

However, further analysis identified an issue arising from the constitutional right of Commonwealth insurance and financial services legislation prevailing over that of a State or Territory. This interacted with the fact that access to subordinate legislation is usually restricted to individuals either domiciled in that jurisdiction, or to those with access through place of employment or other specific entitlements. The absence of consistent data showing the annual distribution of general insurance products/claims/rejected claims across the nine principal jurisdictions compelled me to confine my review to the Commonwealth statutes indicated.

2. Initially, I considered undertaking my review of the statutes on an individual or group basis, rather than on the basis of consideration of a number of relevant provisions in the

[190] At 15ff.

individual statutes. Given the principal focus of these statutes and an apparent consistency in provisions in individual statutes, I believed I was justified in grouping the four anti-discrimination statutory provisions.

However, I had to discard this option on discovering two important details about the statute:

i. Two of the statutes had been the subject of recent detailed reviews, which produced recommendations for restructuring some of the provisions I examine in this chapter[191].

ii. Two other statutes contained specific insurance exemptions, which differed from those insurance related exemptions contained in a another anti-discrimination statute.

Following up on the identification of the objectives of the specified Australian statutes in Figure 3.2, Figure 3.3 below provides the statutory provisions I believe have potential impact:

[191] Sex Discrimination Act 1984 (Cth) and Disability Discrimination Act 1992 (Cth).

Figure 3.4.	Chapters 3. and 4. – Establishing a Financial Exclusionary Effect Constraint Profile: Australian Domestic General Insurance Products – Statute-Based Constraints? – Statutory Provisions

Statutory Provision	Purpose of Provision
Insurance Contracts Act 1984 (Cth) Section13	Duty of Utmost Good Faith
Insurance Contracts Act 1984 (Cth) Section14	Manifestation of the Duty of Utmost Good Faith
Insurance Contracts Act 1984 (Cth) Section 15	Insurance contract judicial relief confined to Act provisions
Insurance Contracts Act 1984 (Cth) Section 35	"*standard cover*"
Insurance Contracts Act 1984 (Cth) Section37	"Unusual Terms"
Racial Discrimination Act 1975 (Cth) Sections 5 and 7	Racial Discrimination
Sex Discrimination Act 1984 (Cth)	Sex Discrimination: Section 41 Exemptions
Disability Discrimination Act 1992 (Cth)	Disability Discrimination: Section 46 Exemptions
Age Discrimination Act 2004 (Cth)	Age Discrimination: Section 37 Exemptions
ASIC Act 2001 (Cth) Sections 12ED(1) & 12ED(3)	Financial products and services: Implied Warranties - Duty of care and skills and services to be reasonably fit for purpose
Corporations Act 2001 (Cth), Part 7.9,	Product Disclosure Statements, Sections 1010A-1022C
Corporations Act 2001 (Cth), Part 7.6.	Alternative Dispute Resolution procedures Section 912A
Australian Consumer Law 2010 (Cth)	Consumer Protection

The outcome of the analysis of each contextual factor element is accompanied by a summary as in the example below in Figure 3.5., indicating the extent to which constraints are considered to exist on the scope and application of the specific financial exclusionary effects under review:

Figure 3.5. Example: Constraint Profile: Risk based access denial and Condition-based denial financial exclusionary effects

Contextual Factors/Factor Elements	Financial Exclusionary Effect	Constraint Very Unlikely	Constraint Unlikely	No Opinion	Limited Constraint Likely	Constraint Very Likely
Factor – Contract Structure						
i. Duty of Utmost Good Faith ICA 1984 Section 13	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

3.4. Analysis

3.4.i. Insurance Contracts Act 1984 (Cth) – Duty of Utmost Good Faith

a. Statutory Provision

Each party to an insurance contract is required to act towards the other with utmost good faith in respect of any matter...related to the contract.[192]

b. Relevance of Provision as a constraint

The Australian statutory provision reflects common law provisions whereby both the insurer and the insured are regarded as having a duty to act with utmost good faith in their duties to each other. This duty, on the part of the insurer, consists in explaining to an insured/intending insured the scope of the insurance indemnity in the context of coverage limit and uninsured liability limits.

[192] ICA 1984 (Cth) Section 13.

Insurer reliance on an ambiguous policy exclusion, or implied terms, may be a breach of this basic contract requirement, resulting in the ambiguity being interpreted in favour of the insured. Australian case law suggests that an insurer found liable under these circumstances may even have indemnity-based costs awarded against them rather than the usual ordered alternatives.[193]

c. Discussion

In their Final Report, the Australian Law Reform Commission (ALRC) recommended that the principle of utmost good faith should be restated as a contractual duty between the parties in an insurance contract, breach of which would constitute a breach of the proposed Australian Insurance Contracts Act.[194]

The Explanatory Memorandum accompanying the introduction of the Insurance Contracts Bill into the Australian Parliament makes it clear that the ALRC Report Recommendations relating to the duty of utmost good faith were not fully accepted by the Australian Government.

The Explanatory Memorandum's preferred view states that:

> *"The extent and application of the duty of good faith should be clarified to ensure that parties are aware of their obligations...The clause will ensure that insurers...are careful in drafting their policies and that they act fairly in relying on their strict terms."*
>
> *In addition, the clear statement of the duty will make it unnecessary to give the courts a general power to review unfair contractual terms".*[195]

The introduction of an implied term of a duty of utmost good faith in every insurance contract, without statutory sanction for non-compliance, indicates that the parties of an insurance contract are relying on presumed acceptance of the need for procedural fairness when addressing contract-based issues arising from within a general insurance contract.

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[193] Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd (2002) NSWSC 1006, at p.1025.
[194] ALRC 20 (1982), at p.51.
[195] Explanatory Memorandum Clause 13, at Paragraph 35.

I have difficulty accepting this recommendation as a solution to a problem the ALRC had clearly identified in their Report, represented by the following data drawn from the ALRC Report.

Table 3.4. General Insurance Claims Data: August – December 1977[196]

	9491	**100%**
Claims Rejected: Breach of policy condition	374	3.94%
Claims Rejected: Loss not covered by the policy	7457	78.57%
Sub-Total: Claims Rejected		
Contract condition-based exclusionary effect	7831	82.51%
Claims Rejected: Other Categories (4)	1660	17.49%

This data suggests that contract condition-based exclusionary effects accounted for over 82% of the reasons insurers used to reject claims during the stated period which was prior to the finalisation of the ALRC Report and the subsequent enactment of a number of the Report recommendations in the Insurance Contracts Act 1984 (Cth).. In turn, this points to on-going systemic issues between insurer and insured regarding the scope of the cover and the insured's grasp of the implications of interaction between policy conditions and/or exclusions on availability of coverage.

The ALRC analysis of the variety of types of policy terms for the basic general insurance policies accessed by domestic insureds indicates that "*Model Policies"* had been progressively introduced into the sector. However, insurers resorting to complex terminology outnumbered policies containing common terminology.[197] Nonetheless, the ALRC provided no evidence substantiating this finding, other than suggesting the need for compliance with an implied term relating to a largely unspecified obligation, what the ICA Review (2004) subsequently termed *"systemic issues".*[198]

[196] ALRC 20 Report, Table 2, Clause 19.
[197] ALRC 20 Report, Clauses 55–68.
[198] Final Report on Second Stage, at p.52.

d. Recent Developments

In 2003, the Australian Government appointed a Review Panel to undertake an examination of the Insurance Contracts Act 1984 (Cth) to inquire into and report on the effectiveness of the Act in achieving its Objectives.[199] The Review was also requested to advise:

> *"Whether any amendments to the Act are required...and whether there are any deficiencies in the Act, such as aspects of the relationship between insurers and insureds that are not adequately covered."*[200]

The Review Panel placed significant emphasis not only on undertaking a detailed examination of the actual performance of the ICA 1984 (Cth), but also on seeking public submissions on a number of principal areas of concern, thus following the scope of the earlier terms of reference to the Australian Law Reform Commission in 1976.

The Review Final Report (2004)[201] noted that while the provisions relating to utmost good faith and the industry internal and external dispute resolution facilities authorised by statute to interpret policy related disputes[202] can assist individual consumers, they

> "*cannot address systemic issues, and there are indications of systemic problems with unfair terms in insurance contracts*".[203]

The Review Panel accordingly recommended that:

> "*1.2 A breach of the duty of utmost good faith should both be a breach of an implied contractual term and a breach of the IC Act, although the breach of the IC Act would not be an offence and would attract no penalty*".[204]

Subsequently, in 2007 the Federal Government introduced draft amendments to the Insurance Contracts Act 1984 (Cth).

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[199] Review of the Insurance Contracts Act 1984 (Cth).
[200] Ibid, at iii.
[201] Final Report on Second Stage: Provisions other than Section 54, June 2004, at p.52.
[202] Corporations Act 2001 (Cth), s912A(2).
[203] Final Report on Second Stage, at p.52.
[204] Final Report on Second Stage: Recommendations, at xi.

The Exposure Draft Bill 2007 included amendments to provisions relating to the duty of utmost good faith, converting the duty to a contract condition and stating:

> *"2. A failure by a party to a contract of insurance to comply with the provision implied in the contract...is a breach of the requirements of this Act".*[205]

It bears noting that the proposed legislation did not accept Review Panel Recommendation 1.2 in its entirety, in that the legislation did not incorporate that part of the proposed amendment providing for a breach of the implied contract term that was not an offence, and which did not attract a penalty, to be regarded as a breach.

In late 2007, this proposed legislation lapsed on the prorogation of the Australian Parliament at the end of the Parliamentary Term, with the result that the existing ICA 1984 (Cth) provisions regarding the duty of utmost good faith remained unchanged.

e. Current Status

In March 2010, proposed amendments to the Insurance Contracts Act 1984 (Cth) were introduced to the Australian Parliament.[206] One amendment inserted a subsection into Section 13 of the Act. The purpose of the amendment is to regard a breach of the implied term relating to the duty of utmost good faith by a party to an insurance contract as a breach of the Act.[207]

Although the proposed amendment refers to an "*insurance contract*", it is unclear whether the proposed amendment relates to a concluded insurance contract, which was once in force, or follows the conventional position by which parties to an insurance contract have certain pre-contractual duties of disclosure at which time they are required to comply with the implied term. The Explanatory Memorandum accompanying the proposed amendments provides some clarification as to their purpose. It identifies the issue of having to rectify factors leading to provisions regarding the duty of utmost good faith becoming ineffective. The Explanatory Memorandum states:

[205] Exposure Draft Insurance Contracts Amendment Bill, 2007, Schedule 1, Part 1.1 and 2; Insurance Contracts Amendment Bill, Explanatory Memorandum, Ch. 2, Cl 2.5.
[206] Insurance Contracts Amendment Bill 2010.
[207] Proposed Section 13 (2)-(4).

> "*2.3 Under the current law, parties to a contract of insurance may enforce compliance with this implied duty of utmost good faith through private legal action. However, this may present too great an expense for some parties and does not provide long-term solutions to systemic breaches of utmost good faith committed over time*".[208]

It is important to note here that the terms used in the Explanatory Memorandum extract, specifically in the reference to the need to address "*systemic issues*"[209], paraphrase views from the Review Report 2004 mentioned earlier.

Later in 2010 this proposed legislation lapsed on the prorogation of the Australian Parliament, again with the result that the existing ICA 1984 (Cth) provisions regarding the duty of utmost good faith remains unaltered.

f. Conclusion

I suggest there is a fundamental question that needs to be addressed at the conclusion of each of my inquiries in this chapter. That question seeks evidence of factors that may constrain the adverse impact of contract condition-based financial exclusionary effects and risk-based access denial, their associated precursor. Having said that, in this instance, the evidence to confirm the existence and effective operation of any such a constraint remains unavailable. In fact, there is clear evidence to indicate the following:

i. The Australian Law Reform Commission inquiries, which resulted in the Australian Insurance Contracts Act 1984, clearly identified and discussed the extent of policy contract exclusions and terms in 1977. The Commission incorporated policy exclusions and conditions, regarded as "convention and practice", into the proposed "*standard cover*", which are those "*Prescribed Contracts*" subsequently identified in Section 35(2) of the Insurance Contracts Act 1984 (Cth).

ii. The Australian government almost completely ignored the ALRC-recommended outcome regarding the breach of the duty of utmost good faith as being a breach of contract.

[208] Explanatory Memorandum, paragraph 2.3 at p.9.
[209] Final Report on Second Stage: Provisions other than Section 54, June 2004, at p.52.

iii. This resulted in the Insurance Contracts Act regarding the duty to be an implied term in all such contracts. I believe that this modification effectively nullified the possible impact of a potential sanction-supported perimeter containing the influence of either risk-based access denial or contract condition-based financial exclusionary effects.

iv. The 2004 ICA 1984 (Cth) Review recommended that duty be amended to a contract condition, the breach of which would not be an offence or attract a penalty. The draft amending legislation incorporated the recommended inclusion of duty as a contract condition, the breach of which would be an offence, and would attract a penalty.

v. The fact that the then pending legislation was allowed to lapse in 2007 resulted in the 1984 statutory provisions remaining unchanged, again with a similar situation occurring in 2010. As a result the overall position remains unaltered.

I therefore regard the impact of policy and statutory developments regarding the duty of utmost good faith as exerting minimal, if any, constraint on the current scope of contract condition-based and risk-based access denial financial exclusionary effects, resulting in the constraint profile below. The reference below to *"Section 15 effect"* is explained later in this chapter.

Figure 3.6.i	Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #1						
i. Duty of Utmost Good Faith ICA 1984 Section 13	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

3.4.ii. Insurance Contracts Act 1984 (Cth) – A Party to an insurance contract may not rely on a contract provision, if to do so would be a breach of the duty of utmost good faith

a. Statutory Provision

The general scope of the duty of utmost good faith impresses upon insurers that they cannot rely on a contract exclusion or condition, if by doing so they would be in breach of that duty.[210]

b. Relevance of Provision as a constraint

The impact of a contract exclusion or condition may not become apparent at the inception of the contract. It is probable that the adverse impact of the contract term may only become apparent as a result of the insured making a claim for indemnity under the contract for the financial consequences of an occurrence, which the insured considers to be covered by the contract.

[210] ICA 1984 (Cth), s14.

An insurer's reliance on the possible complex interaction between contract condition and exclusions may be biased against the insured even if the contract terminology is not unusual.

c. Discussion

The Australian Law Reform Commission Report[211] clearly emphasised that the possibility of action against an insurer for breach of their duty under the proposed s14 was:

> *"Sufficient to encourage insurers to draft policies carefully and act fairly in strictly enforcing policy terms".*

The Australian Law Reform Commission then introduced the argument that, in light of the scope of the proposed s14, it was unnecessary for insurance contracts to be subject to a facility for judicial review of unfair contract terms.[212]

The Insurance Contracts Bill Explanatory Memorandum placed considerable emphasis on the insurer being required to satisfy their duty of utmost good faith by ensuring that the insured is provided with an understanding of the scope and limitations of the policy at the inception of the contract.[213] More recently, two Australian legal decisions have reinforced the adequacy of such action to address the obligation imposed by the duty.[214]

d. Recent Developments

From its own inquiries and submissions, the 2004 Report of the Review on the Insurance Contracts Act 1984 (Cth) stated that the interaction between Section 13 and Section 14 of the Act had appeared to insufficiently encourage insurers to act fairly in drafting contracts and enforcing their terms.[215] The Review subsequently recommended that Section 14 be expanded to clearly reflect the fact that the rights and obligations of the parties are subject to

[211] At Clause 51.
[212] Again at Clause 51.
[213] Explanatory Memorandum Clause 37.
[214] Speno Rail Maintenance Australia Pty. Ltd. V Hamersley Iron Pty. Ltd. (2000) WASCA at 15 and Dumitrov v Sc. Johnston & Son Superannuation Pty. Ltd. and Anor, [2006] NSWSC 1372 at paragraphs 25 and 65.
[215] Clause 6.15 at pp.51, 52.

a range of provisions of the Insurance Contracts Act, whether by express contract terms or otherwise implied.[216] The Review further considered that:

> *"The Sections 13 and 14 have the potential to be used by insureds to deal with insurer conduct that might otherwise be dealt with under statutes dealing with unfair contracts or unconscionable conduct".*[217]

The resultant exposure draft of the amending legislation extended the basic principle of Section 14 to cover provisions that may be regarded as being either generally implied or imposed on an insurance contract by the provisions of the Insurance Contracts Act.[218] The Explanatory Memorandum accompanying the draft legislation confirmed this intention.[219]

As with the proposed amendments to Section 13, the draft legislation lapsed on the prorogation of the Australian Parliament at the end of the Parliamentary Term in late 2007, resulting in the existing ICA 1984 (Cth) provisions relating to this facet of the duty of utmost good faith remaining unchanged.

e. Current Status

In March 2010, proposed amendments to the Insurance Contracts Act 1984 (Cth) were introduced to the Australian parliament.[220] Included among the proposed amendments was one inserting a new Section into the following Section 14 of the Act. The purpose of the amendment was to grant ASIC explicit power to exercise the Commission's powers under Chapter 7 of the Corporations Act 2001 (Cth), in which an insurer has failed to comply with the duty of utmost good faith in handling or settling a claim or potential claim under a contract of insurance.[221]

I view the proposed amendments relating to Section 14 as largely addressing the perceived lack of effectiveness of the existing Section 14 provisions. The proposed Insurance Contracts Act provision specifically granted ASIC authority to regard a breach of ICA provisions as a breach of the insurer's duties attached to their Australian financial services licence. I suggest that providing ASIC with this authority under the Act created a medium

[216] Clauses 6.15 and 6.16 at p.54.
[217] Above at 6.16.
[218] Schedule 6, at p.20.
[219] At p.8.
[220] Insurance Contracts Amendment Bill 2010.
[221] Proposed Section 14A(1).

whereby evidence of "*systemic breaches*" referred to earlier may be a measure of non-compliance by the insurer with their responsibilities under the Corporations Act 2001 (Cth). Although the Explanatory Memorandum suggested that isolated breaches would not be expected to result in severe penalties under that Act, ASIC's proposed new powers to related non-compliance with the duty of utmost good faith requirements with licensee compliance responsibilities must be regarded as major progress in providing the Utmost Good Faith provisions with a compliance profile of greater relevance than ever before.

My comments above are reinforced by the potential impact of an additional amendment which was proposed to the Insurance Contracts Act 1984 (Cth) in 2010 by increasing the powers of ASIC under the Act.[222] This proposed amendment granted ASIC the power to intervene in any matter arising under the Act, in a manner similar to the powers that ASIC has under the provisions of the Corporations Act 2001 (Cth).[223]

I regard it significant that the proposed harmonisation of the intervention powers of this regulator under the Insurance Contracts Act 1984 (Cth) and the Corporations Act 2001 (Cth) was being achieved in a way that substantially broadens ASIC's scope. The proposed broad-based intervention power under the Act, when considered in the context of the proposed additional powers to be granted through Section 14A, suggests that the resultant enhanced powers of ASIC would also be able to address issues arising from unconscionable or unfair acts, principally by insurers during the pre-contract underwriting process. It follows that these enhanced powers when enacted, may be regarded as having the potential to address risk-based access denial financial exclusionary effects, in addition to the contract condition-based financial exclusionary effects manifest during the operational phase of the contract.

As with the proposed amendments to Section 13 of the ICA discussed earlier in this chapter, Later in some time later 2010 this proposed legislation lapsed on the prorogation of the Australian Parliament, again with the result that the existing ICA 1984 (Cth) provisions regarding the reliance upon Section 14 faith remains unaltered.

[222] Proposed Section 11F.
[223] Section 1330.

f. Conclusion

My earlier analysis in 3.4.i. of the potential for the duty of utmost good faith to act as a constraint on the impact of contract condition-based financial exclusionary effects indicated there had been minimal impact. I suggest that implementation of the proposed Section 14A and enforcement of the provisions by the regulator (ASIC) had the potential to exert a major positive effect in addressing the failure of the other provisions in the earlier Sections 13 and 14 and effectively secure compliance with this fundamental duty.

I further suggest that the proposed broadening of ASIC's powers, through the proposed amendment introduced into parliament in March 2010 would have permitted ASIC to intervene unilaterally in any matters arising under the Insurance Contracts Act 1984 (Cth), is to materially enhance the Act's potential to secure the objectives that were initially envisaged, but not achieved, by the Australian Law Reform Commission. This was mainly due to what I regard as having established unrealistic compliance goals without providing for the means of enforcement.

I suggest that the proposed expansion of the broad-based intervention powers granted to ASIC under the proposed Section 11F of the Act, when considered in the context of proposed additional powers to be granted by way of Section 14A that correspond to similar provisions in the Corporations Act 2001 (Cth), would have possessed the potential to address issues arising from unconscionable or unfair acts, principally by insurers during the pre-contract underwriting process. If this is the case, it follows that the proposed enhanced powers may be regarded as having the potential to address risk-based access denial financial exclusionary effects, in addition to the contract condition-based financial exclusionary effects manifest during the operational phase of the contract. The reference below to *"Section 15 effect"* is explained later in this chapter.

Figure 3.6.ii	Constraint Profile: Risk-based access denial and Contract Condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #2						
ii. Non reliance on adverse terms ICA 1984 Section 14	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

3.4.iii Insurance Contracts Act 1984 (Cth) – State, Territory, or other Federal legislative based judicial relief for harsh, oppressive, unconscionable, unjust, or inequitable insurance contract provisions shall not extend to those insurance contracts which fall within the scope of the Insurance Contracts Act 1984 (Cth)

a. Statutory Provision

The Insurance Contracts Act 1984 (Cth) Section 15 provides that, under specified circumstances, a contract of insurance cannot be made the subject of (judicial) relief under any other (Cth) Act (State, Territory, or Ordinance) by judicial review of a contract on the grounds that it is harsh, oppressive, unconscionable, unjust, unfair, or inequitable. This statutory provision resulted in the Insurance Contracts Act 1984 (Cth) becoming the principal source of statutory power capable of granting judicial relief from the impact of the above factors on an insurance contract.[224][225]

[224] Kelly and Ball (2001), at 10, 315.10.
[225] Refer also to Tarr, Tarr et al (2009) at 81.

b. Relevance of Provision as a constraint

The application of this provision in its capacity as a constraint on the existence and application of financial exclusionary effects is however subject to the restriction of having to exist within the framework provided by the Insurance Contracts Act 1984 (Cth).

c. Discussion

Other statute-based consumer-focused measures providing judicial relief, on the grounds that contract conditions are harsh, oppressive, unconscionable, unjust, unfair or inequitable, have been directly affected by this Section by way of being excluded from any application to an insurance contract covered by the Act.

There appears to be a certain degree of harmonisation between Federal legislation relating to harsh, oppressive, unconscionable, unjust, unfair, or inequitable terms contained in insurance contracts. As will be seen later in this chapter and later in chapter four, provisions in the ASIC Act 2001 (Cth) exclude insurance contracts from the implied warranties imposed on financial services providers of exercising appropriate "*duty of care and skill*" and providing services that are "*reasonably fit for purpose"*.[226]

Similarly, insurance contracts are excluded from the scope of the *"unfair contract terms"* provisions of the Australian Consumer Law (Cth) (2010), as a result of the provisions of Section 15 of the Insurance Contracts Act 1984 (Cth).[227]

As a result, the Section draws attention to the adequacy, or otherwise, of the existing provisions of the Insurance Contracts Act 1984 (Cth) in addressing harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurance contract terms and conditions, including those embodying risk-based access denial or contract condition-based financial exclusionary effects. Of particular relevance has been the interpretation by the Federal Court

[226] ASIC Act (2001) ss12ED(1)(a) and 12ED(3). These provisions follow those more generally applicable provisions of the Trade Practices Act 1974, s74(3)(b).
[227] Although the Bill before Federal Parliament does not need to address this aspect, the necessity for compliance with s15, ICA 1984 was clearly intended. 2nd Reading Speech, Senate Hansard (26 October 2009) at 7078.

that Section 15 of the Insurance Contract Act 1984 (Cth) only applies to "*concluded"* contracts, indicating that the insurance contract must actually exist.[228]

Accordingly, while this interpretation will result in judicial relief from contract condition-based financial exclusionary effects falling within the scope of Section 15, pre-contract risk-based access denial to insurance coverage by way of adverse underwriting decisions will not fall within the limitation imposed by Section 15. Consequently, it follows that intending insureds may be entitled to judicial relief under other statutes to address harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurance contract terms and conditions utilised in the pre-contract underwriting process, including the ASIC Act 2001 (Cth) mentioned earlier, and the recently enacted Australian Consumer Law.

Although Tarr, A.A., (1989) [229] had previously expanded this argument to include pre-contract and post-contract unconscionable dealings by other non-contracting parties, I suggest that the scope of that argument is restrictive. It does not reflect that at the pre-contract phase of negotiations, the intending insured is not a party to a contract on the simple grounds that at that time, the contract, despite being proposed, did not exist.

Support for my argument is provided by the interpretation of a disability discrimination insurance related dispute by the Federal Court that will be considered later in Chapter 4..[230] Of relevance to the current discussion is that the Court on that occasion granted relief to an intending insured for a breach of the provisions of the Australian Disability Discrimination Act 1992 resulting from the insurer's underwriting decision to refuse to grant multi-cover travel insurance to the intending insured. Access to non-Insurance Contract Act based relief would not have been available had the litigated issue arisen subsequent to the insurance contract being concluded and being in place.

[228] Australian Consumer and Competition Commission v IMB Group Pty Ltd *(in liq)* (2003) FCA 402 at p.445.
[229] 106 at p.115.
[230] QBE Travel Insurance v Basanelli (2004) FCA 396.

As indicated earlier in this chapter, the Australian Law Reform Commission considered the interaction between proposed Section 13, Section 14, and Section 15 to be adequate in achieving a balance between isolating the insurance contract from the adverse impact of the application of perhaps inappropriate general commercial and consumer contractual remedies, while providing insureds with adequate protection of their interests by clear imposition of a duty of utmost good faith.[231]

I have previously discussed the limited extent to which evidence is available confirming that interaction between Section 13 and Section 14 has been effective. I now suggest that the limitation previously identified has been magnified by the restrictions imposed on the scope of Section 15.

It may be reasonable to argue that the majority of issues involving harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurance related matters are likely to be found in *"concluded"* insurance contracts. However, even in that restricted area, and as indicated earlier in this chapter, there is little evidence indicating any significant judicial activity. Conversely, I note that the level of non-litigated insurance disputes, arising from lack of contract coverage or contract exclusion, which have entered the ASIC mandated General Insurance Internal Dispute Resolution (IDR) and associated External Dispute Resolution (EDR) processes, have significantly increased in the period 2005-2006 to 2008-2009.

Thus, in partial conclusion, I suggest that the now determined scope of Section 15[232] has limited the interaction between Section 13, Section 14, and Section 15 from becoming an effective constraint against circumstances within which financial exclusionary effects may exist.

d. Recent Developments

Earlier, I noted that the 2004 Report of the Review into the Insurance Contracts Act 1984 (Cth) had concluded that interaction between Sections 13 and 14 of the Act had appeared to insufficiently encourage insurers to act fairly in drafting contracts and enforcing their terms.[233]

[231] ALRC 20, Paragraph 51.
[232] By way of the outcomes in ACCC v IMB (2003) and Basanelli (2004).
[233] Clause 6.15 at pp.51, 52.

The Review recommended that Section 13 and Section 14 be expanded to clearly reflect that the rights and obligations of the parties are subject to a range of provisions of the Insurance Contracts Act, whether by express contract terms or otherwise implied.[234]

The Review Panel undertook a detailed analysis of the effectiveness of Section 15 of the Insurance Contracts Act 1984 (Cth) and the implications of any modifications to that Section, including the repeal of the Section. While the Review again took into account the findings of the Australian Law Reform Commission 1982 Report regarding the intention of what became Section 13, Section 14, and Section 15 of the Insurance Contracts Act 1984 (Cth), the Review Panel sought submissions for whether the statute-based constraint contained in Section 15 that precluded access to other forms of statutory relief against harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurance related issues, remained a valid limitation.

The Review set out the arguments received against the retention of the Section 15 based restrictions, and arguments in favour of retaining the restrictions, summarised as follows.[235]

Arguments <u>against</u> retention of Section 15 which restricts access to non-ICA 1984 based judicial relief

a. Insurance contracts should not be immune from relief available from unfair contract terms laws at State, Territory, or Federal levels.

b. The experience between 1984 and 2003 had indicated that the provisions of Sections 13 and 14 of the Insurance Contracts Act 1984 (Cth) have been largely ineffective in achieving "fairness" on the part of insurers in contract drafting and interpretation of contract terms.

c. As indicated earlier in this chapter, while existing insurance-related Internal and External Dispute Resolution processes are effective in addressing individual disputed issues, these processes are ineffective in persuading insurers to address more systemic unfair contract terms related issues.

[234] Clauses 6.15 and 6.16 at p.54.
[235] Clauses 6.8 and 6.9 p.52.

Arguments <u>for</u> retention of Section 15 which restricts access to non-ICA 1984 based judicial relief

a. The specific legislative provisions, such as Section 15, take into account the structural and commercial complexities associated with insurance underwriting, contractual processes, and the extent of the dependency of the Australian insurance market on overseas reinsurance support.

b. While the experience between 1984 and 2003 had indicated that the provisions of Sections 13 and 14 of the Insurance Contracts Act 1984 (Cth) have been largely ineffective in persuading insurers to act fairly in contract drafting and interpretation of contract terms, insureds should nonetheless be encouraged to make recourse to existing dispute resolution facilities, as being distinct to them being provided access to additional remedies.

c. The existence and continued functional and cost-effective operation of the Australian insurance industry internal and external insurance dispute resolution facilities[236] is preferable to encouraging the use of litigation to resolve consumer (insured) related insurance disputes.

The Review Panel, while noting the polarisation of views on the repeal or retention of Section 15, also considered developments that were taking place at a national policy level regarding the introduction of statutory provisions relating directly to the broader issue of "*Unfair Contract Terms*".

The Review Report recommended that a decision on the status of Section 15 be deferred and revisited when national Australian consumer legal processes were introduced.

c. Current Status

As a result, the Review Report did not make any recommendations on this matter, the current outcome being that the scope and potential application of Section 15 remains unchanged.

[236] As now required by ASIC – Corporations Act (2001) (Cth) s912A.

In March 2010, the Australian Treasury issued an Options Paper inviting public submissions on:

> "*The management of issues associated with the prevention of consumers of standard form insurance contracts from suffering detriment as a result of harsh or unfair terms contained in the contract*".[237]

The Options Paper identified five potential options available to achieve the above policy objective:

1. Maintain Status Quo: The Objective would be achieved by relying on the proposed amendments to existing insurance statutory provisions.[238]

2. Option A: Permit the *Unfair Contract Terms* provisions of the ASIC Act 2001 (Cth) to apply to insurance contracts.

3. Option B: Extend the provisions of the Insurance Contracts Act 1984 (Cth) to include unfair contract term provisions similar to those provided by the ASIC Act 2001 (Cth).

4. Option C: Enhance the existing remedies available under the Insurance Contracts Act 1984 (Cth), while retaining the existing constraint imposed by Section 15 of that Act, precluding action for judicial relief being brought under other statutes.

5. Option D: "Encourage industry self-regulation to better prevent the use of unfair contract terms by insurers".[239]

Currently, there has been no indication about the time-frame within which this Review will move forward.

[237] "Unfair terms in Insurance Contracts Options Paper", Australian Treasury, Canberra, March 2010, at p.6.
[238] Proposed s14A Insurance Contracts Act 1984 (Cth).
[239] Options Paper at p.7.

I argue that revival of interest in this issue should not be considered in isolation, but in light of other factors. I am referring specifically to the implications of the preclusion, by Section 15 of the Insurance Contracts Act 1984 (Cth), of the application of the recently established Australian Consumer Law to insurance contracts. As I will discuss later in Chapter Four, the emergence of insurance contract related issues within this context which could be regarded as directly related to the policy objective on which the Options Paper seeks comment.[240]

d. Conclusion

I suggest that the retention of Section 15 effectively precludes access to other sources of remedies for the adverse effects of contract condition-based financial exclusionary effects on the basis of harsh, oppressive, unconscionable, unjust, unfair, or inequitable insurance policy (contract) terms or exclusions.

However, there appears to be little evidence indicating that interaction between Sections 13, 14, and 15, and the preservation of judicial relief to those avenues available within the Insurance Contracts Act, has resulted in relief from unfair insurance contract terms or conditions. I note that my views above must also be conditioned by the fact that Section 15 applies only to insurance contracts that have concluded and that are in place.

In this way, intending insureds retain access to other sources of statutory relief to address condition-based financial exclusionary effects resulting from pre-contract, risk-based access denial financial exclusionary effects, conditional on the external statute actually permitting access for "insurance" related matters.

Finally, I note that, unlike the inaction of the 2003 Review of the Insurance Contracts Act 1984 (Cth) on the status of Section 15 of that Act, a recent Australian Treasury review proposes action be taken to address systemic issues arising from the effect of Section 15 of the Act, effectively excluding the application of recent consumer protection legislative initiatives in addressing the implication of harsh or unfair contract terms contained in insurance contracts.

[240] Chapter Three, Part 3.3.3. xiii.

It is significant that the current review seeks to address systemic issues relating to harsh or unfair terms contained in insurance contracts in a dynamic manner by considering a wide range of options.

This stands in contrast to earlier initiatives, which appeared to accept the views of sectional interests in the insurance industry for whom change in existing processes was neither desirable nor necessary.

Figure 3.6.iii	**Constraint Profile: Risk-based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #3						
iii. Judicial relief for insurance contracts ICA 1984 Section 15	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

3.4.iv. Insurance Contracts Act 1984 (Cth) – Variations to Statute-prescribed "*standard cover*" are permitted and are only effective if the insured was clearly informed in writing of the variance prior to the insurance contract coming into effect.

a. Statutory Provision

Section 35 of the Insurance Contracts Act 1984 (Cth) permits derogation from the terms of the statute-prescribed insurance contracts categorised as "*standard cover*"[241] only where the insured was advised in writing of the derogation prior to the insurance contract being concluded.

[241] ICA 1984 Part V – The Contract Division 1 – Standard Cover.

b. Relevance of Provision as a constraint

In effect, Section 35 permits an insurer to market insurance policies which offer less cover than the relevant standard cover prescribed by the Insurance Contracts Act, as set out in the Insurance Contracts Regulations 1985 (Cth) mentioned earlier in this chapter. This right of derogation is conditional, and is constrained by the extent of variance from the standard cover to be clearly set out, and for the insured to be:

(i) clearly informed of this fact,
(ii) which is required to be in writing.

This requirement potentially imposes a constraint on the Insurer to introduce additional condition-based financial exclusionary effects through policy terms, conditions, or exclusions not included in the statute-prescribed "*standard cover*".

I suggest that the dimensions of the impact of "*standard cover*" in the Australian domestic general insurance sector are illustrated by the following sector data, in that insurance contracts falling within this statute-defined class, accounted for 93% of all Australian domestic general insurance contracts in 2004-2005. The insurance policy wordings reviewed in Chapter Two were drawn from this period.

Table 3.5	**Australian Domestic General Insurance: New Business and Renewals, Claims and Rejected Claims 1 July 2004 to 30 June 2005[242] - Section 35 ICA (Cth) 1984 "*standard cover*"**			
Insurance Classes	**Total New Business and Renewals as at (30/6/2005**	**% All Contracts**	**Total Claims**	**Total Rejected Claims**
Prescribed Contracts - standard cover – Motor	10,301,950	39%	1,515,836	3,251
Prescribed Contracts - standard cover – Home Building and/or Contents	11,293,152	43%	919,975	22,313
Prescribed Contracts - standard cover - Travel	1,975,325	7%	144,203	5,003
Prescribed Contracts - standard cover Consumer Credit	610,966	2%	14,219	1,379

Prescribed Contracts - standard cover – Sickness and Accident	506,269	2%	48,752	1,419
Total Prescribed Contracts: "*standard cover*"	**24,687,662**	**93%**	**2,642,985**	**33,365**
Non-Prescribed Contracts Other Domestic Insurance Classes	1,858,152	7%	194,205	9,717
Total Domestic Insurance Classes	**26,545,814**	**100%**	**2,837,190**	**43,082**

c. Discussion

The Australian Law Reform Commission regarded compliance with the two prior conditions attaching to permitted derogation as placing the intending insured in a pre-contract position that would allow them to make informed decisions regarding the suitability of the modified contract provisions to their particular circumstances. The Commission's emphasis was clearly on providing the opportunity for a decision to be made on the basis of an *"informed choice".*[243]

The Commission appeared not to consider substantive the fact that statute-permitted derogation otherwise allowed the inclusion of unlimited number of onerous policy terms, conditions, and exclusions into the proposed policy.
The Commission considered that insurance *"market forces*" would limit the impact of any adverse variance to the provisions of the "*standard cover*".[244] The Commission did not offer sector related market-based evidence to support such a presumption.

As discussed earlier in Chapter Two, available data indicates that there was a major adverse variance between the extent of those contract condition-based financial exclusionary effects identified in the "*standard cover*" and those identified in contemporary Insurer policy wordings of those domestic general insurance products falling within the scope of the statute prescribed "*standard cover*". This, in turn, suggests that the actual consequences of Insurers exercising their derogation rights under Section 35 of the Insurance Contracts Act 1984 (Cth) may not have met the Commission expectations set out in the paragraph above.

However, I suggest that the situation described above should not be regarded as being unexpected. The Commission makes it clear that their inquiries into the necessity for

[243] ALRC 20 Paragraph 69-70
[244] ALRC 20 at Paragraph 70.

"*standard cover*" and their scope involved making use of existing insurance policies, drawn from three sources:

a. The Insurance Council of Australia.[245]

b. *"Model Policies*" or pro-forma insurance policies then in use, and available from a number of unidentified general insurers.

c. Insurance policies then available in the market place, collected in an ad hoc manner from general insurers.[246]

Tarr, J.A., (2002) states the "*standard Cover*" were structured by the Commission with,

"account... taken not only of the insured's likely expectations based on the relevant class or description of insurance, but also of expectations based on the common course of insurance practice in the relevant area".[247]

[245] An Australian general insurance industry association established in 1975, and whose members comprise at least 83% of all authorised Australian general insurers (2009 data).
[246] ALRC 20, Paragraphs 69-76.
[247] Tarr (2002) at p.130, referring to ALRC 20, Paragraph 69; and Tarr, Tarr, and Clarke (2009) at p.192.

The Commission's account of the nature of the policy information identified and subsequently utilised in the development of the "*standard Cover*" indicates that the Commission did not regard insurance policy conditions, exclusions, and excess condition cost levels, prevailing at the time, as being either unusual or unwarranted. The fact that these policy terms and conditions actually embodied what could now be regarded as contract condition-based financial exclusionary effects might be discounted by the Commission, on the grounds that they reflect the industry custom and practice prevailing at that time.

It is important to note here that the literature that has considered the role and impact of Section 35 "*standard cover"* provisions has occasionally done so from a consumer (insured) perspective. Tarr, A. A.,(1989), for instance, devotes attention to consumer (insured) perspectives when considering the impact of the effect of the derogation discretion made available to insurers, arguing that this renders ineffective the concept of "*standard cover*".[248] Subsequently, Tarr (2001) and Tarr (2002) pursue this theme, taken up by Tarr et al. (2009).[249]

This literature appears to suggest that the concept of "*standard cover*" possesses desirable attributes normally associated with the codification of certain types of customs and practices. This theme is subsequently developed through the argument that anything permitted (such as the right of derogation) to detract from the focus of "*standard Cover*" and the logic of the certainty can be attributed to such codification, a view supported by Birds (1999).[250]

I suggest that reference to the Australian Law Reform Commission Report on Insurance Contracts clarifies the issue above. The Law Reform Commission clearly states the purpose of their proposal, that is to establish "*standard cover*", yet permitting derogation from those provisions.

[248] Tarr (1989) at p.119.
[249] Tarr (2001) at p.4; Tarr (2002) at pp.127-132; and Tarr, Tarr, and Clarke (2009) at pp.191-92.
[250] Birds (1999) at p.209, in Cartwright, P., ed , (1999)," Consumer Protection in Financial Services".

The Commission states:

> *"77. Drafting Standard Cover*
>
> *Two points require emphasis.*
>
> *First, It (The Commission) has made no attempt to state standard cover in "simple" language.*
>
> *The wording of standard cover is not directed to insureds but to insurers. It is they who must inform the insured of any derogation from standard cover.*
>
> *Secondly, the introduction of standard cover would not impose upon insurers an obligation to rephrase their policies in the terms adopted in the relevant legislative schedule."*[251]

Based on this reference, it is possible to suggest that the "*standard cover*" legislative provisions were not intended to provide clarity regarding insurance policy terms, and thus contract certainty, to the intending insured. Rather, the provisions were intended to impose an obligation on the insurer to clearly inform the intending insured of the fact that the insurer has exercised their right of derogation. It appears that Tarr (2001) and Tarr (2002), may have not referred to the to this important Commission reference in their analysis.

The Insurance Contracts Act 1984 (Cth) makes it clear that the obligation of the insurer to clearly inform a prospective insured of the impact of the exercise of the right to derogate, relates to "prescribed contracts".[252] Section 34 of the Act identifies a "prescribed contract" as a "contract of insurance".

I suggest that, following the argument raised earlier, Section 15 of the Insurance Contracts Act 1984 (Cth) shall apply only to "concluded" contracts of insurance, and a similar interpretation may be applied to "prescribed contracts"[253]. I therefore suggest that where the "prescribed contract" is yet to be "concluded", restrictions placed on access to alternative sources of judicial relief do not apply. Consequently, the prospective insured may have access to statutory remedies other than those available under the Insurance Contracts Act 1984 (Cth).

[251] ALRC 20 77, at pp.47-48
[252] S35(1)(a).
[253] Australian Consumer and Competition Commission v IMB Group Pty Ltd *(in liq)* (2003) FCA 402 at p.445.

As indicated earlier, I note that the recent Australian Consumer Legislation does not make reference to the exclusion of coverage of that legislation over contracts of insurance, apparently relying on the presumed all-encompassing scope of Section 15 of the Insurance Contracts Act 1984 (Cth). I suggest that this view is defective, in that it has not taken into account the restriction imposed on the scope of Section 15 by the decision in 2003 in the IMB Pty Ltd *(in liq)*.[254], that the Section only applies to concluded contracts. I suggest that this restrictive interpretation on the scope of Section 15 has resulted in the imposition of a major constraint on risk-based access denial and contract condition-based financial exclusionary effects, in turn, enabling disadvantaged prospective insureds access to other forms of judicial relief for the consequences of harsh, oppressive, unconscionable, unjust, unfair, or inequitable terms.

In partial conclusion, I summarise my discussion above as follows:

i. The purpose of the "*standard cover*" provisions, and the associated right of the insurer to derogate from these provisions, was to provide the intending insured with powers to make an 'informed choice" regarding the suitability of a proposed insurance policy to their particular needs.

ii. The Law Reform Commission appears to rely on the operation of "market forces" to constrain the unconscionable use of the right of derogation by insurers. A review of the scope of contract condition-based financial exclusionary effects in later insurance policies falling within the scope of the "*standard cover*" suggests that such a constraining influence has been largely ineffectual.

iii. That ii. above has occurred may be attributable to the fact that the Commission drafted the proposed "*standard cover*" in a manner embodying prevailing industry custom and practice, including policy terms, conditions and exclusions, which, on review have been found to contain substantial evidence of contract condition-based financial exclusionary effects. This process has embedded existing financial exclusionary effects in the "*standard cover*".

iv. A central point of view that has developed in recent literature over the past two decades argues that the right of derogation granted to insurers to depart from the provisions of the

[254] Ibid.

"*standard cover"* has impacted insureds so adversely as to render their rights largely ineffectual.

v. The above argument appears not to have taken into consideration that the Commission made clear from the outset that "*standard cover*" were not intended for prospective insureds. Rather, they were directly relevant to the insurer.

vi. Available evidence indicates that the Section 35 related "*standard cover*" have not served to constrain the extension of contract condition-based financial exclusionary effects due to two factors:

a. "*standard cover*" embody contract condition-based financial exclusionary effects acceptable to prevailing industry custom and practice.

b. The statute permitted right of derogation provided to insurers enabled insurers to introduce further contract condition-based financial exclusionary effects without constraint, conditional on compliance with conditions attaching to the permitted derogation.

vii. Restrictions on the scope of Section 15 of the Insurance Contracts Act 1984 (Cth), in confining judicial relief to that Act, provides prospective insureds, who were adversely impacted by insurer actions, with the opportunity to seek relief from consumer protection legislation, such as the ASIC Act 2001 (Cth) and the recently introduced Australian Consumer Law.

viii. Figure 3.6.iv. below highlights the effect of insurers exercising their rights of derogation, under Section 32 (5) of the Insurance Contracts Act (Cth) 1984, to vary the terms and conditions attaching to their insurance policies providing domestic insurance coverage, which falls within the scope of those "*standard cover*" as prescribed by the Act.

Examples set out in the Figure have been drawn from insurance policies constituting the base data analysed in Chapter Two. The figure compares a range of provisions contained in the "*standard cover*" and examples of the variation with provisions resulting from exercising the right of derogation.

The scope of the *"standard cover"* provisions included:

i. Specific inclusions, such as the provision of an indemnity for property losses arising from natural perils, such as floods.

ii. The absence of a provision, such as the exclusion of age or illness related conditions or age or disability exclusions including medical conditions pre-existing at the inception of insurance cover (pre-existing medical conditions [PEMC], or those arising during the policy term, such as otherwise insured losses arising from childbirth or pregnancy.

iii. One exclusion contained in the *"standard cover"* included Travel Insurance provisions set out in the Regulations that preclude insurance indemnity under the prescribed policy terms for losses arising from a pre-existing medical condition [PEMC] that had occurred within 6 months of the occurrence.

The scope of the derogation effect in the examples provided range across the three types of *"standard cover"* provisions described above, including:

- Removal of the policy inclusion (such as "flood"), replacing that provision with a specific exclusion, as described in i. above.

- Inserting an exclusion where the "standard cover" does not make a provision, such as in ii. above, as illustrated by insertion of either a policy condition (age) exclusion or an exclusion precluding indemnity for losses arising from childbirth or pregnancy.

- Variation of an exclusion contained in the *"standard cover",* such as extending the scope of the pre-existing medical condition [PEMC] exclusion from the existing 6 months to 12 months.[255].

I suggest that the above provides an indication of the extent to which the insurer right of derogation from the "*standard cover*" has established a statute-based medium for the inclusion of contract condition-based financial exclusionary effects.

[255] As prescribed by Regulation 27(c)(i)(B), Insurance Contracts Regulations (Cth) 1985.

Figure 3.6.iv.	Section 35(2) ICA (Cth) 1984 - Derogation Effect	
Prescribed Contract: "standard cover" Provision	**Insurance Policy Provision Examples**	**Derogation Effect**
Motor Vehicle Insurance: Nil Age condition or exclusion[256]	Under 25 driver age based additional excess[257] Age 75 driver exclusion[258]	Exercise of derogation right includes age-related policy term
Home Buildings and/or Contents Insurance:[259] Flood cover included	Flood cover excluded[260]	Event in ICA Prescribed Contract removed by exercise of right of derogation by insurer
Sickness and Accident Insurance: [261] Nil Age exclusion Nil Childbirth and pregnancy exclusion	Age 65 years cover exclusion[262] Age 60 years cover exclusion[263] Childbirth and pregnancy exclusion[264]	Exercise of derogation right includes age and childbirth/pregnancy cover exclusions
Consumer Credit Insurance:[265] Nil Age exclusion Nil Childbirth and pregnancy exclusion Nil Pre-existing medical condition (PEMC) exclusion	Over 60 years age exclusion[266] Childbirth and pregnancy exclusion[267] PEMC 12 months exclusion[268] PEMC excluded[269]	Exercise of derogation right includes age, childbirth/ pregnancy and PEMC cover exclusions
Travel Insurance:[270] Nil Age exclusion Nil Childbirth and pregnancy exclusion Nil Pre-existing medical condition (PEMC) exclusion	Over 75 years age exclusion[271] Non Australian citizen PEMC exclusion[272] Non Australian resident over 70 years PEMC exclusion[273] PEMC including childbirth and pregnancy exclusion[274]	Exercise of derogation right includes age, childbirth/pregnancy, PEMC and residency status cover exclusions

[256] ICA (Cth) 1985, Regulation 7.
[257] Insurer B, Policy #43, at p.27.
[258] Insurer C, Policy #59 at p.3.
[259]ICA (Cth) 1985, Regulations 10 and 14.
[260] Insurer A, Policy #9 at 26; Insurer B, Policy #34 at 15; Insurer B, Policy 37 at 23; Insurer C, Policy #64 at pp.5, 7.
[261] ICA (Cth) 1985, Regulation 18 and19.
[262] Insurer C, Policy #74 at p.2.
[263] Insurer D, Policy #99 at p.41.
[264] Insurer C, Policy #75 at p.35.
[265] ICA (Cth) 1985, Regulation 22 and 23.
[266] Insurer B, Policy #41 at p.6; Insurer B, Policy #48 at p.40.
[267] Insurer D, Policy #78 at p.5.
[268] Insurer D, Policy #78 at p.5.
[269] Insurer D, Policy #99 at p.41.
[270] ICA (Cth) 1985, Regulation 26 and 27.
[271] Insurer A, Policy #16 at p.7.
[272] Insurer D, Policy #118 at p.17.
[273] Insurer C, Policy #72 at p.2.
[274] Insurer C, Policy #69 at pp.2, 4.

a. Recent Developments

The 2004 Report of the Review into the Insurance Contracts Act 1984 (Cth) devoted considerable time to an analysis of the effectiveness of the "*standard cover*' and, more particularly, to the impact of the right of derogation permitted to insurers to vary policy wordings from those outlined in prescribed wordings. The Review identified a theme in a number of subsequent submissions mentioned above, namely that the right of derogation impacted the "*standard cover*" terms to such an extent that the logic underpinning the establishment of "*standard cover*" had become largely ineffective.

The Review considered the impact of a then recent court decision relating to the purpose of Section 35 and the right of insurers to derogate from the terms of the relevant "*standard cover*". That decision[275] examined the requirements of Section 35 in the context of the policy exclusion relating to "Flood" and the meaning of that term. In that instance, the court maintained that the insurer, having made available a copy of the proposed policy containing the policy exclusion, had adequately "clearly informed" the prospective insured of the existence of the exclusion. The Review also noted the significance of the statement by the court that providing a copy of the proposed policy to the prospective insured constituted providing adequate notice in most instances.

The Review further noted that the decision in the case was subsequently reaffirmed by a later decision, in terms that once again indicated that providing a copy of the policy containing the terms, conditions and exclusions, resulting from the exercise of the right to derogate from the "*standard cover*", was adequate evidence of the insurer "clearly informing" the prospective insured of the extent of the variation. Here, the variation related to the exclusion of property damage resulting from "flood"[276], which is an included risk under the relevant "*standard cover*".[277]

[275] Hams v CGU Insurance Ltd (2002) NSWSC 273.
[276] Marsh v CGU Insurance Ltd t/as Commercial Union Insurance (2004) NTCA 1.
[277] As set out in Insurance Contracts Regulations 1985 (Cth) Reg.14(a)(xi).

I suggest that the two examples above illustrate a relevant fact, that courts will accept derogation by Insurers from the terms of prescribed "*standard cover*". This is the case even in instances where derogation results in an exclusion of policy coverage for losses arising from a cause initially covered under the "*standard cover*". This, effectively, permits the addition of a contract condition-based financial exclusionary effect that has adversely impacted upon the insured consumer.

The Review also considered the desirability of the harmonisation of terms between the provisions of two statutes of relevance to those *"Retail Clients"* seeking to access domestic general insurance products.

The provisions of the first statute are those which relate to the disclosure of policy terms and conditions, under Sections 35 (and 37) of the Insurance Contracts Act 1984 (Cth). The provisions of the second statute are those which are relevant to those intending insureds as *"Retail Clients*" under the provisions of the Corporations Act 2001 (Cth). Chapter 7. The Review recommended that consistency be achieved between provisions in the two statutes by the replacement of "*clearly informed*" requirement in sections 35 and 37 of the Insurance Contracts Act 1984 (Cth) with the more precise phrase "*clear, concise and effective manner*" contained in the Corporations Act..[278]

No doubt this recommendation emphasises the need for consistency in terms used in notifying policy terms and conditions to prospective insureds. However, it does not exert a direct impact on the structure of additional financial exclusionary effects, other than to require that these additional policy terms, conditions, or exclusions are more clearly communicated.

One must presume that this requirement was intended to ensure that acceptance or rejection of a policy containing these additional terms remains at the discretion of the prospective insured. Good intentions notwithstanding, such a discretion has limited value, given that domestic general insurance policies are typically contracts of adhesion, in which individual terms are non-negotiable. In other words, the prospective insured's choice is limited to either accepting or rejecting the Insurer's offer in its entirety.

[278] Review Recommendation 5.1.

The Review indicated a clear understanding of the structural issues embedded in the "*standard cover*", in that they included conditions and exclusions, the effects of which may fall within the scope of condition-based financial exclusionary effects. However, the Review expressed doubts about the extent to which the existing "*standard cover*" should be amended, and identified a need to avoid unintended consequences.[279] Review Recommendation 5.2 stated:

> *"The standard cover regulations should be updated and modernised following a suitable process of consultation with stakeholders including the insurance industry and consumer representatives".*[280]

In the context of the Objectives of Chapter 3, I suggest that this Review recommendation may be regarded as having recognised, both, the necessity for change in current unrestricted autonomy of Insurers to derogate from the "*standard cover*", and the uncertainty around constraining effects implicit in the outcome of any such change in the program.

The Review also considered the inter-relationship between Section 35 of the Insurance Contracts act 1984 (Cth) and the Product Disclosure Statement regime under the Corporations Act 2001 (Cth). Significantly, it also considered, and I view this in light of my analysis of Section 15 of the Insurance Contracts Act 1984 (Cth), remedies that may become available to prospective insured due to the adverse impact of policy terms which may have been unfair, unconscionable, and inequitable. This issue and the constraining influence potential on the scope of access (risk based) and contract condition-based financial exclusionary effects will be addressed later in this chapter.

d. Current Status

The review recommendations were incorporated in proposed amendments to the Insurance Contracts Act 1984 (Cth) by the Insurance Contracts Amendment Bill 2007. The Explanatory Memorandum accompanying the Bill went to considerable lengths to discuss the Review Recommendations, indicating acceptance of the proposal to harmonise terms relating to the provision of notice to prospective insureds under the Act and provisions relating to "*Retail Clients* "under the Corporations Act 2001 (Cth).

[279] Review Paragraph 5.40, p.46.
[280] Review Paragraph 5.40, p.46.

However, the amending legislation did not develop the Review Recommendation 5.3, presumably on the grounds that the Recommendation could be implemented by executive action, rather than necessitating a statutory requirement.

As with the proposed amendments to the Act as discussed earlier, the draft legislation lapsed on the prorogation of the Australian Parliament at the end of the Parliamentary Term in late 2007, resulting in the existing ICA 1984 (Cth) provisions remaining unaltered.

e. Conclusion

I argue that four fundamental conclusions result from my analysis of the extent to which the provisions of Section 35 of the Insurance Contracts act 1984 (Cth) act as a constraint on the extension of contract condition-based financial exclusionary effects:

1. The Australian Law Reform Commission regarded the "*standard cover*" prescribed by Section 35 as embodying the custom and practice of the Australian general insurance industry prevailing at the time of the Commission's inquiries undertaken prior to 1982. Evidence of custom and practice was drawn mainly from three nominated industry sources of policy data. Embedded within the custom and practice were a considerable number of contract condition-based financial exclusionary effects.

2. Insurers were permitted the right of derogation from the terms of the prescribed "*standard cover*", which the Commission regarded as reference points for Insurers, rather than an ineffective attempt at codification. This theme was developed in some subsequent literature.

3. The Commission's presumption that unspecified "market forces" would constrain insurers from introducing major variances in the terms of the prescribed "*standard cover*" as references points has been regarded as unfounded. This was examined in Chapter Two where I identified the extent to which contract condition-based financial exclusionary effects were widely distributed throughout the reviewed policy documents.

4. Identification of a clear link between Section 35 "prescribed contracts" and "contracts of insurance", in the context of "concluded contracts", and when considering the scope of Section 15 of the Insurance Contracts Act 1984 (Cth), considerably lessens restriction of access to judicial relief. This permits prospective insureds access to other sources of judicial relief to seek redress for the adverse

impact of risk-based access denial financial exclusionary effects, and thus provides an effective potential constraint on the area of impact of such exclusionary effects.

Figure 3.6.v.	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #4						
iv. "*ctandard cover*" Derogation ICA 1984 Section 35	RBAD				Nil Section 15 ICA effect	
	CCBD				Nil Section 15 ICA effect	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

3.4.v. Insurance Contracts Act 1984 (Cth) – Provisions permitting an insurer to rely on an unusual term in a contract of insurance other than prescribed contracts ("*standard cover*") are effective only if the insured was clearly informed in writing of the provision prior to the insurance contract coming into effect.

a. Statutory Provision

Section 37 of the Insurance Contracts Act 1984 (Cth) permits insurers to rely on unusual contract terms in insurance contracts other than prescribed contracts ("*standard cover*"), only where the insured was advised in writing of the existence of that term prior to the conclusion of the insurance contract.

b. Relevance of Provision as a constraint

Compliance with the requirements of Section 37 enables the insurer to utilise a provision containing an unusual term containing an additional contract condition-based financial exclusionary effect in a proposed insured policy.

This is conditional on the insurer having clearly informed the prospective insured in writing of the provision's effect. The insurer providing the prospective insured with a copy of the proposed policy is regarded as satisfying this requirement.

Non-compliance with the statutory provision precludes the insurer from relying on that term against the insured. Should the contract term include a contract-condition based financial exclusionary effect, such as a broad-based cover exclusion, non-compliance may potentially constrain the insurer.

c. Discussion

On a superficial level, this provision may be regarded as being comparable to those contained in Section 35 of the Insurance Contract Act 1984 (Cth) relating to "*standard cover*" considered earlier. However, the application of the provision differs from that of Section 35. As discussed earlier, an Insurer may derogate from the provisions of a "*standard cover*" by informing the intending insured in writing of the derogation prior to the insurance contract coming into effect. Providing a copy of the proposed policy wording containing the amended terms constituted adequate notice.

Non-Compliance with the Section 35 notice of derogation requirements resulted in the insured being entitled to an indemnity under the policy for a "minimum amount" arising out of losses resulting in a "prescribed event" as defined under the ICA 1984 (Cth) Regulations.[281] In effect, this lack of notice of derogation automatically invokes statutory provisions providing the Insured with a level of policy protection. In the latter context, it should be noted that "prescribed events" under the ICA Regulations may, in fact, provide considerably broader policy indemnity than that provided by the policy, had the required notice of derogation been provided properly.

An example of the latter occurs in the context of Household Building and Contents "*standard cover*", where "prescribed events" under the Insurance Contracts Regulations 1985 (Cth) include "flood".[282] As indicated in Chapter Two, coverage for losses arising from "flood" was excluded under all similar policies, necessitating notice of derogation to be provided for this exception to prevail.

[281] ICA Regulations 1985 (Cth) Regulations 5-28.
[282] ICA Regulations 1985 (Cth), Regulations.10(a)(xi) & 14(a)(xi).

My analysis suggests a different process is involved in the application of Section 37, in that there are no relevant benchmarks regarding "prescribed events" or "minimum amounts" against which a policy term may be compared in order to determine whether or not the particular term is "unusual". I regard the provisions of Section 37 as satisfactorily addressing this interpretation problem by providing the insured:

> *"with a document containing the provisions, or the relevant provisions of the proposed contract or otherwise*".[283]

As indicated earlier in this chapter regarding Section 35 of the Insurance Contracts Act 1984 (Cth), Australian courts have regarded the simple fact of providing the intending Insured with a copy of the proposed contract wording as satisfying the statutory requirement.[284] However, I note that the Australian courts had no qualms imposing an equally clear but perhaps more onerous duty on an insured to establish that the contract term is *"unusual"*.[285]

As I will note later in Chapter Four regarding the impact of the Financial Services Reforms, the mandated requirement that a Product Disclosure Statement be provided to an intending insured also addresses the Section 37 requirements of the Insurance Contracts Act 1984 (Cth), though principally where the product is directed to a "*Retail Client"* under those provisions[286]

In partial conclusion, I regard the provisions of Section 37 of the Insurance Contracts Act 1984 (Cth) as constraining an Insurer's reliance on unusual terms or conditions in an Insurance Contract. The fact that reliance on an unusual policy term or condition may apply only where prior notice has been provided indicates the existence of a constraint on the application of contract condition-based financial exclusionary effects. Such a constraint is easily avoided by providing the requisite notice.

In other words, the opportunity for an intending Insured to prepare the proposed contract form rarely exists.

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[283] ICA 1984 (Cth) Section 37.
[284] Hams v CGU Insurance Ltd (2002) supra.
[285] Dumitrov v SC Johnson and Son Superannuation Pty Ltd and Anor, [2006] NSWSC 1371 Paragraphs 11-18, 83.
[286] Corporations Act 2001 (Cth) Part 7.9 ss1010A ff.

d. **Recent Developments**

As with inquiries relating to the "*standard cover"* the 2004 Report of the Review into the Insurance Contracts Act 1984 (Cth) devoted considerable time to analysing the effectiveness of the provisions of Section 37 of the Act relating to the use of unusual terms in insurance contracts other than those that fell under the "standard cover" category.

The Review again identified a continuing theme in a number of submissions following "*standard cover",* in that the provisions of Section 37 relating to the impact of unusual terms in insurance contracts were again regarded as being largely ineffective. Similar to Section 35, the Review drew attention to the need for the terms and conditions of insurance contracts to be expressed such that the intending insured was "clearly informed" about the scope of insurance coverage including exclusions and conditions impacting the same.

The Review drew a clear connection between issues relating to application of Section 37 and Section 35 related issues. In particular, the Review noted that Section 37 indicated that the requisite notification of the existence of unusual insurance contract terms could be addressed by providing the intending insured with a copy of the proposed policy wording.[287]

As mentioned earlier, the Review also considered the desirability of the insurer harmonising terms relating to the disclosure of policy terms and conditions to the intending insured, under Section 37 and Section 35 of the Insurance Contracts Act 1984 (Cth), and the responsibilities under the provisions of the Corporations Act 2001, Chapter 7. In so doing, the Review recommended consistency between the replacement of the term "clearly informed" with the more precise phrase "clear, concise, and effective manner".[288]

The Review also supported the practical relevance of achieving consistency in insurer disclosure responsibility, prescribed by the Insurance Contracts Act, relating to Product Disclosure under the provisions of the Corporations Act, Chapter 7. In other words, the Review recommended that a Product Disclosure Statement satisfying the disclosure requirements of the relevant parts of the Corporations Act (2001) Chapter 7[289] would also satisfy the specific disclosure requirements of Sections 35 and 37 of the Insurance Contract Act

[287] Australian Consumer and Competition Commission v IMB Group Pty Ltd *(in liq)* (2003) FCA 402 at p.445.
[288] Review Recommendation 5.1.
[289] Corporations Act 2001 (Cth) Part 7.9 ss1010A ff.

e. **Current Status**

As with the proposed changes to Insurance Contracts Act 1984 (Cth) considered earlier, which included Section 35, the Review recommendations were incorporated in proposed amendments to the Insurance Contracts Act 1984 (Cth) through the Insurance Contracts Amendment Bill 2007. The Explanatory Memorandum accompanying the Bill went to considerable lengths to discuss the Review Recommendations, indicating acceptance of the proposal to secure harmonisation between terms relating to the provision of notice to prospective insureds under the Act and provisions relating to *"Retail Clients"* under the Corporations Act 2001 (Cth). However, the amending legislation did not advance the Review Recommendation 5.3 discussed above, presumably on the grounds that the Recommendation could be implemented by executive action rather than imposing a statutory requirement.

As for proposed amendments to the Act as discussed earlier, the draft legislation lapsed on the prorogation of the Australian Parliament at the end of the Parliamentary Term in late 2007, resulting in the existing ICA 1984 (Cth) provisions remaining unaltered.

f. Conclusion

The conclusions below follow from my analysis of the extent to which the provisions of Section 37 of the Insurance Contracts Act 1984 (Cth) act as a constraint on the extension of contract condition-based financial exclusionary effects:

1. As with the s*Standard cover*" considered earlier, the Australian Law Reform Commission's reliance on unspecified "market forces" to constrain the excessive use of the insurer's right to use unusual contract terms, by providing the intending insured with documentation or a copy of the proposed policy wording, has been found to be generally ineffective. This was examined in Chapter Two by identifying condition-based financial exclusionary effects that were widely distributed throughout those policy documents reviewed, including policies that fell within the scope of Section 37 of the Insurance Contracts act 1984 (Cth).

2. With respect to Section 35 "prescribed contracts" and "contracts of insurance", Section 37 "Other than prescribed contracts", when applied in the context of "concluded contracts", and considering the scope of Section 15 of the Insurance Contracts Act 1984 (Cth), lessen restriction of access to judicial relief confined to that Act.

3. This permits prospective insureds access to other sources of judicial relief to seek redress for the adverse impact of risk-based access denial financial exclusionary effects contained in policy documents that fall within the scope of Section 37, and thus provides an effective potential constraint on the area of impact of such exclusionary effects.

Figure 3.6.vi	**Constraint Profile: Risk based access denial and Condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #5						
v. Notice of unusual terms ICA 1984 Section 37	RBAD				Nil Section 15 effect	
	CCBD				Interaction between ICA Section 37 and Section 15	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**
Shaded area above indicates specific constraint assessment

3.5 Discussion

Given the extent of the five-part detailed analysis undertaken in this chapter, the following is a summary of the conclusions of the analysis undertaken in each part:

3.5.i Insurance Contracts Act 1984 (Cth) – Duty of Utmost Good Faith

- The inclusion of the concept of Utmost Good Faith as an implied term in an insurance contract without a statute-based remedy for breach has resulted in it being regarded as largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms.

- Proposed legislation introduced to Parliament in 2007 and later in 2010 sought to address this omission. These consecutive proposed legislative changes have both now lapsed.

3.5.ii. Insurance Contracts Act 1984 (Cth) – Reliance on provisions except in the utmost good faith.

- A statutory provision is regarded as exerting minimal impact as a result of it being conditional on the extent to which the insured had received notice of a contract condition or exclusion. As a result, the provision has been regarded as largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms.

- Proposed legislation introduced to Parliament in 2007 and later in 2010 provided ASIC with the powers to intervene in matters involving insurance claims handling or settlement, partly addressing the systemic issue of the effectiveness of the existing provisions. This legislation has now lapsed.

3.5.iii. Insurance Contracts Act 1984 (Cth) – Judicial relief confined to remedies available under the ICA.

- A statutory provision that precludes a party to an insurance contract from seeking judicial relief from the impact of "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms, under legislation other than the ICA.

- Although a relevant court decision limited the scope of this provision to "concluded" insurance contracts, an earlier review of this statutory provision concluded that it was largely ineffectual in addressing systemic structural issues in contracts.

- As a result, the provision has been regarded as largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms, due to the limited nature of the remedies available under the ICA.

- In 2010, a Federal Government Options Paper canvassed opinion on the introduction of alternative processes to address the limitations of the existing statutory provisions in dealing with unfair contract terms in insurance contracts. These inquiries are still underway.

3.5.iv. Insurance Contracts Act 1984 (Cth) – Permitted variations to statute-prescribed "*Standard Cover*" – The right of derogation.

- When introduced, "*standard cover*" contained insurance contract conditions and exclusions that were regarded as reflecting insurance industry custom and practice prevailing at the time of the recommendations in 1982.

- Statutory provisions permitted Insurers to derogate from the terms of the "*standard cover*", conditional on the intending insured receiving notice in writing of the proposed variations.

- The Australian Law Reform Commission's recommendation of reliance on "market forces" to constrain excessive use of the right of derogation has been found to be misplaced and ineffective. As a result, "*standard cover"* provisions have been regarded as largely ineffective in addressing the impact of contract condition-based financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms.

- Again, the constraint precluding access to judicial relief, other than that available under the ICA, is restricted to "concluded" contracts, which results in judicial relief being available under external statutes addressing the impact of risk-based access denial financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms, as would be found in the insurance underwriting process.

3.5.v. Insurance Contracts Act 1984 (Cth) – Insurer reliance on use of unusual terms in an insurance contract is conditional on the insured being provided with prior written notice of the provision.

- The statutory provision precluding insurer reliance on the use of "unusual terms" in other than "*standard cover*" is conditioned by the exemption that such terms are

permitted where the insurer has provided the intending insured with prior written notice of the term. This exemption is regarded as rendering ineffective the constraint on the use of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable*" terms.

- Where the contract has been concluded, the Section 15 statutory provision, considered above, would preclude access to judicial relief other than that available under the ICA.

- However, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable" contract terms, as would be found in the insurance underwriting process.

3.6. Chapter Conclusion

The two objectives of my Chapter Three analysis were:

1. To identify and report on the existence of the extent of those contextual factors internal to general insurance policies that may constrain the impact of the risk-based access denial and contract condition-based denial financial exclusionary effects identified in the Australian domestic general insurance policies most commonly utilised by domestic insureds.

2. To establish an internal "constraint profile" that identifies the scope of those constraints identified in Objective 1. above.

I have achieved my overall chapter objectives through the identification of total of 15 outcomes arising from the analysis of those 5 internal contextual elements which I had selected. These conclusions were summarised in 3.5 above. In addition, there are three key conclusions arising from Chapter. These are as follows:

i. My analysis has identified a financial exclusionary effect *"constraint profile"* for each of the elements reviewed from the perspectives of the potential impact on the scope and dimensions of risk-based access denial and on contract condition-based financial exclusionary effects.

ii. My analysis indicates that the statute-prescribed *"standard cover"* contain a broad range of risk-based access denial financial exclusionary effects of relevance in the pre-contract phase, and that these effects are largely unconstrained by the provisions of Section 15 of the Insurance Contracts Act (Cth) 1984 due to the judicial interpretation that remedy against *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms is restricted to concluded insurance contracts, and therefore not applicable to the pre-contract phase of the general insurance contract cycle..

iii. My third conclusion draws attention to the evidence available indicating that the remedies contained in the Insurance Contracts Act (Cth) 1984 against insurer action falling within the scope, outlined in ii. above, have been largely ineffective in addressing such issues. This has been principally due to the interaction between those remedies available to provide relief for the consequences of insurer non-compliance with the implied term of *"Utmost Good Faith"* and the statute-based conditional right of insurers to derogate from the provisions of "*Ssandard cover*", even including varied or additional contract terms, which may adversely impact upon the interests of insureds.

Figure 3.7. following offers a suggested internal contextual-based constraint profile based on the impact of insurance contract related structural factors on the risk-based and contract condition-based financial exclusionary effects identified through my inquiries.

Figure 3.7	Constraint Profile: Chapter Three - Risk-based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure #1 - #5Profile						
i. Duty of Utmost Good Faith ICA 1984 Section 13	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
ii. Non reliance on adverse terms ICA 1984 Section 14	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
iii. Judicial relief for insurance contracts ICA 1984 Section 15	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
iv." *Standard Cover*" Derogation ICA 1984 Section 35	RBAD				Nil Section 15 ICA effect	
	CCBD				Nil Section 15 ICA effect	
v. Notice of unusual terms ICA 1984 Section 37	RBAD				Nil Section 15 ICA effect	
	CCBD				Interaction between Section 37 and Section 15	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

Chapter Four - Australian Domestic General Insurance Arena: Financial Exclusionary Effects Development of an External Contextual Constraint Profile

Chapter Abstract

Inquiries in Chapter Two identified the existence of risk-based access denial and contract condition-based denial financial exclusionary effects in general insurance policies principally accessed by Australian domestic insureds and in "*standard cover*", the structure of which underpins most of the general insurance products accessed by that market sector. Progressing the analysis, Chapter Four seeks to establish to which these two specific financial exclusionary effects may operate, and determine whether they operate without constraint.

Towards this aim, following my analysis in Chapter Three which directed attention to the impact of selected internal contextual factors upon two specific financial exclusionary effects, in this Chapter I utilise a similar analytical framework that focuses on those selected external contextual factors that may impact upon the dimensions of financial exclusionary effects such as relate to Australian domestic general insurance products and services. I have identified statute-based conditions external to Australian domestic general insurance policies that may directly impact the scope of specific financial exclusionary effects, thereby establishing a "*"constraint profile"*" within which such effects generally operate.

4.1. Chapter Objective

This Chapter has a single objective:

To identify and report on the extent to which contextual factors external to general insurance policies exist and constrain the impact of the risk-based access denial and contract condition-based denial financial exclusionary effects of the most commonly utilised Australian domestic general insurance policies among domestic insureds.

4.2. Chapter Introduction

Chapter Four develops those inquiries I commenced in Chapter Three to ascertain whether there are perimeters within which those financial exclusionary effects identified earlier in Chapter Two would appear to operate, and to determine whether they operate without constraint. Here, I identify and evaluate various external contextual factors relating to domestic general insurance policies that may impact the application of these two manifestations of financial exclusionary effects.

In order to achieve the chapter objective, I shall review the interaction between eight selected statutory provisions external to the Australian domestic general insurance contracts process and the financial exclusionary effects identified in these contracts. The output from this analysis should shed light on a likely "Constraint Profile" reflecting the sum of any interaction between external contextual factors and financial exclusionary effects embedded in domestic general insurance policies.

4.3 Methodology & Inquiries

An analytical framework was established within which to review the contextual factors likely to impact the nominated financial exclusionary effects. In this chapter, the framework is applied to external contextual constraints that may potentially constrain the extent of specific financial exclusionary effects in Australian domestic general insurance products identified earlier in Chapter Two. The same framework was used in Chapter Three to analyse internal contextual constraints with a constraint potential similar to those now under review. It incorporates six elements:

a. Statutory Provision

This element identifies the statutory provision external to the financial exclusionary effect.

b. Relevance of provision as a constraint

I then provide an outline as to why I consider this provision may act as a constraint on the scope of the identified financial exclusionary effect.

c. Discussion

I then analyse those factors that may impact upon potential constraints in a positive or negative manner.

d. Recent Developments

As identified during the course of my Chapter Three inquiries, my research indicated that a number of the areas of potential constraint are currently under review in inquiries or foreshadowed legislation. Accordingly, I seek to identify emerging factors that may alter the potential constraint profile of the provision under review.

e. Current Status

Whilst there be little doubt that implementation of Australian legislation would impact upon the constraint profile of the provision. I identify instances in which proposed legislation has been delayed due to external factors and discuss their relevance to the provision.

f. Conclusion

I provide a summary and evaluation of the currently likely impact of the external constraining contextual factor on specific financial exclusionary effects in categories of general insurance policies identified and analysed in Chapter Two

As was the case earlier in Chapter Three, I have again depended on the work of Johns (2001)[290] and Johns (2006)[291] to provide the logic underpinning the use of contextual analysis The selection of the contextual factors has also again followed those principles defined in International Standard ISO 73:2009[292] that augment the framework set out in AS/NZS ISO 31000:2009 and ISO 31010:2009.[293] My choice of methodology derived from its international and immediate relevance to an Australian context, which was established

[290] At pp.36, 38.
[291] At pp.388-89.
[292] At 3.3.1.
[293] At pp.12-13.

earlier by the use of AS NZS 4360:2004 in Australian corporate risk analysis that also underwrote the development of the more recent risk management standard AS/NZS ISO 31000:2009.[294]

I selected five groups of Australian statutes. These appear to directly impact on the development, distribution, and operation of Australian domestic general insurance products, including those utilised by domestic insureds that potentially constrain the impact of contract condition-based financial exclusionary effects, or risk-based access denial financial exclusionary effects, in the pre-contractual underwriting and/or risk classification phase.

4.4. Analysis

4.4.i. Racial Discrimination Act 1975 (Cth) – Prohibition and Exemptions

a. Statutory Provision

Within the general anti-discrimination focus of the Racial Discrimination Act 1975 (Cth), there is a specific provision relating to the provision of goods and services as summarised above, with Section 13 of the Act making it clear that such action is unlawful.

b. Relevance of Provision as a constraint

I suggest that the Act provides a broad-based barrier against "race-based" discriminatory practices in a number of specifically defined areas, including the provision of goods and services, a broad definition which, I consider also encompasses financial products and services.

As such, I regard the statutory provision as superficially placing a constraint on race-based financial exclusionary effects. However, I note the issue on which I have commented earlier, namely the impact of Section 15 of the Insurance Contracts Act 1984 (Cth) in precluding judicial relief under other statutes for matters arising from concluded insurance contracts. As noted earlier, the effect of the Section 15 limitation would effectively restrict non-Insurance Contracts Act relief to those instances where risk–based access denial financial exclusionary effects have occurred principally in the pre-contract phase.

[294] At pp.15-16.

c. Discussion

My comments in b. above indicate that Section 13 of the Racial Discrimination Act 1975 (Cth) superficially constrains the use of race-based financial exclusionary effects by way of risk–based insurance product or service access denial. I suggest that on further examination, it is in fact possible for the potential impact of the use of the provisions of this Act to be nullified in the context of addressing these financial exclusionary effects.

In Chapter One earlier[295], I identified and discussed the existence and impact of the insurance underwriting practice of "redlining", a process of selecting against underwriting particular risks (frequency personal motor vehicles or domestic buildings and their contents), on the grounds that an adverse risk profile occurred in specific locations, principally due to location specific factors. Included among the latter was a higher than average building loss profile resulting from flood damage to structures located on a flood plain subject to seasonal inundation.

Alternatively, the adverse risk profile of a particular location may be directly related to the socio-economic profile of the residents in that area. Such a profile may in turn have resulted from the density of unemployed persons residing at a particular location, the density directly attributable to a high level of unskilled migrant workers residing in rented accommodation in socially disadvantaged circumstances.

Insurers could use related risk indicators such as domestic property theft levels, motor vehicle theft, or third party damage to justify declining underwriting risks from that location. Or, they would only underwrite the risks for a higher premium than that sought for the insurance of risks at other locations. The scenario described above is consistent with those identified and discussed by Aalbers (2005a).[296]

I suggest that the above scenario would justify adversely affected residents attributing inability to access suitable insurance coverage, or ability to access suitable insurance only by paying a premium surcharge or incurring policy conditions not levied elsewhere, to their particular socio-economic profile—unskilled unemployed migrant workers with an ethnic or cultural profile distinct from individuals residing elsewhere. The argument could follow that this kind of treatment at the hands of an insurer clearly falls within the scope of Section 13 of the Racial Discrimination Act 1975 (Cth), and is therefore unlawful.

[295] At pages pp.18-28
[296] At p.100 ff.

However, evidence shows that the action of insurers in the scenario above may not in fact fall within the scope of Section 13 where it can be demonstrated that the risk rating of the particular location was "reasonable" under the circumstances. I suggest that a relevant argument may be developed following Brown et al. (2006)[297] as to what is *"reasonable discrimination"* from a risk classification perspective, which emphasises securing the correct interaction between appropriate risk classification and the application of actuarial equity principles.[298]

Australian courts appear to have also adopted a similar view on the issue of what constitutes *"reasonable"* under the circumstances above. A relevant decision considered that a requirement (in this instance, an underwriting) will not be considered discriminatory if it is:

> *"reasonable having regard to the circumstances*".[299]

I suggest that, under these circumstances, the constraint provided by non-compliance with the provisions of Section 13 of the Racial Discrimination Act 1975 (Cth), as a means of establishing a limit on the application of a risk-based access denial financial exclusionary effect, is illusory where there is sound evidence supporting the risk classification selected by Insurers. Here, I am specifically referring to racial discrimination encountered prior to the conclusion of the insurance contract that restricts judicial relief available under the Insurance Contracts Act 1984 (Cth).

d. Recent Developments

A recent review of the Racial Discrimination Act 1975 (Cth), undertaken in 2008 by the Australian Human Rights and Equal Opportunity Commission, indicated that the Australian Act compares favourably with similar legislation in the UK, US, and in the European Union, though more restrictively.[300] Other than minor amendments necessary to secure on-going links with other Australian federal legislation, the review and successive Human Rights and Equal Opportunity Commission Annual Reports have not recommended substantial restructuring of this Australian legislation.

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[297] At pp.103, 105.
[298] I suggest that while Brown et al. (2006) based their argument on age-based discrimination, the construct may be equally applicable to race or cultural-based discrimination.
[299] Secretary, Department of Foreign Affairs and Trade v Styles and anor, 88 ALR 621 at p.634; Waters; Commonwealth v HREOC (1995) 63 FCR 74, and Commonwealth Bank of Australia v HREOC (1997) 150 ALR 1.
[300] HREOC (2008) Background Paper No. 1, at p.31

e. Current Status

The Racial Discrimination Act 1975 (Cth) has remained unaltered following the 2010 conversion of the former Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission.

f. Conclusion

My analysis of the potential impact of the Racial Discrimination Act 1975 (Cth) on constraining risk-based access denial and contract condition-based financial exclusionary effects in general insurance goods and services suggests a three-part conclusion.

1. In this instance, the legal interpretation of limiting the application of Section 15 of the Insurance Contracts Act 1984 (Cth) to insurance contracts in force appears to preclude insureds of concluded insurance contracts from access to relief under the Racial Discrimination Act 1975 (Cth). As noted earlier, that there are doubts as to the overall effectiveness of judicial relief available under the Insurance Contracts Act 1984 (Cth) and, from a consumer protection perspective, regarding the ability of individual insureds to actually access this medium.

2. It appears that the application of Section 13 of the Racial Discrimination Act 1975 (Cth) declaring unlawful racial or related discrimination in the provision of financial products and services may be severely limited where it can be established that the otherwise discriminatory action was reasonable under the circumstances. This constraint impacts upon application of Section 13 of the Act in general insurance specific underwriting circumstances where it can be shown that the risk classification embodying otherwise racial discriminatory effects is based on accurate and relevant risk factors applied in an actuarially equitable manner, which may be reasonable under the circumstances.[301]

3. This highlights a fact that emerged earlier in Chapter Three and is encountered again in this chapter. Although there initially appear to be substantial limitations on specific financial exclusionary effects resulting from the application of contextual statutory terms which act as a constraint , these often can be only exercised once specific interpretative hurdles have been overcome.

[301] s41.

Figure 4.1.i	Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Individual – Occupation – Activity						
vi.- ix. – Racial Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.4.ii. Sex Discrimination Act 1984 (Cth) – Prohibition and Exemptions

a. Statutory Provision

Among other offences, provisions in the Sex Discrimination Act 1984 (Cth) make it unlawful for a person to:

i. Discriminate against another person on the grounds of that person's gender (Section 5).

ii. Discriminate against a woman on the grounds of that woman's pregnancy, or potential pregnancy (Section 7).

iii. Discriminate against another person in the provision of goods or services by either refusing to supply those goods or services on the grounds of the other person's gender, marital status, pregnancy or pregnancy potential, or on adverse terms or conditions when compared to those terms or conditions applicable when the goods or services are provided to Third Parties (Section 22).

However, Section 41 of the Act permits a person (an insurer) to discriminate against another person (a Client) on the grounds of the Client's gender, conditional on the discrimination being implicit in the terms of an insurance policy offered to the Client, based on actuarial or statistical data from a source upon which it would be reasonable for an insurer to rely a reliable source, and the discrimination is reasonable having regard to the data, and the Client is provided with access to documentation relating to the data.

The application of this statutory exemption is however limited to a number of personal risk insurance policy types specifically identified in the Section. Three of the *"standard Cover"* earlier in Chapters Two and Three (Consumer Credit, Sickness and Accident and Travel Insurance) embody terms and conditions of the designated personal risk insurance policy types. The statutory exemption is regarded as not being applicable to the remaining *"standard Cover"*, which largely relate to either real or personal property, including chattels.

b. Relevance of Provision as a constraint

I suggest that the statutory provisions mentioned above constitute a substantial constraint on the operation of risk-based access denial or contract condition-based financial exclusionary effects in general insurance products or services. I maintain this view despite the existence of the statute-based exemption permitting discrimination by means of the terms and conditions of an "*insurance policy*" which falls within the scope of a restricted class of personal risk policies, and note that this exemption is a conditional only upon satisfaction of a three-part test relating to the statistical or actuarial relevance of the data, that the discrimination is reasonable having regard for the data, and that the person () against whom the discriminatory act is directed, has been provided with documentation relating to the data as prescribed by the statute.

c. Discussion

Chapter Two identified a number of instances where insurance policy terms and conditions overtly discriminated against individuals on the grounds of that person's gender. While instances of gender based discrimination were not identified in "*standard sover*", they were widely distributed across general insurer policy wordings, indicating that insurers, under Section 35 of the Insurance Contracts Act 1984, had exercised their right of derogation to reduce the scope of cover available to insureds in the following insurance products:

- Sickness and Accident
- Consumer Credit
- Personal risk policy modules in:
  Farm Insurance policies
  Business Insurance policies
  Domestic and International travel insurance

The gender discriminatory terms and conditions fell into three broad categories:

a. Policy exclusion clauses excluding liability for claims arising from, or related to pregnancy and/or childbirth, and

b. Policy conditions declining sickness and accident or consumer credit coverage to male insureds who fell into specified unskilled labour categories and aged 60 years or older, without an equivalent provision applying to females of the same profile, and

c. Policy conditions declining sickness and accident coverage to male insureds aged 60 years or older, without equivalent provision applying to females of the same profile.

In their 1982 Report on Insurance Contracts, the Australian Law Reform Commission indicated the Commission encountered difficulties in deciding on the inclusion of, or the prohibition against these discriminatory practices in the *"standard cover"* provisions in the proposed insurance contracts legislation.

It also emphasises that the eventual decision had been made after detailed consideration of the issues in the *"Differentiation between Risks*" Section of the Report[302].

It should be noted that regardless of the Commission's eventual decision, my analysis in Chapter Two of existing terms in those relevant policies which were surveyed, suggests that general insurers have universally exercised their right of derogation to introduce gender specific risk-based access denial or contract condition-based financial exclusionary effects into their policies.

It is also of significance that the Sex Discrimination Act 1984 Section 41 Insurance Exemption provisions and the conditional basis of that exemption have been similarly incorporated in the two subsequent Federal anti-discrimination Acts, considered later in this chapter.[303] This suggests that the provisions have been used as a standard in enacting exemption provisions in comparable legislation elsewhere, which in turn facilitates easy application of an interpretation of an exemption provision in one Act to similar provisions in another act. A recent court decision has sought to establish a benchmark against what was meant by the phrase:

> *"based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and the discrimination is reasonable having regard to the data".*[304]

That case considered the meaning of an analogous provision contained in the Disability Discrimination Act 1992 in the context of insurer's declinature of cover for an individual suffering from a terminal illness seeking travel baggage insurance cover for an overseas trip.

Although the rejection of the intending insured resulted in the non-existence of the insurance contract, provisions of Section 15 of the Insurance Contracts Act 1984 (Cth) were not relevant and thus did not preclude the individual from seeking access to judicial relief from an alternative source, by way of commencing action against the insurer under the provisions of the Disability Discrimination Act 1992.[305]

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[302] ALRC 20 (1982) Chapter 15, at Paragraphs 381-86.
[303] Disability Discrimination Act 1992 (Cth) and Age Discrimination Act 2004 (Cth).
[304] Refer to s41(c) and (d) of the Act.
[305] QBE Travel Insurance v Basanelli (2004) FCA 396 at 414ff.

When considering an appeal from a lower court, the Court found against the insurer, on the grounds that the actuarial or statistical data on which the declinature was based was largely irrelevant, and did not support the Insurer's decision.

Accordingly, the Act exemption did not apply, resulting in the insurer losing immunity under the Act, with damages awarded against them.

I regard the outcome of the decision described above as being directly relevant to the question addressed in this chapter. Specifically, the outcome of the decision centres on the requirement that reliance on a statutory exemption, in this instance from an unlawful discriminatory practice embodied in a risk-based access denial financial exclusionary effect, will succeed only where such reliance was found to be *"reasonable under the circumstances*"[306]. I point out that these criteria were already applicable in matters involving the Racial Discrimination Act 1975 (Cth). This suggests that interaction between the Section 41 Sex Discrimination Act 1984 (Cth) exemption, from what would otherwise have been an unlawful act under Section 5 of the statute, and the benchmark against which that exemption must be measured, creates a constraint on the scope and extent of the application of a relevant financial exclusionary effect.

Similarly, a few years earlier, the Australian Federal Magistrates court had partially considered some disability discrimination related issues, such as the necessity for any *"actuarial or statistical data",* as prescribed in Section 46 of the Act, and identified the need for such data to remain relevant to later events, distinct from those prevailing at the time of the collation of the data.[307]

d. Recent Developments

In 2008, the Australian Federal Parliament requested a Senate Standing Committee to undertake a review and report on the continuing effectiveness of the Sex Discrimination Act 1984, which, at the time, had been in operation for over 25 years[308].

[306] Secretary, Department of Foreign Affairs and Trade v Styles and anor, 88 ALR 621 at p.634.
[307] Xiros v Fortis Life Assurance Ltd (2001) FMCA 15, at p.20.
[308] Senate Standing Committee on Legal and constitutional Affairs – Inquiry into the "Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality" Report 12 December 2008.

While submissions to the Inquiry included some relating to Section 41 of the Act, these were confined to provisions contained in Section 41A and Section 41B relating to superannuation, and did not raise matters relating to the continued existence of the Section 44 based exemption of insurance-related matters from the scope of the Act.

Although the Committee's final recommendations eventually included one to restructure the statute-based exemption process provided by Section 44 of the Act, they also drew attention to the larger question of managing changing perceptions of exempted activities, rather than merely concentrating on any one insurance related issue[309].

Recommendations of this Australian Parliamentary review into the Sex Discrimination Act (1984) Cth[310] had identified the potential advantages resulting from the harmonising of the provisions of a number of the existing anti-discrimination statutes to achieve a more effective outcomes than occurred previously. Following a period of consultation, legislation amending the Sex Discrimination Act and incorporating a number of the earlier recommendations, was introduced into the Australian Parliament was subsequently passed and commenced in June 2011.[311] The amending legislation also included a number of changes to the provisions of the existing Age Discrimination Act (2004) Cth which interacted with those of the Sex Discrimination Act. The Act however did not amend the insurance exemption provisions contained in Section 41 of Sex Discrimination Act (1984) Cth.

e. Current Status

My analysis found that none of the statutory amendments appeared to either directly or indirectly impact upon those specific statutory exemption provisions relating to insurance discussed earlier. As a result the original provisions remain unchanged.

f. Conclusion

My analysis provides a three-part conclusion as to the potential impact of the Sex Discrimination Act 1984 (Cth) as a constraint on risk-based access denial and contract condition-based financial exclusionary effects in general insurance goods and services.

[309] Report Chapter 11, Paragraphs 11.64 and Report Recommendation 36 at Paragraph 11.98.
[310] Senate Standing Committee on Legal and Constitutional Affairs – "Effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality" Report 12 December 2008.
[311] Act No. 40 of 2011

1. The previously identified legal interpretation limiting the scope of Section 15 of the Insurance Contracts Act 1984 (Cth) to insurance contracts in force, appears, in this instance, to preclude access to relief under the Sex Discrimination Act 1975 (Cth), as is the case with the Racial Discrimination Act 1975 (Cth) where a concluded insurance contract is involved. I have noted earlier that there are doubts as to the overall effectiveness of judicial relief available under the Insurance Contracts Act 1984 (Cth) and, from a consumer protection perspective, about the ability of individual insureds to actually be able to access this medium.

2. As seen earlier, with regard to similar provisions (Section 13) of the Racial Discrimination Act 1975, it appears that the application of Section 22 of the Sex Discrimination Act 1984 (Cth) declaring unlawful gender-based discrimination in the provision of financial products and services may be severely limited where it can be established that the otherwise discriminatory action was reasonable under specifically defined circumstances relating to statute prescribed insurance policy classes, offered to or obtained by the person. If such discrimination was based upon actuarial or statistical data and it was reasonable for the insurer to rely on that data source, conditional upon the discrimination directly related to that data, it followed that the exemption was permitted[312] I suggest there is a significant implication of this constraint on the application of Section 22 of the Act in general insurance specific underwriting circumstances, where it can be shown that the risk classification embodying otherwise gender-based discriminatory effects is based on accurate and relevant risk factors, applied in an actuarially equitable manner.

3. This again highlights a fact that emerged earlier in this chapter, that there appear to be substantial limitations on the relevance of statutory terms as a constraining influence on the extent and application of risk-based access denial and contract condition-based financial exclusionary effects embedded in general insurance products and services, the limitations being exercisable only where specific criteria have been met.

[312] SDA 1984, s42.

Figure 4.1.ii	Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Individual-Occupation-Activity						
vi.- ix. Sex Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.4.iii. Disability Discrimination Act 1992 (Cth) –Prohibition and Exemptions

Statutory Provision

Amongst other sanctions, provisions in the Disability Discrimination Act 1992 (Cth) make it unlawful for a person to:

i. To either directly or indirectly discriminate against another person on the grounds of that person's disability (Sections 5 and 6)

ii. Discriminate against another person in provision of goods or services, by either refusing to supply those goods or services on the grounds of the other person's disability, or on adverse terms or conditions when compared to terms or conditions applicable to Third Parties (Section 24).

However, Section 46 of the Act permits a person (an insurer) to discriminate against another person (a Client) on the grounds of the Client's disability, in the terms of an insurance policy offered to the Client, where such discrimination is based on actuarial or statistical data on which it was reasonable to rely and was reasonable having regard to the data and/or other relevant factors.

a. Relevance of Provision as a constraint

As with the Sex Discrimination Act 1984 (Cth) provisions considered earlier, the Disability Discrimination statutory provisions exert a considerable constraint on the operation of risk-based access denial or contract condition-based financial exclusionary effects in the context of general insurance products or services. Again I suggest this view is relevant despite the existence of the statute-based exemption permitting discrimination via the terms and conditions of an *"insurance policy"*. I also note that this exemption is conditional on satisfaction of a three-part test of the relevance of the data on which the specific discriminatory effects are based.

When considering the application of such exemptions as provided by Section 46 of the Disability Discrimination Act 1992 (Cth), I note that similar exemptions in other legislation have been subject to searching reviews in an effort to determine whether the discriminatory practice was *"reasonable under the circumstances*".[313]

b. Discussion

My data analysis in Chapter Two identified a number of instances where insurance policy terms and conditions overtly discriminated against individuals on the grounds of a sustained disability. Unlike the sex discrimination related financial exclusionary effects, where gender-based discrimination was not identified in the "*standard cover*", instances of disability-based discrimination were found in both "*standard cover"* and general insurer policy wordings.

[313] My earlier discussion refers as to what constitutes *"reasonable"* in the context of the Racial Discrimination Act 1975 (Cth) and Sex Discrimination Act 1984 (Cth).

The above indicates that insurers had again exercised their right of derogation under Section 35 of the Insurance Contracts Act 1984 to reduce the scope of cover available to insureds in the following insurance products –

- Sickness and Accident,
- Consumer Credit,
- Personal risk policy modules in,
  - Farm Insurance policies
  - Business Insurance policies
  - Domestic and International travel insurance
- Travel Insurance

The disability discriminatory terms and conditions fell into five broad categories:

i. Policy conditions excluding claims for payment of medical and hospital expenses arising from pregnancy or childbirth.

ii. Broad-based policy exclusion clauses excluding liability for claims arising from specific physical and mental conditions arising during the policy period where there was no Pre-Existing Medical Condition (PEMC).

iii. Broad-based Policy exclusion clauses excluding liability for claims arising from a PEMC sickness, disease, or disability that had either occurred within a designated period ranging from 30 to 180 days prior to the commencement of the cover, or derived from a resulting occurrence[314]

iv. Policy conditions providing for the exclusion of claims arising from relating to specified medical conditions with a PEMC range varying from 30 days to 10 years (Determined specific medical conditions).

[314] Note that Insurance Contracts Regulations 1985, Reg.27(c)(i)(B) provides for a PEMC period of 6 months.

v. Policy conditions providing for interaction between disability and age-related financial exclusionary effects by imposition of surcharges of up to 200% of base premium for claimants over 70 years with specified medical conditions. The additional policy excess payable increased by $ 5,000 for claimants over 81 years.

As has been earlier noted in this chapter, the Australian Law Reform Commission makes it clear in their Report on Insurance Contracts that the inclusion of such discriminatory practices in the then proposed insurance contracts legislation was a deliberate decision, and that recommendations were based on detailed consideration of these issues in the *"Differentiation between Risks"* Section of that Report[315]. The Commission again referred to the fact that the inclusion of these discriminatory practices was simply to embed:

> *"the common course of insurance practice in the relevant area*".[316]

I suggest that the Commission's comment above is represented by the widespread use by insurers of the right of derogation to substantially reduce the scope of cover provided by the "*standard Cover*" in the instance of Sickness and Accident, Consumer Credit, and Travel insurance, in addition to multi-cover policies such as farm and business policies providing indemnity for specified personal risk exposures distinct from property or legal liability risk exposures. This in turn suggests a policy perception that such exemptions were acceptable.

As with the Sex Discrimination Act 1984 exemption provisions, Division Five of the Disability Discrimination Act 1992 (Cth) contains provisions for the permanent exemption of certain classes of activities and relationships from either all or some of the provisions of the Act.[317] Section 46 of the Act provides for insurance-related disability discriminatory acts to be exempted from the application of the Act sanctions, and sets out the conditional nature of that exemption.[318]

[315] ALRC 20 (1982) Chapter 15 refers, more particularly at Paragraphs 381-86.
[316] ALRC 20 (1982) Paragraph 76.
[317] Sections 45-58.
[318] Section 46 (1)(f)(i) and (ii) and (2)(f)(i) and (ii).

Unlike the Explanatory Memorandum provisions relating to exemptions under the Sex Discrimination Act 1984 (Cth), the Explanatory Memorandum for what became the Disability Discrimination Act 1992 (Cth), details the scope of the then proposed exemption and offers explanation as to why such a broad-based exemption from the Act provisions should be included in the legislation.[319]

I suggest that the use in the Disability Discrimination legislation of terms analogous to those used in the earlier Sex Discrimination Act 1984 (Cth) indicates that these provisions have, in effect, been used as a standard when enacting exemption provisions in comparable legislation elsewhere, which also permits the application of an interpretation of an exemption provision in one Act to similar provisions in another.

Previously, I have referred to the court decision in *Basanelli,*[320] regarding the judicial interpretation of the basis for exemption from sanctions of the Disability Discrimination Act 1992 (Cth) of insurance policy related disability discrimination:

> *"based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and the discrimination is reasonable having regard to the data"*.[321]

Again, the decision above is relevant to the question addressed in this chapter, in that it centres on the requirement that reliance on a statutory exemption, in this instance from an unlawful discriminatory practice embodied in a risk-based access denial financial exclusionary effect, will succeed only where such reliance was found to be *"reasonable under the circumstances*"[322]. I note that these criteria may have already applied in the context of the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth).

The consistent application of these criteria suggests to us that the interaction between the Disability Discrimination Act 1992 (Cth) exemption[323] from what would otherwise have been an unlawful act, and the benchmark against which that exemption must be measured, effectively creates a constraint impacting the scope and extent of the application of a relevant financial exclusionary effect.

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[319] Explanatory memorandum Clause 46, at p.17.
[320] QBE Travel Insurance v Basanelli [2004] FCA 396 at 414ff.
[321] Section 46(1)(f)(i) and (ii).
[322] Secretary, Department of Foreign Affairs and Trade v Styles and Anor, 88 ALR 621 at p.634.
[323] Section 46.

d. Recent Developments

Developments since the commencement of the Disability Discrimination Act 1992 (Cth) indicate that the provisions under that Act exempting insurance products and services from the application of the Act have been subject to considerable scrutiny. Observers have recognised the need for the Act to be modified in order to reflect social contextual developments emerging since the Act commenced. Included among these modifications has been the amendment of existing exemption provisions to minimise the opportunity to further prolong unjustified insurer discriminatory practices, such as those emerging from the decision in *Basanelli* discussed earlier.

Like the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth) has also been the subject of a Commonwealth Government detailed review, following a Governmental referral to the Australian Productivity Commission.[324] The Referral required the Productivity Commission to undertake a wide-ranging review of the social impact of the Disability Discrimination Act, and of its capacity to eliminate discrimination in the future.

The detailed analysis of what were regarded as constituting factors set out in the Insurance Exemption contained in Section 46 of the Act is directly relevant.

The four factors identified by the Productivity Commission[325] are as follows:

> **i. *"Actuarial and statistical data"* in the insurance and superannuation exemption** – The (then) Human Rights and Equal Opportunity Commission – Insurance Guidelines[326] outline those information sources and their relevance. Particular reference was made to such issues as absence of data and limitations in the data and insurer "historical practice" or inaccurate assumptions regarding the potential insureds risk profile that were not considered reasonable in declining coverage or, if provided, limited the scope of that cover. The question as to what constitutes *"reasonable"* under such circumstances has been subject to extensive and relevant examination.[327]

[324] An Australian Government statutory authority appointed as an independent economic, social, and environmental research body and established under the Productivity Commission Act 1998.
[325] Review Report, pp.334-36.
[326] HREOC (1998) and HREOC 2005 Disability Rights Guidelines (Revision).
[327] Secretary, Department of Foreign Affairs and Trade v Styles and Anor, 88 ALR 621 at p.634 .

ii. ***"Other relevant factors"*** **in the insurance and superannuation exemption**: The Commission Review Report cites the decision in *Basanelli* (2004), particularly referring to:

> *"Other relevant factors" should include "any matter which is rationally capable of bearing upon whether the discrimination is reasonable".*[328]

iii. Stereotypes and assumptions in *"other relevant factors"* – The Review Report noted the potential for *"prejudicial assumptions/stereotyped or out-dated or incorrect assumptions*" being used in the insurer underwriting process, echoing Glenn's (2003) concern over *"insurance stories*" in which long standing but erroneous or exaggerated risk perceptions were used in the underwriting process.[329]

iv. Access to data and information used in underwriting decisions – The Review Report noted that, while it is currently an offence under the Act for an insurer to fail to provide actuarial or statistical data to the (then) HREOC when requested in relation to a discrimination complaint, there is no obligation to provide such information to complainants, insurance applicants, or, more widely, to Sectional interest groups or the public.

Point 4. above highlights the issue of the absence of transparency. Specifically, some might read the opacity of process as intentional concealment of discriminatory practices or the use of inappropriate risk classification techniques, consequently excluding intending insureds from access to insurance and, when permitted access, denying a subsequent claim under a policy.

From the wider perspective of Chapter Three, I regard the sum of the four factors above as an example of the manner by which an otherwise absolute permission to apply financial exclusionary effects, either in the underwriting process or via an insurance contract term, is largely constrained. This may occur by using Third Party (such as a Court or non-judicial external dispute resolution process) objectivity to determine if the application of the financial exclusionary effect was in fact appropriate.

[328] QBE Travel Insurance v Basanelli (2004) FCA 396, per Mansfield J., at #53, while also referring to the relevance of the factor.
[329] At p.140

The Review Report's conclusions are based on the view that insurance (and superannuation) exemption provided under Section 46 of the Disability Discrimination Act 1992 (Cth) is warranted, subject to specific conditions.[330]

The Commission noted the essential role that the fundamental discriminatory nature of the role insurance plays in effective underwriting by seeking homogeneity in the classification of risk categories, excluding those individuals whose risk profile varies markedly from that of others within that classification. In doing so, the Review Report noted that an insurer should retain the discretion to vary their underwriting pricing and condition criteria in a manner commensurate with the extent of the variation of the individual risk profile from that category.

However, the Commission considered it necessary for there to be constraints on this discrimination permitted by the Section 46 exemption provided in the Act. These constraints are reflected in two recommendations made in the Review Report that relate to insurance (and superannuation) summarised as follows:[331]

Recommendation 12.1

The Section 46 Exemption provisions should be amended to:

1. Clarify what is meant by the term *"other relevant factors"*
2. Exclude-
    a. *"stereotypical assumptions about disability that are not sustained by reasonable evidence".*
    b. *"unfounded assumptions about risks related to disability".*

Recommendation 12.2

That the Section 46 Exemption should apply only if insurance providers, when requested, give:

> *"clear and meaningful reasons for unfavourable decisions (including an explanation of the information on which they have relied".*

[330] Review Report at p.340
[331] Review Report at pp.341-42.

In January 2005, the then Commonwealth Government provided a response to the recommendations of the Productivity Commission's Review of the Disability Discrimination Act 1992 (Cth). Of specific relevance to my inquiries were responses to the two Recommendations above, summarised as follows:

Response to Recommendation 12.1 above - Comments

- Accepted in principle.
- Clarification of what constitutes *"other relevant factors"* should be through the medium of relevant industry codes of practice, rather than by way of legislation.

I suggest that an objective behind the use of industry codes of practice is largely similar to the use of sanction-backed legislative provisions, namely that compliance with the provisions of either are directed to satisfying an external requirement. The powers granted ASIC under the Corporations Act (2001) Cth to establish the parameters relating to the approval of Industry Codes (of practice or conduct) have a clear statutory compliance based objective.[332]

As discussed later in this chapter, the Corporations Act 2001 (Cth) imposes obligations on the development and distribution of financial services goods and services, including general insurance goods and services.[333] One such obligation requires any party engaged in the development or distribution of a financial services product to be licensed under the Act and comply with its provisions, which dictate the obligations of financial services licensees.[334]

There are specific Act provisions setting out the scope of statute-prescribed dispute resolution processes relating to licensee disputes with "*Retail Clients*".[335] The General Insurance Code of Practice 2006 (and later in 2010), administered by the Australian Financial Ombudsman Service (FOS), maintains that Code of Practice members will have an effective complaints handling system alternative to traditional litigation processes[336], with the external dispute resolution process administered by FOS via the Insurance Ombudsman.

[332] Corporations Act 2001 (Cth) Section 1101A and ASIC Regulatory Guidelines 183 refer.
[333] Corporations Act 2001 (Cth), Chapter 7.
[334] Including those general obligations set out in s912A(1) and (2).
[335] As prescribed by s912A(g) and detailed in s912A(2)(a) and (b).
[336] Code of Practice 2006 Part 6.

In order to meet the approval criteria of the Australian Securities and Investments Commission (ASIC), Corporations Regulations 2001 (Cth) further specify the criteria to be satisfied for both internal and external dispute resolution (IDR/EDR) procedures.[337]

Therefore, I suggest that, given that the General Insurance Code of Practice requires members to have alternative dispute resolution process, and given that processes where financial products and services are involved are statute approved, there is minimal difference between the then Government's preferred medium and the alternative

Response to Recommendation 12.2 above – Comments

- Not accepted.

- Relevant industry codes of practice are regarded as an appropriate medium for consumers to access supporting evidence on which adverse underwriting or insurance claims decisions were based. Failure on the part of the industry to establish such processes may result in a further review of the provisions, with the potential of legislation-based relief then being an option.

Yet again, the government response to this Productivity Commission Review Recommendation emphasises "self-regulation" as the preferred option to the direct legislative interventionist approach proposed by the Commission.

I reiterate my views set out in comments to Recommendation 12.1 above with regard to the existence of statute-based provisions, which may address issues underpinning Recommendation 12.2. I suggest that the statutory requirements relating to the ASIC approved internal and external dispute resolution processes provide a relevant medium to address the issues raised by the Commission, albeit without the direct sanction sought by the Commission.

[337] Corporations Regulations 2001, Regulation 7.6.02 (1)-(4).

e. Current Status

The former government did not progress any further action regarding Commission Recommendations 12.1. and 12.2. for the remainder of that Parliamentary Term concluding in November 2007.

Subsequently, in July 2008, following a change in government, the new Australian government undertook to introduce legislative amendments to the Disability Discrimination Act 1992 (Cth) to implement the recommendations made by the Productivity Commission in the Commission's 2004 Review Report. However, the resulting amendments to the Act did not include the implementation of the Productivity Commission's Review Report 2004 Recommendations 12.1. and 12.2., due to which the Section 46 exemption provisions of the Disability Discrimination Act 1992 (Cth) relating to insurance remain unaltered from those introduced in 1992.

f. Conclusion

A four-part conclusion results as to the potential impact of the Disability Discrimination Act 1992 (Cth) as a constraint on risk-based access denial and contract condition-based financial exclusionary effects in general insurance goods and services.

1. As identified earlier, the legal interpretation limitation placed on the scope of Section 15 of the Insurance Contracts Act 1984 (Cth) application of the Section only to insurance contracts in force, appears, in this instance, to preclude access to relief under the relevant provisions of the Disability Discrimination Act 1992 (Cth). This was also the case with the Sex Discrimination Act and the Racial Discrimination Act 1975 where a concluded insurance contract was involved.

   I have noted earlier that there are doubts about the overall effectiveness of judicial relief available under the Insurance Contracts Act 1984 (Cth) and, from a consumer protection perspective, about the ability of individual insureds to actually be able to access this medium.

2. As seen earlier with regard to similar provisions (Section 13) of the Racial Discrimination Act 1975 and the insurance product or service specific exemptions contained in Section 41 of Sex Discrimination Act 1984 (Cth), the circumstances

under which discrimination may be unlawful under the Disability Discrimination Act 1992 (Cth) in the provision of insurance related products or services may be severely limited to circumstances specifically stated in Section 46 of the Act. However, these insurance and superannuation specific exemptions are considered to be similar in scope when compared to provisions examined in the two earlier Acts that were mainly based on the "*reasonableness"* tests, namely where it can be established that the otherwise discriminatory action was reasonable under the circumstances.

This constraint had significant implications for the application of Section 46 of the Act in general insurance specific underwriting circumstances where it can be shown that the risk classification, embodying otherwise disability discriminatory effects following the argument of Brown (2006) was based on accurate and relevant risk factors, applied in an actuarially equitable manner.

3. This highlighted the fact that while there appear to be substantial limitations on the relevance of statutory terms as a constraining influence on the extent and application of risk-based access denial and contract condition-based financial exclusionary effects embedded in general insurance products and services, with those terms being effective only where specific criteria have been met.

4. However, it is significant that a major review was later undertaken of the efficacy of the Disability Discrimination Act 1992 (Cth). The review considered the desirability of substantial amendments to the existing exemptions relating to insurance (and superannuation) goods and services, and generated precise recommendations to reinforce the requirement that such exemptions would apply only under more precisely delineated terms than was previously the case.

   As discussed earlier, similar recommendations arising from reviews undertaken in the context of the Insurance Contracts Act 1984 (Cth), the Sex Discrimination Act 1984 (Cth), and now the Disability Discrimination Act 1992 (Cth), have not actually resulted in any substantial changes to the existing legislation in the context of general insurance products and services.

Therefore, I once again argue that there is additional evidence now available to support my suggestion that the actual effect of the statute-based presumed constraints identified is severely limited. What this suggests is that the pattern of legislative inaction thus emerging is reflective of substantive policy-based concerns about the broader socio-economic implications of modifications to specific statutory provisions directed towards the general insurance process.

I therefore suggest the resultant constraint profile is set out in Figure 4.1.iii below: :

Figure 4.1.iii	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Individual-Occupation-Activity						
vi.- ix. Disability Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.4.iv Age Discrimination Act 2004 (Cth) – Prohibition and Exemptions

a. Statutory Provision

Following a structure previously identified in the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth), provisions in the Age Discrimination Act 2004 (Cth), among other offences, deem it unlawful for a person to:

i. To either directly or indirectly discriminate against another person on the grounds of that person's age (Sections 14 and 15)

ii. Discriminate against another person in the provision of goods or services by either refusing to supply those goods or services on the grounds of the other person's age, or on adverse terms or conditions when compared to terms or conditions applicable when the goods or services are provided to third parties (Section 28).

However, Section 37 of the Act permits a person (an insurer) to discriminate against another person (a Client) on the grounds of the Client's age, conditional on the discrimination being implicit in the terms of an insurance policy offered to the Client, on being based on actuarial or statistical data from a reliable source, and on consistency between the discrimination and the data. Similar provisions in Section 37 provide an equivalent exemption of the application of the Act to superannuation related products.

b. Relevance of Provision as a constraint

Like similar provisions in the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth) considered earlier, the Age Discrimination statutory provisions constitute a considerable constraint on the operation of risk-based access denial or contract condition-based financial exclusionary effects in general insurance products or services. Again, as indicated earlier, I maintain this view despite the existence of the statute-based exemption permitting discrimination by way of the terms and conditions of an "insurance policy". I also note that this exemption is conditional on satisfaction of a three-part test of the relevance of the data on which the specific discriminatory effects are based.

When considering the application of such "exemptions" as provided by Section 46 of the Disability Discrimination Act 1992 (Cth), I have already observed similar exemptions in other legislation being subject to detailed review in an effort to determine whether the discriminatory practice was "*reasonable under the circumstances*".[338]

I note the consistency of terminology for insurance-related exemptions contained in the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth), and the Age Discrimination Act 2004 (Cth), and suggest that the conclusions of reviews (both

[338] My earlier discussion of the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), and Disability Discrimination Act 1992 (Cth) refers to what constitutes *"reasonable"* circumstances.

administrative and judicial), previously examined in this chapter, would equally apply to the Age Discrimination Act 2004 (Cth).

c. Discussion

My data analysis in Chapter Two's identified a number of instances where general insurance policy terms and conditions overtly discriminated against individuals on the grounds of age. Unlike the disability discrimination related financial exclusionary effects—where disability-based discrimination was identified in the general insurance *"standard cover*" prescribed by Section 35 of the Insurance Contracts Act 1984 (Cth)—and like sex-based discriminatory effects, age based discriminatory effects were found in *"standard cover"* and general insurer policy wordings where personal risk coverage was available. This indicated that insurers had once again exercised their right of derogation under Section 35 of the Insurance Contracts Act 1984 to reduce the scope of cover available to insureds in the following general insurance products:

- Motor Vehicle
- Sickness and Accident,
- Consumer Credit,
- Personal risk policy modules in,
  - Farm Insurance policies
  - Business Insurance policies
  - Domestic and International travel insurance

The age based discriminatory terms and conditions appeared to fall into the following broad categories:

i. Motor Vehicle policy conditions imposing an additional claim Policy Excess payable where claims involved an insured vehicle driver under the age of 25 years.[339]

ii. Broad-based Motor Vehicle policy exclusion clauses excluding liability for claims arising from accidents involving a driver under the age of 25 years driving an insured vehicle, or the death of that driver in those instances where

[339] The Age Discrimination Bill 2003 Explanatory Memorandum at Clause 37, provides an example where the operation of Clause 37(2) permits such discrimination as in example a. and b., where supported by actuarial or statistical data Clause 37(3)(a) (i) and (ii) refer.

policy conditions provide for a capital benefit being paid in the event of death of a specified class of person.

iii. Travel insurance related claims for reimbursement of medical and hospital treatment related medical expenses excluded where the insured claimant is a non-Australian permanent resident over the age of 70 years. No such limitation applied under the policy for claimants aged under 70 years.

iv. Broad-based Travel, Sickness and Accident, and Consumer Credit insurance Policy exclusion clauses excluding liability for claims arising from a Pre-Existing Medical Condition (PEMC) involving sickness, disease, or disability occurring within a designated period ranging from 90 to 180 Days prior to cover commencing or resulting occurrence[340], where the insured person was older than a policy prescribed age (55 years/60 years/65 years). This provision is in contrast to the PEMC period for younger insured persons where a lesser period applied.

v. Sickness and Accident, Consumer Credit, and related provisions contained in personal risk modules in multi-cover policies such as Farm and Business (Commercial) Policy conditions providing for the exclusion of personal sickness or accident claims arising involving individuals older than a prescribed age (55 years/60 years/65 years) with specified medical conditions, such as a PEMC.

vi. Policy conditions providing for interaction between disability and age related financial exclusionary effects by imposing surcharges of up to 200% of base premium for claimants over 70 years with specified medical conditions in d. above, increasing to AUS $5,000 additional policy excess payable where the claimant under these conditions was aged in excess of 81 years.

As seen earlier, when considering disability discriminatory effects, the Australian Law Reform Commission makes it clear in their Report on Insurance Contracts that the inclusion of such discriminatory practices in the then proposed insurance contracts legislation was a deliberate decision, and recommendation was based on a detailed consideration of these

[340] Note that Insurance Contracts Regulations 1985, Reg.27(c)(i)(B) provide for a PEMC period of 6 months but without prescribing an age limit for such an exclusion.

issues in the *"Differentiation between Risks*" Section of that Report[341]. The Commission specifically considered the interaction between specific types of discrimination such as that based upon gender and the application of age-based underwriting and contract conditions regarding both the underwriting of specific risks and the contract conditions relating to the resultant coverage.[342]

As mentioned earlier in this Chapter, the Commission has referred to the fact that the inclusion of these discriminatory practices was simply to embed:

> *"the common course of insurance practice in the relevant area*".[343]

I again suggest that the Commission's comment above is represented by insurers' widespread use of the right of derogation to substantially reduce the scope of cover provided by the "*standard Cover*" in the instance of Motor Vehicle, Sickness and Accident, Consumer Credit, Travel insurance, and multi-cover policies providing indemnities for personal risk exposures.

As with the Sex Discrimination Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth) exemption provisions considered earlier, Division Four of Part Four of the Age Discrimination Act 2004 (Cth) contains provisions for the permanent exemption of certain classes of activities and relationships from all or some of the provisions of the Act. Section 37 of the Act provides for insurance-related disability discriminatory acts to be exempted from the application of the Act sanctions, and sets out the conditional nature of that exemption.

[341] ALRC 20 (1982) Chapter 15, at Paragraphs 381-86.
[342] ALRC 20 (1982) Paragraph 381.
[343] ALRC 20 (1982) Paragraph 76.

Unlike the Explanatory memoranda provisions relating to exemptions under the Sex Discrimination Act 1984 (Cth), and those under the Disability Discrimination Act 1992 (Cth), the Explanatory Memorandum for what became the Age Discrimination Act 1992 (Cth) details the scope of the then proposed exemption, and offers explanation for why such a broad-based exemption from the Act provisions should be included in the legislation.[344]

A review of the Explanatory Memorandum provisions for this legislation again reveals the emergence of a clear consistency of approach to the use of statute-based exemptions to permit the continuation of discriminatory practices, which would otherwise have been unlawful, albeit subject to the satisfaction of conditions prescribed in the legislation.

As discussed earlier in the context of the anti-disability discrimination legislation, I reiterate that the use of terms analogous to those used in the earlier Sex Discrimination Act 1984 (Cth) in the age anti-discrimination legislation indicates that these provisions have been used as a standard when enacting exemption provisions in comparable legislation elsewhere. I regard this process as also permitting the more ready application of administrative or judicial interpretations of an exemption provision in one Act to similar provisions in another.

Previously, I have referred to the court decisions in *Xiros* and *Basanelli* [345] relating to judicial interpretations of the basis for exemption from sanctions of the Disability Discrimination Act 1992 (Cth) of insurance policy related disability discrimination, where consideration was given to the meaning of:

> *"based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and the discrimination is reasonable having regard to the data"*.[346]

Again, I regard the outcomes of the decisions above as relevant to the question addressed in this section of the chapter, namely that reliance on a statutory exemption from an unlawful discriminatory practice, embodied in a risk-based access denial financial exclusionary effect, will succeed only when found to be "*reasonable under the circumstances*".[347]

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[344] Explanatory memorandum Clause 37, at p.41.
[345] QBE Travel Insurance v Basanelli (2004) FCA 396 at 414ff. And Xiros v Fortis Life Assurance Ltd (2001) FMCA 15 at p.20.
[346] Disability Discrimination Act 1992 (Cth), Section 46(1)(f)(i) and (ii).
[347] Secretary, Department of Foreign Affairs and Trade v Styles and anor, 88 ALR 621 at p.634.

I note that these criteria may already be applied in the context of the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), and the Disability Discrimination Act 1992 (Cth).

The consistent application of these criteria, suggests that the interaction between the Age Discrimination Act 1992 (Cth) exemption[348] from what would otherwise have been an unlawful act and the benchmark against which that exemption must be measured effectively creates a constraint impacting the scope and extent of the application of a relevant financial exclusionary effect. The introduction of a "*dominant reason"* test [349]perhaps serves to restrict access to the remedies under the statute to those instances where discrimination based upon age was established evidentially to be the principal reason for the discrimination.

i. Recent Developments

Recommendations of an earlier Australian Parliamentary review into the Sex Discrimination Act (1984) Cth[350] had identified the potential advantages resulting from the harmonising of the provisions of a number of the existing anti-discrimination statutes to achieve a more effective outcomes than occurred previously. Following a period of consultation, amending legislation was introduced into the Australian Parliament and to implement a number of these recommendations and was subsequently passed and commenced in June 2011.[351] The Act did not amend the insurance exemption provisions contained in Section 37 of the Age Discrimination Act (2004) Cth.

e. Current Status

The existing insurance exemption provisions contained in Section 37 of the Age Discrimination Act (2004) Cth remain unchanged.

[348] Section 37.
[349] Section 16 refers.
[350] Senate Standing Committee on Legal and Constitutional Affairs – "Effectiveness of the Sex Discrimination Act in eliminating discrimination and promoting gender equality" Report 12 December 2008.
[351] Act No. 40 of 2011

f. Conclusion

I note that of the analyses undertaken in this chapter so far there has been only one where the statutory provision analysed has not been the subject of direct and detailed examination and review relating to the continued efficacy of the particular statutory provision in the context of contemporary socio-legal values. The only instance where the statutory provisions were not subject to direct administrative or judicial scrutiny were the anti-discriminatory provisions contained in the Racial Discrimination Act 1975 (Cth). As discussed earlier in this chapter, I noted that even in that instance, there had been some discussion as to what constituted "*reasonable(ness)"* within the scope of a specific statute.

Regarding the anti-discriminatory provisions of the Age Discrimination Act 2004 (Cth) and its exemptions, my inquiries indicate the absence of successful litigation under the Act.[352] However, I do not regard this absence of litigated outcomes involving the Age Discrimination Act 2004 (Cth) as being indicative of an absence of disputes occurring within the jurisdiction of the Act, or of structural defects in the statute, which either precludes or deters litigation. Rather, I suggest that what has occurred regarding the Age Discrimination Act 2004 (Cth), reflects the interaction between three factors, which I regard as being of direct relevance to my overall studies.

These factors are:

i. The enactment of the age-based anti-discrimination legislation in 2004 followed the earlier enactment of anti-discrimination provisions related to race (1975)/sex (1984)/disability (1992) discrimination. The expanding activities of the then Human Rights and Equal Opportunity Commission was accompanied by the dissemination of comprehensive guidelines, in conjunction with education programs, to raise awareness levels in the community regarding key anti-discrimination issues and remedial strategies.

   I regard the age anti-discrimination legislation as having benefited from earlier anti-discrimination statutory initiatives, in that producers of financial products (insurance) and related services as well as the consumer Client may be regarded as being more aware of what constitutes unacceptable conduct within the scope of a specific statute.

[352] Inquiries at Australian Human Rights Commission, October 2009.

ii. The enactment of the Sex Discrimination Act 1984 (Cth) saw the introduction of a process whereby statutory exemptions permitted acts that were otherwise unlawful. Section 41 of that Act permitted gender discrimination based terms and conditions in insurance policies, conditional on compliance with a set of specific conditions. In the later Disability Discrimination Act 1992 (Cth), Section 46 provided for similar statute-based exemptions that were accompanied by enlarged and more precisely stated compliance requirements. The Age Discrimination Act 2004 followed with statutory exemptions (Section 37) identical to those contained in the earlier disability anti-discrimination legislation.

I regard the age anti-discrimination legislation's use of exemption provisions identical to those that had been in operation for the previous 12 years as providing a firm basis for the understanding of what constitutes permitted discriminatory behaviour by insurers. The interaction between successive judicial decisions considering what constitutes "*reasonable behaviour*" creates a clear framework for on-going use by both insurers and consumer Clients.

An insurer seeking to exercise their right of derogation provided by Section 35 of the Insurance Contracts Act 1984 (Cth) to vary a *"standard cover"* by including an age-based discriminatory policy term or condition may now be regarded as being aware of what constitutes appropriate statistics or actuarial advice, on which it was reasonable for the insurer to rely.

I regard a similar situation prevailing in the context of insurers seeking to exercise their prerogative under Section 37 of the same Act regarding an explanation of unusual terms, by providing the prospective insured with a copy of the proposed policy wording containing the terms and conditions applying in a policy other than a "*standard cover*".

iii. The 2008 review of the Sex Discrimination Act 1984 (Cth) was preceded by a similarly comprehensive review of the Disability Discrimination Act 1992 (Cth) in 2004. Both reviews examined the nature of prior judicial decisions and their impact on other legislation, particularly legislation containing similar provisions regarding exemptions of what would otherwise have been unlawful acts under the legislation.

> I regard the principles of the age anti-discrimination legislation as having been augmented by the experience available from interaction between judicial interpretation of the scope of the statutory exemptions available to insurers and the past actual experience, gained from the administration of the three prior statutes over a period of 22 years, when the Age Discrimination Act 2004 came into effect.

I suggest that the apparently differing litigation profile of the age anti-discrimination legislation from those of earlier Acts may have something to do with an important socio-legal factor—that perceptions of what constitutes "*reasonable behaviour"* may have varied significantly over an identifiable period.

The cumulative impact of judicial interpretation and administrative review may be regarded has having impacted upon what are now prevailing constraints on application of either risk-based access denial or contract condition-based financial exclusionary effects.

I suggest my view is supported by the increased judicial scrutiny of what was regarded as adequate and relevant statistical data. In *Basanelli* (2004), for instance, the court made it clear that in order for an otherwise unlawful act to become an action authorised by the relevant statutory exemption, the pertinent data must be coherent, consistent, and of contemporary relevance.[353]

[353] QBE Travel Insurance v Basanelli (2004) FCA 396 at 414ff.

My analysis suggests the following constraint profile:

Figure 4.1.iv	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Individual-Occupation-Activity						
vi.- ix. Age Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**
Shaded area above indicates specific constraint assessment

4.4.v. Australian Securities and Investments Commission Act 2001 [ASIC Act](Cth) Implied Warranties

a. Statutory Provision

ASIC Act 2001 (Cth) Section 12ED(1) (a) imposes a duty by way of a general implied warranty that financial services provided to a consumer shall be carried out with due care and skill and, (b) that the financial services provided to a consumer will be reasonably fit for the purpose for which they are supplied.

However, Section 12ED(3) excludes application of this implied warranty to the provision of financial services under a contract of insurance.

b. Relevance of Provision as a constraint

A superficial examination of the interaction between Sections 12ED(1) and 12ED(3) suggests there is no relief available under the ASIC Act provisions against the terms of a *"contract of insurance"* on the grounds that those terms or conditions are "*harsh, oppressive, unconscionable, unjust, unfair or inequitable".*

However, further examination will indicate that under particular circumstances the provisions contained in Section 12ED(1), relating to implied warranties that the financial services will be reasonably fit for the purpose for which they are supplied, may be invoked and that relief may be available under the Act where terms or conditions attaching to the provision of financial services are terms or conditions are *"harsh, oppressive, unconscionable, unjust, unfair or inequitable".*

Here, I refer to limitations placed on the scope of Section 15 of the Insurance Contracts Act 1984 (Cth), which provides that judicial relief relating to *"contracts of insurance"* is limited to relief provided by the Act.

As discussed earlier in this chapter, these limitations arise from a relevant Australian court decision determining that the phrase *"contract of insurance"* relates to a concluded contract of insurance, namely to a contract of insurance that is in actual operation.[354] I suggest that, where the "*contract of insurance"* has not been concluded and is not in effect, access to relief is available for the effects of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* terms contained in the proposed contract.

I further regard such relief as being available under the provisions of the ASIC Act 2001, as will be considered later in this chapter, under the provisions of the recently introduced Australian Consumer Law.[355] It is in this context that I regard the provisions of Section 12ED(1) ASIC Act 2001 as exerting a substantial constraint on the extent to which risk-based access denial results in *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* consequences[356].

c. Discussion

[354] Australian Consumer and Competition Commission v IMB Group Pty Ltd *(in liq)* (2003) FCA 402 at p.445.
[355] A Trade Practices Amendments (Australian Consumer Law) Bill (No.1) 2009 was passed by the Australian Parliament on 17 March 2010, received Assent and became effective on 1st January 2011.
[356] As indicated earlier the phrase has been drawn from s15(2) of the Insurance Contracts Act 1984 (Cth).

I note that the ASIC Act 2001 has only relatively recently come into force, with the specific provisions under review being enacted as part of the overall Australian financial services reform process. The 2001 Act replaced an earlier 1989 Act with an identical title resulting from the resolution of a number of constitutional issues in favour of the Commonwealth relating to corporations law.

My review of the 2001 Act indicates that the provisions of Section 12ED are identical to those of the ASIC Act 1989, though with a more financial services focused provision. This contrasts with the more generalised provisions contained in Section 74 of the Trade Practices Act 1974 (Cth), in that Section 74(3)(b) did not apply to contracts of insurance.

Although the Trade Practices Act 1974 predates the Insurance Contracts Act 1984 (Cth), it is clear from the Australian Law Reform Commission Report on Insurance Contracts that the overall context within which the Commission's inquiries were undertaken from 1976 to 1981 included recognition of interaction of insurance processes within the overall Australian national legislative, judicial, and commercial systems.[357] It follows that regulation of the insurance process, other than by what became the Insurance Contracts Act 1984 (Cth), was not a desirable outcome consistent with the Commission's general strategy.

Whereas Section 12ED(3) of the ASIC Act 2001 (Cth) specifically excludes the application of the Section 12ED(1) implied warranty provisions to contracts of insurance, I regard the *"reasonably fit for purpose"* test imposed by that Section as providing guidance in reviewing the terms or conditions of a contract of insurance to determine if they were *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*.

If a judicial review, under the provisions of Section 15 of the Insurance Contract Act 1984 (Cth), regarded the ASIC Act provisions as indicative of a relevant test to be applied, the resulting decision could regard the terms or conditions in question as implying a breach of the insurer's duty of utmost good faith, the duty being delineated in Section 13 of the Act. The relevance of my view derives from the application of what under the Act constitutes *"reasonableness under the particular circumstances"*[358] of an insurer's behaviour.

[357] ALRC 20, Ch. 1, Paragraph 30, at p.16.
[358] Secretary, Department of Foreign Affairs and Trade v Styles and Anor, 88 ALR 621 at p.634. Waters; Commonwealth v HREOC (1995) 63 FCR 74, and Commonwealth Bank of Australia v HREOC (1997) 150 ALR 1.

I suggest that the provisions of Section 14(1) of the Act would then preclude the insurer from relying on those particular terms or conditions, if to do so would result in *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* treatment of the insured.

It is under these circumstances that I regard application of the principles expressed in the ASIC Act 2001 (Cth) Section 12ED(1) provisions as providing an effective constraint to the application of risk-based access denial at the underwriting stage of the insurance process and to arising contract condition-based financial exclusionary effects that prejudice the interests of an insured during the currency of a contract.

Whilst Pearson (2009) notes *"due care and skill"* and *"reasonably fit for purpose"* as being among the non-excludable statutory implied terms in every financial services contract targeted at consumers with the exception of insurance contracts, guidance is not however provided as to whether these implied terms could be used as a test of "*reasonableness"* in the manner I have identified above.

d. Recent Developments

On 24th June 2009, a major restructuring of Australian consumer protection legislation commenced with the introduction of the Trade Practices Amendment (Australian Consumer Law) Bill (No.1) to the Australian Parliament, which approved the legislation on 17th March 2010.A second stage of the restructuring process then commenced with the introduction of the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 on 17th March 2010. Later in this chapter, I will consider the potential overall impact of these legislative changes on insurance related financial exclusionary effects.

At this stage, I direct attention to the impact of the two-part legislation on provisions of the ASIC Act 2001.

A review of both parts of the legislation introducing the Australian Consumer Law and a restatement of the Trade Practices Act in the form of the Competition and Consumer Law did not identify any provisions amending the provisions of Section 12ED of the ASIC Act 2001. Clear guidance is however available from the Explanatory Memoranda accompanying the proposed legislation. In identical terms, each of these documents state the provisions of Section 15 of the Insurance Contracts Act 1984 (Cth) as follows:

"Effect of the Insurance Contracts Act 1984 on certain consumer contracts

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

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

But does not include relief in the form of compensatory damages. The effect of Section 15 is to mean that the unfair contract terms of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the Insurance Contracts Act 1984, to the extent that that Act applies".[359]

e. Current Status

In my view, it is clear that recent developments introducing a harmonised "Australian Consumer Law" are not intended to impact upon ASIC Act 2001 provisions precluding relief provided under the Act for the *harsh, oppressive, unconscionable, unjust, unfair or inequitable* effects of the terms or conditions of an insurance contract, due to the recognition of the role played by Section 15 of the Insurance Contracts Act (1984) Cth.

f. Conclusion

The analysis in this part of the chapter has again drawn attention to the identification of constraints restricting the application of financial exclusionary effects from the financial products and services regulatory perspective of the implied warranty provisions of the Australian Securities and Investment Commission Act 2001 (Cth).

As with the previous four-part analysis of the insurance-relevant provisions of a number of Commonwealth anti-discrimination Acts, the current analysis has located a statute-based exemption that precludes the ASIC Act 2001 implied warranty provisions from applying to *"contracts of insurance".*

[359] Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2009 Explanatory Memorandum at p.31 and, the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 Explanatory Memorandum at p.74.

The specific exemption contained in Section 12ED(3) of the Act applies even though the Act makes it clear that contracts of insurance fall within the scope of the Act[360]. However, guidance is provided by relevant Explanatory Memoranda accompanying other Bills through Parliament, that similar provisions are excluded due to the operation of Section 15 of the Insurance Contracts Act 1984 (Cth).

However, I have already pointed out that the application of Section 15 of the Insurance Contracts Act 1984 (Cth) is limited to those insurance contracts that have "concluded", with the result that statutory provision does not apply to the pre-contract underwriting phase containing risk selection criteria embodying risk-based access denial financial exclusionary effects, such as age or gender-based coverage limitations. As such, the full effect of the implied warranty contained in Section 12ED(1) relates to the financial service being *"reasonably fit for purpose*".[361] It is under such circumstances that I regard the ASIC Act 2001 implied warranty provisions as clearly constraining risk-based access denial financial exclusionary effects.

In addition, the interpretation of what constitutes *"reasonableness under the particular circumstances"* [362] would be directly relevant to an Insurance Contracts Act 1984 (Cth) Section 15 judicial review of an insurer's behaviour. Under such circumstances, a resulting decision could regard the terms or conditions in question as implying a breach of the insurer's duty of utmost good faith that is delineated in Section 13 of the Act. As discussed earlier, application of Section 14(1) of the Act would preclude the insurer from relying on those particular terms or conditions if to do so would result in *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* treatment of the insured. Given this context, I argue that the application of principles expressed in the ASIC Act 2001 (Cth) Section 12ED(1) provisions exert an effective constraint on the application of risk-based access denial at the underwriting stage of the insurance process, and contract condition-based financial exclusionary effects that may prejudice the insured's interests during the currency of a contract.

[360] More specifically defined in s12BAA(7)(d) and (e) and (9)(a) and (b).
[361] S12ED(2).
[362] Secretary, Department of Foreign Affairs and Trade v Styles and Anor, 88 ALR 621 at p.634. Waters; Commonwealth v HREOC (1995) 63 FCR 74, and Commonwealth Bank of Australia v HREOC (1997) 150 ALR 1.

My conclusion is summarised in the Figure below:

Figure 4.1.v.	**Constraint Profile: Risk based access denial and Contract condition based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Consumer Warranties						
x. ASIC – Financial Products & Services Implied Warranties	RBAD				Nil Section 15 ICA effect and impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Nil impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**
Shaded area above indicates specific constraint assessment

4.4.vi. Corporations Act 2001 (Cth), Chapter 7 – Product Disclosure Statements

a. Statutory Provision

Part Seven of the Corporations Act 2001 requires that a regulated person[363] shall provide a Product Disclosure Statement (PDS) to a *Retail Client*[364], in which information regarding the financial product shall be provided in a manner satisfying detailed requirements specified by the Act.[365] The Act also requires that the information contained in the PDS must be presented in a *"clear, concise and effective manner"*[366].

b. Relevance of Provision as a constraint

[363] As defined in Corporations Act s1011B to include an issuer, seller, of a financial product, or other specified persons in s1011B(a)-(g).
[364] Defined by s761G(5) of the Act as an individual or small business where they purchase one of the listed general insurance products specified in the Corporations Regulations 2001 (Cth) Reg.7.1.11-7.1.17A.
[365] s1013D(1)-(4).
[366] s1013C(3).

I suggest there are several instances where the statutory provision under review may act as a constraint on the effect of either risk-based access denial or contract condition-based financial exclusionary effects. These are summarised as:

i. Non-compliance with the detailed PDS specific disclosure requirements of the Corporations Act 2001 (Cth) is an offence under that Act.[367]

ii. A breach of the statutory requirements regarding Product Disclosure Statement contents provides an alternative source of a remedy that may effectively circumvent effects of Section 15 of the Insurance Contracts Act 1984 (Cth) relating to "concluded" insurance contracts.

iii. The failure of an insurer to satisfy, and thus be in breach the statutory requirement that the information contained in a PDS must be worded and presented in a *"clear, concise and effective manner"*[368] constrains the use of complex and ambiguous terms set out in a term or condition, the effect of which is either risk-based access denial, or, in the case of an insurance contract, an example of contract condition based financial exclusionary effects.

c. Discussion

Whereas, non-compliance with the detailed PDS specific disclosure requirements of the Corporations Act 2001 (Cth) is unlawful, and therefore an offence under the Act, non-compliance with a number of the disclosure provisions of the Insurance Contracts Act 1984 (Cth) with regard to product (contract provisions) is neither a breach of the Act nor unlawful. At best, it may be regarded as an indication of the insurer not having acted with the *utmost good faith* as required under Section 13 of that Act.

[367] Financial Services Reform Bill 2001 Explanatory Memorandum, at Clause 14.73 provides guidance on the s1013D requirements.
[368] s1013C(3).

I have previously noted that the effect of Section 15 of the Insurance Contracts Act 1984 (Cth) precludes judicial relief being available under any other statute for review of a contract (of insurance) on the grounds that a contract was "*"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*. However, I suggest that the overall effect of the comprehensive statutory requirements regarding the content of an insurance product to be incorporated in a PDS is an equally comprehensive statement of the *"rights, terms and conditions"*[369] contained in the product.

It follows that a breach of the statutory requirements regarding Product Disclosure Statement contents provides an alternative source of a remedy that effectively circumvents the effects of Section 15 of the Insurance Contracts Act 1984 (Cth) that relate to "concluded" insurance contracts. The existence of access to such a remedy may be regarded as an effective constraint on the financial exclusionary effects of terms and conditions as set out in the PDS.

Earlier in this chapter, I observed that the Insurance Contracts Act 1984 (Cth) required an insurer, prior to commencement of the contract, to have "*clearly inform*(ed)" *the insured in writing*" of the provisions of the proposed insurance contract,[370] or where the product was not a *"standard cover"*, or the effect of an unusual term.

Under the Act, not satisfying this obligation disallowed the insurer from relying on the terms involved in instances where it is claimed that the provisions were *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* against the insured.

As noted above, the Corporations Act 2001 (Cth) also requires that information contained in the PDS must be worded and presented in a *"clear, concise and effective manner"*[371]. Failing to satisfy this requirement is again a breach of the Act and unlawful. I suggest that this sanction provides an effective constraint on the use of complex and ambiguous terms to set out a term or condition, the effect of which is either risk-based access denial, or, in the case of an insurance contract, contract condition based financial exclusionary effects.

[369] As required by the Corporations Act 2001 (Cth) s1013D(6).
[370] Refer to Section 35(2) and Section 37.
[371] See s1013C(3).

The Insurance Contracts Act Review 2004 considered the extent of any interaction, between provisions of the Insurance Contracts Act 1984 (Cth)—relating to insurer disclosure obligations and the effect of non-compliance with requirements[372]—and the insurer's parallel duty towards "*Retail Clients*" to fully comply with PDS disclosure requirements, in the context of specified general insurance products.[373]

The Review Report identified considerable gaps between the PDS regime's scope and application under the Financial Service Reforms, now embedded in Chapter 7 of the Corporations Act 2001, and the insurer's product disclosure duties. It concluded that the *"standard cover"* provisions of the Insurance Contracts Act 1984 (Cth) provided more effective consumer protection, than those available under the PDS regime.[374] Although this would seem to suggest the existence of effective constraints that may be invoked against insurers whose dealings with insureds in either a pre-insurance contract or "concluded" contract context were *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*, I have yet to find evidence supporting this conclusion.

In addition, I have had difficulty rationalising the contrast between sanctions resulting from a breach by an insurer under the Insurance Contracts Act 1984 (Cth) in the context of insurer obligations under Sections 13, 14, 15, 35, and 37 of the Act and those applicable under the Corporations Act 2001 for breaches of the Chapter Seven provisions. Sanctions applicable under the Insurance Contracts Act 1984 (Cth) have earlier discussed in detail in Chapter Three and are summarised as follows:

- Sections 13 and 14 – An insurer may not rely on the *duty of utmost good faith* where they have not complied with the requirements and manifestation of compliance with that duty. Such a sanction may be regarded as being case-specific and, other than in situations not involving domestic insureds *"standard cover",* the financial risk exposure is not substantial.

[372] Refer to Sections 13,14,15, 35, and 37.
[373] Refer to 5.4.
[374] See Review Report 2004, Paragraph 5.46.

- Section 15 – Relief for an insured under a "concluded" contract of insurance for *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* conduct against that insured would appear to be limited to an order that a claim made under an insurance contract be paid or to a rescission of the particular contract and refund of the premium paid.[375] Rather than compensating the insured for losses incurred by the insurer's conduct, these remedies, other than returning the insured to the pre-contractual position, appear to be largely ineffectual.

- Section 35 – Relief for an insured is prescribed by the Act. In contrast to earlier conditions that were more prejudicial to the interests of the insured, and which had resulted from the insurer exercising their right of derogation, the insurer would now be responsible for providing an indemnity based upon minimum amount provisions in the accompany Regulations[376].

- Section 37 – Relief for an insured is restricted to preventing an insurer from relying on an unusual term or condition in an insurance contract, other than where specified prior requirements have been satisfied.

Some of the sanctions for breach of the provisions of the Corporations Act 2001 relating to Product Disclosure Statements may be summarised as follows:

- Section 991A provides that a financial services licensee (such as an insurer) must not, in relation to the provision of a financial service, engage in conduct that is in all circumstances *"unconscionable*"[377]. If a person (such as an intending insured) suffers loss or damage, that person may recover the amount lost by action against the licensee.[378]

[375] Speno Rail Maintenance Pty Ltd v Hamersley Iron Pty Ltd [2000] WASCA per Malcolm CL at Paragraph 46.
[376] Insurance Contract Regulations (1985) Cth, Regulations 8, 12 16, 20, 24 and 28.
[377] S991A(1).
[378] S991A(2).

Such an action may be commenced within 6 years after the day on which the cause of action arose.[379] Here, one might look to the example of *Hammer Waste* (2003). Other than the statutory constraint imposed by Section 15 of the Insurance Contracts Act 1984 (Cth), this insured could have sought relief under the provisions of Section 991A of the Corporations Act, 2001 (Cth) for what the Court determined to be *"unconscionable and unjustified"* insurer conduct in conveying the terms and conditions of the proposed insurance contract to the intending insured.[380]

- Section 912B provides that a financial services licensee (such as an insurer) providing a financial service to a *Retail Client* must make ASIC- approved arrangements to compensate persons for loss or damage suffered due to breaches of relevant obligations.[381] Such compensatory arrangements typically consist in the licensee holding effective professional indemnity insurance, or ASIC-approved powers, to meet such contingencies.[382]

- Part 7.10 of the Corporations Act 2001 (Cth) lists a range of prohibited forms of market misconduct. Relevant prohibitions include acts relating to *"misleading, dishonest and deceptive conduct; false and misleading statements".*[383] Many of these constitute criminal offences, while others attract civil liability.[384]

d. Recent Developments

The Product Disclosure Statement protocols have undergone various procedural modifications following the financial services reforms coming into full effect in March 2004. However the fundamental requirement, that a Retail Client shall be fully informed in a clear, concise, and effective manner of all facets of the financial product or service being sought, has remained unchanged.

[379] S991A(3).
[380] QBE Mercantile Mutual Ltd v Hammer Waste Pty Ltd & Anor (2003) NSWCA, as per Sheller JA at paragraph 61.
[381] S912B(1) and (2).
[382] ASIC Regulatory Guideline (RG) 126 .
[383] S1041.
[384] Such as s1041H relating to misleading or deceptive conduct, as distinct to dishonest conduct which is an offence, as well as attracting civil penalties (s1041G).

Although a number of the Insurance Contracts Act 1984 (Cth) Review Report 2004 recommendations were intended to harmonise product disclosure obligations under the Act and those contained in Part 7 of Corporations Act 2001 (Cth), the proposed draft legislation implementing the recommendations lapsed in 2007. Redrafted proposed amendments to the Insurance Contracts Act 1984 (Cth) were introduced in 2010 and focused mainly on modifying the *utmost good faith* principles contained in Section 13 of the Act, rather than undertaking a more radical or wide-spread restructuring of the Act.[385] The proposed amendment regarded non-compliance as being a breach of the Act, although it would not be an offence that would otherwise attract a prescribed penalty. The accompanying Explanatory Memorandum clearly indicates that the proposed amendments to the Act were part of an process of systematic restructuring of the Act.[386] The redrafted proposed amendments subsequently lapsed with the prorogation of that Parliament and have not been subsequently reintroduced.

e. Current Status

The failure on two occasions of the draft legislation to be enacted has resulted in the absence of a harmonised approach being adopted by those relevant provisions of the Insurance Contracts Act (1984) with equivalent provisions in the Corporations Act (2001) Cth

f. Conclusion

The analysis undertaken in this part of the Chapter has again drawn attention to the identification of constraints restricting the application of financial exclusionary effects.

On this occasion, I examined the scope of constraints arising from requirements for compliance with the provisions of Part 7 of the Corporations Act 2001 (Cth) relating to financial services licensee (such as an insurer) providing Product Disclosure Statements (PDS) to intending insureds, regarded as *Retail Clients* under the Act. My conclusions are summarised as follows:

i. Unlike the experience encountered in earlier reviews in this chapter, in this instance, I identified no statute-based exemption of insurance products and services from the requirement for full disclosure of the terms and conditions in a "*clear, concise and effective*

[385] Insurance Contracts Amendment Bill 2010, Schedule 1, Part 1.
[386] Insurance Contracts Amendment Bill 2010 Explanatory Memorandum 3.27 and 3.28 read in conjunction with the Australian Treasury Options Paper *"Unfair Terms in Insurance Contracts",* 18 March 2010.

manner". I regard this standard of disclosure as exceeding that required by the Insurance Contracts Act 2001 (Cth), which only required the insurer to *"clearly inform in writing"* an intending insured accessing "*standard cover*" or other insurance products.[387] I regard this as meaning that a higher standard of disclosure automatically requires an insurer to more fully and accurately disclose the nature of possible financial exclusionary effects in a manner that would facilitate a review to determine if those financial exclusionary effects represented *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* conduct that was "unreasonable under the circumstances".

ii. I have previously noted observed that Section 15 of the Insurance Contracts Act 1984 (Cth) precludes access to judicial relief under other Acts in insurance contracts that have "concluded". Again, I note that judicial relief would nonetheless be available under other Acts in situations where an insurance contract is not in force, such as where risk-based access denial financial exclusion had occurred during the pre-contract underwriting phase. I regard the statutory requirement that a *"Retail Client"* shall be provided with a Product Disclosure Statement as being relevant to the pre-insurance contract and to the concluded contract phases of the insurance process.

Furthermore, I suggest that an insurer's non-compliance with Corporations Law 2001 (Cth) requirements regarding PDS may constitute a breach punishable by civil/criminal sanctions. During the course of my analysis, I noticed that judicial relief via compensation for loss or damage due to non-compliance was permissible under the Act. Therefore, given the Corporations Act 2001 (Cth) provides for relief from a breach of specific PDS disclosure requirements, the restrictive provisions of Section 15 of the Insurance Contracts Act 1984 (Cth) would not apply.

iii. I compared the respective effects of breaching different statutory requirements under the Insurance Contracts Act 2001 (Cth) and a breach of Product Disclosure protocol under Part 7 of the Corporations Act 2001 (Cth).

[387] S35 and 37.

I found that the failure of a financial services licensee, such as an insurer, to comply with Act requirements, regarding clear, concise, and effective product or service disclosure, could be regarded as being *"unconscionable and unjustified"*. It would constitute a breach of that Act and result in criminal or civil sanctions. I further noted that criminal and/or civil penalties may also result where a licensee's actions were serious enough to constitute *"misleading, dishonest and deceptive conduct: false or misleading statements".*

In my view, the existence of clear sanctions for non-compliance constitutes an effective constraint on risk-based access denial financial exclusionary effects during the underwriting stage or contract-condition based financial exclusionary effects that may arise on conclusion of the contract. This pertains to my position that statutory provisions regarding non-compliance appear to be adequately communicated in the term *"unconscionable or unjustified",* which lends itself to easy interpretation.

My conclusions result in the constraint profile below:

Figure 4.1.vi	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Financial Services Reform – Insurer Product Disclosure						
xi. Insurer Product & Service Disclosure	RBAD				Nil Section 15 ICA effect and impact of external statutory provisions	
	CCBD				Section 15 ICA effect and impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.4.vii. Corporations Act 2001 (Cth), Chapter 7 Alternative Dispute Resolution (ADR)

a. Statutory Provision

Chapter Seven of the Corporations Act 2001 provides that where a financial services licensee (including an insurer) makes financial services available to a *"Retail Client"*[388] they shall have internal (IDR) and external (EDR) dispute resolution schemes that cover complaints against the licensee by Retail Clients pertinent to the provision of all financial services covered by the licence[389], and that these schemes shall be approved by ASIC.[390] The Act further provides that the Corporations Regulations 2001 (Cth) shall detail scheme provisions as approved by ASIC and those related standards to be followed.[391]

b. Relevance of Provision as a constraint

As with my earlier reviews of various statutory provisions[392], I suggest that these provisions may act as a constraint on the expansion or impact of risk-based access denial or contract condition-based financial exclusionary effects. As indicated earlier, I note some variance of opinion on the nature and extent of the impact of the interlinked IDR–EDR processes in a general insurance context. This was illustrated by the following view expressed by the Insurance Contracts Act Review 2004, when noting that, while the provisions (of the Insurance Contracts Act 1984 (Cth) relating to utmost good faith and the industry IDR and EDR facilities authorised by statute to interpret policy (insurance contract) related disputes can assist individual consumers, they:

> *"Cannot address systemic issues, and indications are there are systemic problems with unfair terms in insurance contracts".*[393]

I believe however that a constraint restricting risk-based denial access or contract condition-based financial exclusionary effect should be regarded as being applicable in those specific instances where it may be demonstrated that the constraining factor is of general application within a particular class of insureds or intending insureds or provides guidance on what constitutes *"reasonableness*".

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[388] Defined by s761G(5) of the Act in the context of an insurance product, as an individual or small business where they purchase one of the listed general insurance products specified in the Corporations Regulations 2001 (Cth) Reg.7.1.11-7.1.17A.
[389] Corporations Act 2001 (Cth) s912A(1)(g) and s912A(2)(a) and (b).
[390] s912A(2)(a)(i) and (b)(i).
[391] s912A(3)(a) and (b), and Regulation 7.6.02(1) - (4).
[392] Chapter 3.3.3.(i) and (viii).
[393] Final Report on Second Stage, at p.52

Whilst I regard the IDR and EDR provisions as providing an medium to address specific Retail Client issues, I accept that these processes are not directed to addressing those *"systemic issues"* referred to in the Review.

c. Discussion

My principal goal in analysing general insurance IDR/ADR processes is identifying the extent to which these statute-prescribed non-judicial/non-litigation alternative dispute resolution processes may constrain the effects of either risk-based access denial or contract condition-based financial exclusionary effects. Above, I have identified ASIC's central role in approving and overseeing the financial services sector alternative dispute resolution processes. This regulatory role is largely implemented by establishing *regulatory guidelines* defining licensee compliance in terms of a licence condition, which, if breached, could result in a suspended license or a different sanction being imposed by ASIC.

ASIC Regulatory Guidelines 139 and 165 identify the parameters of appropriate internal and external dispute resolution processes, and procedures to be followed by ASIC when approving these processes. Where the process is self-certified, as in the case of IDR schemes, the guidelines identify audit requirements to be followed to ascertain the extent to which a particular scheme complies with the guidelines.[394] ASIC relies on external standards in determining the suitability of a particular IDR scheme.

Whereas previously, reliance was placed on the Australian Complaints Handling Standard[395], with effect from 1 January 2010[396], this standard has been superseded by a modified version of a more comprehensive but generic international standard.[397] Similar processes of external dispute resolution schemes permitted to operate in the financial services sector have been put in place for approval by ASIC.

The Financial Ombudsman Service (FOS) has ASIC approval to operate EDR schemes for those financial services sectors other than superannuation, financial cooperatives, and credit unions.

[394] RG 165 (May 2009) Appendix 1.
[395] AS 4269:1995.
[396] RG 165.12.
[397] AS ISO 100002 – 2006 Customer satisfaction – Guidelines for complaints handling in organisations (ISO 100002: 2004, MOD).

Specifically, ASIC's approval process includes endorsing the appropriateness of the schemes' Terms of Reference for financial service sector related tasks. On 1 January 2010, reflecting the harmonisation of Sector EDR schemes, FOS implemented ASIC approved Terms of Reference that underpin various EDR schemes, including those relating to the general insurance industry. I suggest that an analysis of these protocols may provide guidance in determining the extent to which those general insurance related IDR/EDR processes may impact either risk-based access denial or contract condition-based financial exclusionary effects in the general insurance industry.

My review identified that the Terms of Reference of an earlier (Pre-2001) general insurance EDR scheme precluded the scheme from addressing disputes involving:

> *"(b) An insurer's pricing or underwriting decisions; or*
> *(c) An insurer's sales or marketing practices, or general business administration except where they directly relate to the claim."*.[398]

I regard such dispute exclusions as having a wide scope, encompassing pricing and underwriting of risks, in addition to sales and marketing practices adopted by the insurer. I note that the use of the term *"underwriting decisions"* would include underwriting decisions declining acceptance of proposals of intending insureds for coverage.

d. Recent Developments

My review also noted that the FOS 2010 Terms of Reference broadened the exclusion of disputes considered by the general insurance industry EDR, as follows:

> *"5.1 Exclusions*
> *5.1.(e) Disputes relating to rating factors and weightings the insurer applies to determine the insured's or proposed insured's base premium which is commercially sensitive information, and,*
>
> *5.1.(f) Disputes about a decision to refuse to provide insurance cover except where:*
> *(i) The dispute is that the decision was made indiscriminately, maliciously or on the basis of incorrect information".*[399]

[398] General Insurance Enquiries and Complaints Scheme Terms of Reference (2001) in Isaacs (2001) Appendix 3 at p.92. A. Tarr (2002) at p.139.

My analysis suggests that information relating to the marketing, sales, risk rating factors, and weighting profiles used by general insurers are regarded as being *"commercially sensitive".* It is on that basis that I suggest that the Clause 5.1(e) and 5.1(f) exclusion cited above effectively precludes the involvement of FOS in any matter involving these elements, such as would be manifested by way of risk-based financial exclusionary effects involving the declinature by an insurer of coverage for an intending insured.

I however regard the revised FOS Terms of Reference as not precluding an insured's access to the IDR/EDR process where the dispute involves an insurance contract which is current, such as those instances where a claim under the contract has been denied. On these occasions I regard the dispute as relating to the operation of the concluded contract, and not relating to any prior underwriting decision.

e. Current Status

There is no evidence indicating that the structures of the current general insurance industry FOS related IDR/EDR schemes are undergoing further review, other than those required by ASIC to be undertaken at regular intervals..

f. Conclusion

My earlier review in Chapter Three identified the extent to which the provisions of Section 15 of the Insurance Contracts Act 1984 (Cth) precluded access to judicial relief from statutes other than an Act with a subsequent interpretation of that Section of the Act, thus restricting application of the Section to those circumstances where an insurance contract, having been "concluded", did actually exist,

In addition, I noted that the subsequent extensive review of the Act in 2004 emphasised the fact that an appropriate alternative dispute resolution (ADR) framework existed in the Australian domestic general insurance industry in the form of a comprehensive integrated internal and external dispute resolution process. As I noted earlier, the argument then followed that there was little justification for amending the Section 15 provisions on the grounds that the provisions effectively discouraged consumer-based litigation involving general insurance issues, given the effectiveness of the ADR processes that were in place.

[399] FOS Terms of Reference 2010 at pp.9, 10.

i. My review has sought to establish the extent to which current ADR processes provide an effective constraint on financial exclusionary effects in the general insurance process. I have identified the existence of a number of systemic barriers embedded in the ADR process that preclude the dispute resolution process from considering disputes which may focus on risk classification and underwriting practices such as would underpin a risk-based financial exclusionary effect.

ii. My review noted that while some of the above dispute exclusions existed two decades ago, contemporary ADR dispute exclusions have in fact been broadened, and may now be regarded as excluding consideration of disputes, which may have been included previously.

iii. In conclusion, I suggest that there is relevant evidence indicating that there are significant limitations on the extent to which existing ADR processes may be regarded as providing effective constraints against the application of several financial exclusionary effects, including those involving risk-based access denial or contract condition-based financial exclusion.

I suggest that my conclusions result in the following constraint profile:

Figure 4.1.vii.	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Financial Services Reform - General Insurance Alternative Dispute Resolution						
xii. Internal and External Dispute Resolution Schemes	RBAD	Nil Section 15 ICA effect and Nil impact of external statutory provisions				
	CCBD				Section 15 ICA effect and impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.4.viii. The recent Australian Consumer Law (ACL) financial services related provisions contained in the ASIC Act state that a term in a consumer contract is void if the term is unfair and the contract is in a standard form contract.

a. Statutory Provision

The recent amendments to the Australian Securities and Investments Commission Act 2001 (Cth) provide that a term in a consumer contract is void if:

- the term is unfair and,
- the contracts is a standard form contract and,
- the contract is a financial product or a contract for the supply, or possible supply, of services that are financial services.[400]

[400] Proposed s12BF(1).

The Act defines *"a consumer contract*" as one in which at least one of the parties is an individual, and in which the contract provides for the supply of any financial product or service that is wholly or predominantly for personal domestic or household use or consumption.[401]

The Act provides the basis on which a contract term may be considered unfair, placing the onus on the proponent of the term to prove it is not unfair.[402]

A test by which a contract may be determined to be a *"standard form contract"* is one in which:

- one of the parties has most or all of the bargaining power relating to the transaction, and,
- the contract was prepared by one party before any discussion relating to the transaction commenced and,
- the other party was required to accept or reject the terms in the contract on a *"take-it-or-leave-it basis"*.[403]

b. Relevance of Provision as a constraint

An initial examination suggests that the Australian Consumer Law, incorporated into the amended Trade Practices Act 1974 (Cth) and the ASIC Act 2001 (Cth), seeks to address the impact of number of the financial exclusionary effects I have identified as generally occurring within financial products and related services.

[401] Proposed s12BF(3).
[402] Proposed ss12BG(1)(a) and (b).
[403] Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill 2009, at Clause 2.89.

In this context, my use of the term *"address"* suggests that the legislation provides a medium by which unfair contract terms found in *"standard form contracts"* may be examined and compared against statutory provisions to determine if such terms are *"unfair"*, and therefore void. As earlier encountered in this chapter, I again find that there some potential constraints exist on the application of the ACL principles to Australian domestic general insurance contracts, resulting in instances where the principles may not apply.

c. Discussion

I have identified a number of factors requiring further examination in order to determine firstly, if the factor is of relevance to the overall objective of this Chapter and secondly, where the factor is of relevance, the extent of that relevance.

i. I considered the question of what are the relevant statutory provisions relating to the financial exclusionary effects in general insurance products and services, in the context of the Australian Consumer Law (ACL) provisions relating to Unfair Contract Terms. I sought to identify whether or not the general insurance *"standard cover"* considered earlier fall within the scope of the ACL legislation.

I note that there appears to be some similarity between ACL provisions and those of other general insurance relevant legislation regarding what constitutes a *"consumer contract*".

The ACL principles regard such a contract as being principally directed to individuals and providing products or services that are predominantly for personal domestic or household use or consumption.[404] Similarly, the Insurance Contracts Act 1984 (Cth) "*standard cover*" provisions, including those relating to *"prescribed contracts*"[405], regard each of these contracts as:

[404] Proposed s12BF(3).
[405] Insurance Contracts Act 1984 (Cth) s34.

"contracts that provide insurance cover... where the insured or one of the insureds is a natural person".[406]

This level of concordance continues in provisions of the Corporations Act 2001 (Cth) relating to the regulation of financial products and services, including general insurance products provided to *"Retail Clients"* who are:

(a) either,
(i) an individual,
(ii) or will be for use in connection with a small business.[407]

"Small business" was defined as:

"a business employing less than:
(a) if the business is or includes the manufacture of goods – 100 people,
(b) otherwise – 20 people".[408]

I therefore regard the broad scope of the ACL definition of "*consumer contract"* as encompassing general insurance contracts described as "*standard cover(s)"* identified as *"prescribed contracts*" in the Insurance Contracts Regulations 1985 (Cth).

However, I note from my analysis earlier in this chapter that the financial exclusionary effect related issues which may have resulted from insurers exercising their right of derogation under that Act may have avoided being regarded as unlawful by way of the statute-authorised use of the right of derogation.

I further regard the ACL definition above as being in accord with financial products and services falling within the scope of the Corporations Act 2001 (Cth). In Chapter Two, I have already identified the existence of contract condition-based financial exclusionary effects in "*standard cover*" as prescribed by the Insurance Contracts Act 1984 (Cth).

[406] Insurance Contracts Regulations 1985 (Cth), Regulations 5,9,13,17,21, and 25, relating to Motor Vehicle Insurance, Home Building Insurance, Home Contents Insurance, Sickness and Accident Insurance, Consumer Credit Insurance and Travel Insurance respectively.
[407] Corporations Act 2001 (Cth) ss761G(5)(a)(i) and (ii).
[408] Corporations Act 2001 (Cth) s761G(5)(12).

Later, in Chapter Five I will establish that there is evidence indicating that insurance products defined under the Corporations Law 2001 (Cth) as applicable to *"Retail Clients"* do in fact contain similar financial exclusionary effects, occasioned by a process of "replication'.

Consequently, I suggest that it is appropriate to regard domestic general insurance products falling within the scope of the financial products and services to which the ASIC Act amendments will apply as being *"consumer contracts"* qualifying for redress under ACL Unfair Contract Term provisions.

ii. My inquiries suggest that the Unfair Contract Terms contained in the ACL are similar to the European Union 1993 Directive on Unfair Terms in Consumer Contracts [409] that has subsequently been adapted to an insurance context.[410] I suggest that recent amendments introducing unfair terms into the ASIC Act 2001 (Cth) that were regarded as being of relevance to contracts for the supply of financial products or services, largely follow examples set out in the Annexure to the Directive.[411]

Adelmann (2008) follows Clarke (2002) when exploring the perimeters of unfair contract terms and terms of relevance to the insurance contractual process.[412] However, subsequently, Clarke (2009)[413] considerably expanded this analysis, particularly exploring the concept of *"unfairness"* vis-à-vis "*good faith"*, which, in an Australian insurance context under Section 13 of the Insurance Contracts Act 1984 (Cth), is regarded as an implied term in any insurance contract.

iii. I then proceeded to address the question of whether there are exemptions from the application of the ACL Unfair Contract Terms provisions that may relate to domestic general insurance products or services.

[409] Directive 93/13/EEC, 5 April 1993 "Unfair Terms in Consumer Contracts".
[410] Clarke et al (2007) and Article 2:304 at p.18.
[411] Examples of Unfair Terms", S12BH(1)(a) – (n).
[412] At p.138.
[413] At 19-5A3; pp.617-24.

The amendments to the ASIC Act 2001 (Cth) provide that specific categories of consumer contract terms and conditions do not fall within the scope of the *unfair contract terms* legislation. These categories are:

- Terms that define the main subject matter of a consumer contract,
- Terms that set the "upfront price" payable under the contract, or
- **A term that is a term required or expressly permitted, by law of the Commonwealth or a State or Territory**".[414] (My emphasis)

I have earlier observed that "*prescribed contracts*", which constitute *"standard cover(s)"* under the Insurance Contract Act 1984 (Cth), may contain conditions or exclusions within which contract condition-based financial exclusionary effects may be identified. I have already noted that the terms *"prescribed contracts"* are specifically stated in the related Insurance Contracts Regulations 1985 (Cth).

It is under these circumstances that I suggest that the terms of such *"standard Cover"* fall within the scope of the third exempt category above, as they are:

"……required or expressly permitted by law of the Commonwealth……"

Accordingly I suggest that the ACL Unfair Contract Terms provisions contained in the amendments to the ASIC Act 2001 (Cth) will not apply. I regard this as again being an instance where financial exclusionary effects have been exempted from what would otherwise have been those provisions declaring the adverse terms being void.

However, Adelmann (2008) notes that the EEC PEICL Unfair Contract Terms provisions relating to insurance contracts also have specific exemptions to what may generally be regarded as "Core" contractual terms,[415] in a manner similar to recent amendments to the ASIC Act 2001 (Cth) inserting the exemption provisions referred to above. I have not however identified any similar categorisation specifically mentioned in either the Australian statutory amendment or supporting documentation.

[414] S12BI(1).
[415] Adelmann (2008) at 135 referring to PEICL Art. 2:304(3)"Abusive Clauses" in Clarke et al. (2007) at p.18.

iv. I then advanced the consideration of whether those modifications to the terms and conditions of general insurance *"prescribed contracts"* (*standard Cover*) were exempt from the application of the ACL Unfair Contract Terms provisions where these modifications have arisen from the insurer's use of the statutory right of derogation provided by Section 35 of the Insurance Contracts Act 1984 (Cth).

Examination of this issue follows directly from #1 above, in that there is consideration of circumstances where a statutory provision permits a financial exclusionary effect that may be "*unfair"* to a particular individual insured or potential insured or to a class of insureds or potential insureds.

I also suggest a second issue for consideration. Here, a Product Disclosure Statement as required under the provisions of the Corporations Act 2001 (Cth)[416] may contain details of a domestic general insurance product or service in terms resulting from an insurer exercising their right of derogation under Section 35 of the Insurance Contracts Act 1984 (Cth) which I have examined some aspects of this earlier in Chapter Three.

Previously in Chapter Two, my analysis considered the extent to which the insurer right of derogation was the vehicle whereby a broad-spectrum of condition-based financial exclusionary effects were imported into insurance contract wordings. These included variety of contract wording conditions, exclusions, contract excess or deductibles, all of which embodied contract condition-based financial exclusionary effects. The question thus arises whether the terms and conditions embodying financial exclusionary effects and resulting from the correct exercising of the statutory right of derogation fall within the scope of the exemptions contained in the amendments to the ASIC Act 2001 (Cth).

[416] Corporations Act 2001 (Cth), s1013C.

I suggest that guidance on this issue may be obtained from the wording of the amendment to the ASIC Act 2001 (Cth) considered earlier:

> ***"Heading:*** *"12BI Terms that define main subject matter of consumer contracts etc. are unaffected*
> *(1) Section 12BF does not apply to a term of a consumer contract referred to in subsection (1) of that Section to the extent that, but only to the extent that, the term:*
> *(a) defines the main subject matter of the contract; or*
> *(b) sets the upfront price payable under the contract; or*
> *(c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory."*

Section 35(2) of Insurance Contract Act 1984 (Cth) provided insurers the following right of derogation from *"standard cover"* terms and provisions:

> "*Section 35*
> *Notification of certain provisions*
> *(1) Where*
> *(a) a claim is made under a prescribed event; and*
> *(b) the event the happening of which gave rise to the claim is a prescribed event in relation to the contract;*
> *the insurer may not refuse to pay an amount equal to the minimum relation to the claim by reason only that the effect of the contract, but for this Sub Section, would be that the event the happening of which gave rise to the claim was an event in respect of which:*
> *(c) the amount of the insurance cover provided by the contract was less than the; or*
> *(d) insurance cover was not provided by the contract.*

> *(2) Sub Section(1) does not have effect where the insurer proves that, before the contract was entered into, the insurer clearly informed the insured in writing (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise) or the insured knew, or a reasonable person in the circumstances could be expected to have known".*

I regard the right of derogation provided by Section 35(2), falling within the scope of the amendment to the ASIC Act 2001 (Cth) as being:

> *"expressly permitted, by a law of the Commonwealth".*[417]

I therefore regard interaction between ACL Unfair Contract Terms provisions relating to exemptions from the application of the Australian Consumer Law contained in the amendments to the ASIC Act 2001 (Cth) as being another instance in which actions approved under one statute become permitted exemptions under another. I note that the permitted actions relate again to what may be regarded as statutory approved contract condition-based financial exclusionary effects, here relating to general insurance products or services.

5. I then proceeded to address the question of whether domestic general insurance products and related services were specifically excluded from the application of the ACL Unfair Contract Terms provisions included in the amendments to the ASIC Act 2001 (Cth), as seen earlier in instances of the reasonable fitness for purpose provisions of the ASIC Act 2001 (Cth) due to the application of the provisions of Section 15 of the Insurance Contracts Act 1984 (Cth). This in contrast to the position were any exemption flows from the inclusion of these products under a more generic exemption as illustrated in Section 12 BI(1)(c) of the ASIC Act in 4. Above.

I note that there are no provisions in either the Trade Practices Amendment (Australian Consumer Law) (No. 1) Act (2009), or the Trade Practices Amendment (Australian Consumer Law) (No. 2) Act (2010), which specifically precludes the application of the ACL unfair contract terms provisions to domestic general insurance contracts, other than by the operation of Section 12BI(1) of the ASIC Act 2001 (Cth).

[417] Refer to s12BI(i)(c).

My inquiries have identified references in the respective Explanatory Memoranda accompanying the above legislation indicating that, although the two-part ACL legislation is silent on this matter, it is clear that the provisions of the Insurance Contracts Act 1984 (Cth) are again regarded as precluding judicial relief obtained under the ACL legislation against the impact of "harsh, oppressive, unconscionable, unjust, unfair or inequitable" conduct by insurers.[418]

The Explanatory Memoranda accompanying the two ACL related Acts, contained identical statements regarding this matter:

> *"Section 15 of the Insurance Contracts Act 1984 provides that a contract of insurance (as defined by that Act) is not capable of being made the subject of relief under any other Commonwealth Act, a State Act or an Act or Ordinance of a Territory. In this context, 'relief" means relief in the form of:*
>
> - *the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or*
> - *relief for insureds from the consequences in law of making a misrepresentation,*
> - *but does not include relief in the form of compensatory damages.*
> - *The effect of Section 15 is to mean that the unfair contract terms provisions of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the Insurance Contracts Act 1984, to the extent that that Act applies."*[419]

Similarly, it is clear from the parliamentary debates during the passage of the two Bills through Parliament also noted the adverse impact of the provisions of the Insurance Contracts Act 1984 (Cth) on the then proposed Australian Consumer Law in the context of Unfair Contract Terms contained in general insurance products or services.[420]

[418] S15 of the Insurance Contracts Act.
[419] Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) (No. 1) Bill 2009, at Clause 2.100, and Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) (No. 2) Bill 2010, at Clause 5.84.
[420] Senator Wong in Senate Hansard, 26 October 2009, at p.7078 relating to Bill (No.1) 2009 and Senators Bushby and Hurley in Senate Hansard,16 March 2010, at pp.1887, 1949 respectively.

In the latter part of 2009, an Australian Parliamentary (Senate) Inquiry also considered the impact of the then proposed statutory amendments, which, on implementation, would establish the Australian Consumer Law and amend existing laws.[421] In effect, this Review endorsed the findings of the earlier 2004 Review Report of the Insurance Contracts Act, noting that the proposed legislative initiatives were permitted to lapse in 2007.

However, the 2009 Senate Review noted that their inquiries had indicated a need to harmonise the provisions of the Insurance Contracts Act 1984 (Cth) with those of the proposed Australian Consumer Law, by either incorporating provisions analogous to those contained in the ACL Unfair Contract Terms provisions or removing the constraints imposed by Section 15 of the Act.[422]

Neither the Explanatory Memoranda, the Parliamentary Debate references, and the Senate Economics Legislation Committee Report, referred to the restriction placed on the application of Section 15 of the Insurance Contracts Act 1984 (Cth) as the result of an earlier relevant Australian Court decision, in which the application of that Section of the Act was restricted to insurance contracts that had been properly "concluded" to which I have referred earlier[423]

I regard these successive omissions as having overlooked limitations placed on the actual scope of the judicial relief constraint, giving no consideration to the interaction between the Act judicial relief provisions and the established ASIC approved Alternative Dispute Resolution facilities, in place and fully operational for some years.[424]

As indicated earlier in this chapter, I have noted that, in turn, the application of Section 15 to "concluded contracts" the limitation on obtaining judicial relief to those "concluded" insurance contracts permitted access to alternative judicial relief as imposing an effective constraint on the potential extension of risk-based access denial financial exclusionary effects in the context of general insurance products or services.

[421] The Australian Senate Economics Legislation Committee Report, "Trade Practices Amendment (Australian Consumer Law) Bill 2009, September 2009.
[422] Report above, at p.68.
[423] Australian Consumer and Competition Commission v IMB Group Pty Ltd *(in liq)* (2003) FCA 402 at p.445.
[424] Chapter 3 Part 3.3.xii in this study.

I note that contrary to perceptions conveyed by the Explanatory Memoranda and the accompanying Parliamentary Debates, alternative judicial relief could be obtained under the Australian Consumer Law that was previously excluded by Section 15 of the Insurance Contracts Act 1984 (Cth) in the instances referred to above.

d. Recent Developments & Current Status

In March 2010, the Federal Treasury Department issued an Options Paper canvassing five alternatives as to the on-going role of Section 15 of the Insurance Contracts Act 1984 (Cth). Earlier, I identified several instances where the operation of Section 15 of the Act precluded insureds from accessing judicial relief external to the Act, for *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* conduct by insurers, while also restricting relief available under the Act. Although the submission date of responses to the Options Paper have been long closed, there has not been any response by the Federal government as to the outcome of this review.

e. Conclusion

This analysis has again drawn attention to the identification of constraints restricting the application of financial exclusionary effects. On this occasion, I examined the scope of constraints arising from a requirement for compliance with the recently enacted Australian Consumer Law Unfair Contract Terms provisions relating to a general insurance contract.

I summarise my conclusions in this Section as follows:

i. My analysis indicates that those general insurance *"standard cover*" which are "*prescribed contracts*" under the Insurance Contracts Act 1984 (Cth) may be regarded as satisfying the two-part threshold test contained in the Australian Consumer Law to determine if a financial product or services contract may be regarded as a "*Consumer Contract*" and, as such, may be presumed to fall within the scope of the Australian Consumer Law (ACL)**.**

I found that the general insurance *"standard cover"* satisfied the criteria relating to "standard form contracts" under the ACL. I found that the general insurance *"standard cover"* also satisfied the second threshold criteria in that they were related to general insurance products or services that were principally directed to individuals. However, as will be more fully discussed in Chapter Five, when the terms describing these *"standard cover"* in the Insurance Contracts Act 1984 (Cth) were utilised unchanged in defining "*Retail*

Client" under the financial services reforms, now incorporated in Part Seven of the Corporations Act 2001 (Cth), the definition of "*Retail Client*" was expanded to include specifically-defined small to medium sized enterprises.

I suggest that the impact of this altered definition contained in the Corporations Act 2001 may result in unfairness. Specifically, one category of persons accessing "standard form contracts" under the ACL may be being presumed to be able to access relief against the consequences of unfair contract terms under the ACL, whereas other parties falling within the same "*Retail Client*" definition may be excluded.[425] I have not identified any evidence suggesting this omission was intended.

ii. I found that in largely following international precedents, the ACL provides specific exemption from the application of the Unfair Contract Terms provisions for terms that may be regarded as "Core" terms. This fundamental provision is expanded under the ACL exemption provisions to exempt *"a term that is required, or expressly permitted by statute"* from the application of the Unfair Contract terms provisions.

I regard this exemption as applying to the *"standard cover"* provisions which are regarded as *"prescribed contracts"* under the Insurance Contracts Act 1984 (Cth). My review in Chapter Two identified the existence of either risk-based access denial or contract condition-based financial exclusionary effects in the terms and conditions of the "*standard cover*" set out in the Insurance Contracts Regulations 1985 (Cth).

This results in the ACL Unfair Contract Terms exemption provisions perhaps unintentionally excluding risk-based access denial or contract condition-based financial exclusionary effects, contained in the "*standard cover*", from the scope of the ACL.

iii. My analysis sought to assess the extended application of ACL exemption provisions that exempts insurers exercising right of derogation from the terms and conditions of "*standard cover*" as "prescribed contracts" under the provisions of the Insurance Contracts Act 1984 (Cth). Earlier in Chapter Two, I noted that insurers exercising the right of derogation from *"standard cover"* provisions had substantially increased the scope and extent of insurance contract terms, conditions and exclusions, risk-based access denial and/or contract condition-based financial exclusionary effects.

[425] S761G5(a) and (b),Corporations Act 2001 and (Cth)Corporations Regulations 2001 (Cth) Regs. 7.1.11- 7.1.17.

My analysis in this Chapter proceeded to review the interaction between the recent amendments of the ASIC Act 2001 (Cth) relating to exemptions from coverage of the ACL and provisions of the Insurance Contracts Act 1984 (Cth) relating to discretion granted to insurers to exercise a right of derogation from the terms and conditions of the *"standard cover".* I conclude that, given that compliance with the expressly stated conditions attaching to the right of derogation, permits an insurer to vary the terms of the *"standard Cover",* any variation increasing the scope and extent of financial exclusionary effects would fall within the ambit of the exemption from the application of the ACL Unfair Contract Terms provisions.

iv. My earlier analysis identified that the ASIC Act 2001 (Cth) provisions relating to implied warranties that financial products and services are reasonably "fit for purpose" were specifically precluded from applying to a contract of insurance. The recently enacted Australian Consumer Law related provisions in the same Act make no mention of whether Australian domestic general insurance contracts as "*consumer contracts"* were subject to these statutory provisions, or excluded from applying to a contract of insurance.

However, as indicated above, the initial Explanatory Memoranda to the ACL Act 2010 (Cth) and the second stage contained in the Trade Practices Amendment (Australian Consumer Law) (No. 2) Bill indicate that these provisions will not apply to contracts of insurance, due to the existence of Section 15 of the Insurance Contracts Act 1984 (Cth) limiting judicial relief for insurance contracts respectively available under and subject to the Act. I also note that the Explanatory Memoranda, Parliamentary Debates, and the Senate Economics Legislation Committee Report 2009 did not make any mention of the restriction placed on Section 15, which is applicable only to "concluded" contracts of insurance.

As indicated earlier in this chapter, I note that the restriction on the application of Section 15 of the Insurance Contracts Act 1984 (Cth), in turn, permits judicial relief being sought other than under the Insurance Contracts Act 1984 (Cth) for *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* conduct by insurers during the course of the pre-contract phase. I again regard this permitted access to alternative judicial relief as imposing an effective constraint on the potential extension of risk-based access denial financial exclusionary effects in the context of general insurance products or services.

Accordingly, I regard the limitation imposed on Section 15 as enabling relief to be sought from "*harsh, oppressive, unconscionable, unjust, unfair or inequitable"* conduct by insurers, resulting from unfair contract terms falling within the ambit of the relief provided by the Australian Consumer Law provisions now contained in the ASIC Act 2001 (Cth).

I summarise the resultant constraint profile as follows:

Figure 4.1.viii	**Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Australian Consumer Law						
xiii. Unfair Contract Terms Legislation	RBAD				Nil Section 15 ICA effect and impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Nil impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

4.5 Chapter Discussion

Given the extent of the Eight-Part detailed analysis undertaken in 4.4 above, the following is a summary of the conclusions of the analysis undertaken in each part of this Chapter:

4.5.i. Racial Discrimination Act 1975 (Cth) – It is unlawful to refuse to supply goods or services to a person by reason of race, colour, national or ethnic origin of that person.

- The statutory provision would apply to circumstances where goods or services relating to general insurance products or services were supplied in a manner contravening the provisions of this anti-discrimination legislation.

- However, judicial relief from such a breach where an insurance contract had been "concluded" would be confined to those limited remedies available under the ICA. Thus, limited relief would be available for the impact of contract condition-based financial exclusionary effects.

- Conversely, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, as might occur in the insurance underwriting process.

- Relevant Australian court decisions suggest that insurers may receive partial protection against litigation seeking judicial relief, where it can be shown that the action of the insurer under consideration was:

  "reasonable having regard to the circumstances".

4.5.ii. Sex Discrimination Act 1984 (Cth) – It is unlawful to discriminate against a person on the grounds of that person's gender and it is unlawful to discriminate against a woman on the grounds of that woman's pregnancy or potential pregnancy.

- The statutory provision would apply to circumstances where goods or services related to general insurance products or services were supplied in a manner contravening the provisions of this anti-discrimination legislation.

- As considered earlier, judicial relief for the consequences of such a breach where an insurance contract had been "concluded" would, however, be confined to those limited remedies available under the ICA. Thus, limited relief would be available for the impact of contract condition-based financial exclusionary effects.

- Conversely, as considered earlier, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects *embodying "harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, as might be found in the insurance underwriting process.

- The anti-discrimination statute, however, provides a specific conditional exemption to an insurer from the application of the statute, where the discrimination is in terms of an insurance policy offered to or which may be obtained by the prospective insured, and where the discrimination is based on actuarial or statistical data, and reasonable having regard to that data.

- This limited exemption could negate the availability of relief being sought from external statutes to combat the impact of risk-based access denial financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms, as might be found in the insurance underwriting process.

4.5.iii. Disability Discrimination Act 1992 (Cth) – It is unlawful to discriminate against a person on the grounds of that person's disability.

And

4.5.iv. Age Discrimination Act 2004(Cth) – It is unlawful to discriminate against a person on the grounds of that person's disability.

- The statutory provisions relating to disability and age discrimination largely follow those considered earlier relating to sex discrimination. The provisions would apply to circumstances where goods or services related to general insurance products or services were supplied in a manner contravening the provisions of these essentially similar anti-discrimination statutes.

- As considered earlier, in the context of the race and sex discrimination statutes, judicial relief for the consequences of such a breach of the provisions of these statutes where an insurance contract had been "concluded" would be confined to those limited remedies available under the ICA. Thus, limited relief would be available for the impact of contract condition-based financial exclusionary effects.

- Conversely, as considered earlier, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, as might be found in the insurance underwriting process.

- These anti-discrimination statutes, however, provide identical specific conditional exemptions to an insurer from the application of the statutory provisions, where the discrimination is in terms of an insurance policy offered to or which may be obtained by the prospective insured, and where the discrimination is based on actuarial or statistical data, and reasonable having regard to that data.

- This limited exemption could negate the availability of relief being sought from external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, as might be found in the insurance underwriting process.

4.5.v. Australian Securities and Investments Commission Act 2001 [ASIC Act] (Cth) provides for implied warranties that financial services are provided with due skill and care and that the services will be reasonably fit for the purpose for which they were supplied.

- The ASIC Act contains an exemption specifically precluding the application of these implied warranty provisions of the statute to "*contracts of insurance*".

- As considered earlier, the term "*contract of insurance*" is taken to mean a "*concluded*" contract of insurance distinct from a proposed contract of insurance". Under such circumstances, judicial relief for the concluded contract of insurance would fall within the scope of the ICA provision limiting judicial relief available under that statute, in effect limiting the availability of judicial relief for contract-condition based exclusionary effects resulting from what would otherwise be a breach of the implied warranty provisions of the ASIC Act.

- Conversely, the Insurance Contract Act based judicial relief constraints are regarded as not applying to risk-based access denial financial exclusionary effects that did not comply with the implied warranty provisions of the ASIC Act. The provisions of that Act would apply under such circumstances.

4.5.vi. The Corporations Act 2001 (Cth), Chapter 7 requires that a Product Disclosure Statement (PDS) shall be provided by an insurer to an intending insured who is a Retail Client, when that person makes an offer to acquire a financial product, in this instance, an insurance contract.

- There is no statute-based exemption of general insurance products or services from the requirement to provide a PDS to a Retail Client as defined under the statute.

- The previously considered ICA provisions, relating to the availability of judicial relief for "concluded" contracts of insurance to redress the effects of "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, would not apply because the statutory provisions are now considered to relate specifically to the statute-based disclosure requirements by the service provider in the pre-contract phase, and in the actual contract phase of a financial product or services transaction. These responsibilities are distinct from those imposed on insurers under the ICA, with the latter Act not having any application in this context.

- Consequently, the remedies available for breaches of the disclosure responsibilities would include those specifically provided in the Corporations Act for breaches of the provisions of that Act by Australian Financial Services Licensees. The availability of these remedies may be regarded as providing an effective constraint on the scope of financial exclusionary effects being reviewed.

4.5.vii. Corporations Act 2001 (Cth), Chapter 7 requires that a financial services licensee (including a general insurer) providing services to a Retail Client shall have Alternative Dispute Resolution (ADR) processes in place, comprising internal and external dispute resolution procedures to facilitate the resolution of complaints made in connection with the financial services provided.

- Financial services licence conditions require licensees to utilise ADR processes which comply with Regulatory Guidelines prescribed by ASIC. Australian general insurers are therefore required to participate in the Financial Ombudsman Service (FOS) external dispute resolution (EDR) processes at the second stage of a two-part ADR process.

- ASIC approved FOS Terms of Reference specify the scope of ADR services provided by FOS. These services include arbitration on disputes involving general insurance claims handling and settlement as a cost-effective alternative to private litigation in compliance with the provisions of Section 15 of the ICA limiting judicial relief to remedies available under the Act.

- These ADR processes, which do not seek judicial relief, do not fall within the ambit of Section 15 of the ICA, and include arbitration on disputes which may involve contract condition-based denial financial exclusionary effects.

- The FOS Terms of Reference specifically exclude arbitration of general insurance underwriting disputes, such as those that relate to risk-based access denial financial exclusionary effects.

4.5.viii. The recently enacted Australian Consumer Law (ACL) financial services related "unfair contract terms" provisions now contained in the ASIC Act 2001 (Cth) state that a term in a consumer contract is void if the term is unfair and the contract is contained in a standard form contract.

- The ACL unfair contract terms provisions do not apply to general insurance "*standard cover*" prescribed contracts under the ICA, due to an exemption contained in the ACL relating to terms expressly permitted by a law of the Commonwealth (Such as the ICA). Consequently, risk-based access denial and contract condition-based denial financial exclusionary effects do not fall within constraints introduced by the ACL.

- The Explanatory Memoranda accompanying the introduction of the proposed ACL legislation into Parliament indicate that the ACL was not intended to apply to unfair contract terms contained in general insurance products or services, on the grounds that remedies for the impact of such terms were already provided by Section 15 of the ICA.

4.6 Chapter Conclusion

This Chapter Analysis has identified a total of 25 partial conclusions arising from the analysis of 8 external contextual factors summarised in Chapter 4.5 above.

I suggest that two principal conclusions arise from my Chapter Four Analysis which in turn address the Chapter Objectives:

i. My analysis has developed a financial exclusionary effect *"constraint profile"* for each of the internal and external contextual factors reviewed, from the perspectives of risk-based access denial and contract condition-based financial exclusionary effects.

ii. I have identified the manner in which the provisions of one statute may extend to preclude consumer access to relief provisions against the effects of unfair contract terms contained in more recent purpose-specific statutes. I have also identified a number of instances whereby statutory provisions proscribing anti-consumer action by financial product and services providers may also contain provisions exempting the application of those provisions to general insurance products and services. In

These constraint profiles are summarised in Figure 4.2 below:

4.6.i Financial Exclusionary Effects – "Constraint Profile"

Figure 4.2.	**External Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects**					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
vi.- ix. Racial Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	
vi.- ix. Sex Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provision	
vi.- ix. Disability Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	
vi.- ix. Age Discrimination	RBAD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions	
	CCBD				Section 15 ICA effect and Conditional impact of external statutory provisions	
x. ASIC – Financial Products and Services Implied Warranties	RBAD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and Nil impact of external statutory provisions	
	CCBD					
xi. Insurer Product Disclosure	RBAD				Nil Section 15 ICA effect and impact of external statutory provisions	
	CCBD				Section 15 ICA effect and impact of external statutory provisions	
X ii. Internal and External Dispute Resolution Schemes	RBAD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and impact of external statutory provisions	
	CCBD					
xiii. Unfair Contract Terms Legislation	RBAD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and Nil impact of external statutory provisions	
	CCBD					

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA Indices **Constraint effect of Section 15 ICA 1984 (Cth** ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

Chapter Five Australian Financial Services Reforms 2000 – 2010: Legislative Intent and Impact of reforms upon Financial Exclusionary Effects - Domestic General Insurance Products and Services

Chapter Abstract

Earlier Chapters have identified the existence of risk-based access denial and contract condition-based financial exclusionary effects in the general insurance policies principally accessed by Australian domestic insureds. My analysis has also identified the extent to which internal and external contextual factors constrained the extent of these financial exclusionary effects.

Chapter Five has a single objective, namely the progression of my overall study by determining the intent and impact of recent Australian financial services reforms on the scope and application of financial exclusionary effects identified earlier in domestic general insurance products.

My analysis identifies that the principal intent of the financial services reform process relevant to general insurance has consisted in ensuring greater certainty in insurance product disclosure by service providers and in the distribution process of products, in order to permit consumers of domestic insurance product and services to determine the suitability of products and services to their specific needs.

My analysis draws three diverse conclusions when reviewing the impact of financial services reforms on general insurance goods and services. Firstly, I identify evidence confirming the attainment of greater certainty of the disclosure by insurers of insurance contract terms and conditions, albeit within a framework of complexity defined by the risk-averse compliance focus of Providers and certainty of the product and services distribution processes. Secondly, I identify evidence of a replication process having embedded insurance contract condition-based financial exclusionary effects within the financial services reform framework.

Thirdly, although I identified evidence of access (geographic) based financial exclusionary effects from the preliminary stages of the development of the Financial Services Reform regime to the Parliamentary Committee review stage, evidence was not available to indicate that the Financial Services Reforms when implemented, had sought to address these specific concerns.

5.1 Chapter Objective

This chapter seeks to determine the intent and impact of the recent Australian financial services reforms relevant to domestic general insurance process on the scope and application of financial exclusionary effects identified in general insurance products.

5.2. Introduction – The Intent and Impact of the Australian Financial Services Reforms on the scope and application of financial exclusionary effects

In this chapter, I focus on determining the intent and impact of recent Australian financial services reforms (2001-2010) relevant to the general insurance sector on financial exclusionary effects of the type identified in Chapter Two, the dimensions of which were further examined in Chapters Three and Four.

Initially, I examine the background of the recent financial services reform process to ascertain if the then proposed reform agenda envisaged consideration and resolution of financial product and services systemic issues, such as impediments to access by consumers, including financial exclusionary effects. I then develop my study by identifying relevant data sources to use in establishing the intention and impact of the financial services reform process and appropriate methodologies. Similar to previous chapters, I have sought to identify data that is readily accessible within the public domain and largely contemporaneous to the reform processes and the post-reform implementation period..

5.2.i. Background - The Wallis Inquiry 1997

The Regulation Impact Statements accompanying the introduction of the Financial Services Reform Bill 2001 to the Australian Parliament set out the antecedents of the proposed legislation in clear terms:

> *"1.1. The Financial Services Reform Bill (FSR Bill) is the culmination of an extensive reform program examining current regulatory requirements applying to the financial services industry. In particular, the draft Bill provides the legislative response to a number of recommendations of the Financial System Inquiry (FSI).*"[426]

The reference above is indicative of similar statements made during the preliminary stages of the progress of the FSR Bill through the Australian Commonwealth legislative process.[427] Firmly dispelling any potential suggestion of singular origins of the proposed reforms, these policy references highlight the goals of the reform agenda's earlier stages, namely to prepare appropriate responses and initiatives to:

> *"…developments in the international and domestic business environments which had made the streamlining of the Australian corporate law necessary if the Australian economy was to meet the demands of contemporary business*."[428]

The policy statement above suggests that reform agenda resulting in the proposed legislation of the time was broad, and intended to reflect developments in international and domestic business arenas and encompass sectors and potential opportunities including but not limited to the Australian financial services context.

[426] The Financial Services Bill 2001 Explanatory Memorandum, (House of Representatives) Document #39202/2001, Section 1. Regulation Impact Statement p.3. An identical reference is contained in the Explanatory Memorandum (Senate) Document #42243/2001, Section 1. Regulation Impact Statement, p.1.
[427] Refer to the "Report on the Draft Financial Services Reform Bill", Parliamentary Joint Statutory Committee on Corporations and Securities (JCCS), August 2000 Clause 2.1, and "Report on the Financial Services Reform Bill 2001", Parliamentary Joint Statutory Committee on Corporations and Securities (JCCS), August 2001, Clause 2.5.
[428] JCCS August 2001 Report at Clause 2.5.

The *"Financial System Inquiry"* (FSI) referred to above was known as the "Wallis Inquiry into Australian Financial System", and was commissioned by the Australian Federal Treasurer in May 1996. The Inquiry undertook an extensive review of all facets of the Australian financial system, and in its final report advocated significant change to existing processes, both operational and regulatory, issuing a Final Report in early 1997.[429] Central to the 115 Recommendations made by the FSI was a perception of a need to substantially restructure processes to secure a diverse set of efficiencies, including the harmonisation of the disclosure and regulatory processes operative within the System.

I am particularly interested in the FSI view that evidence submitted to the Inquiry made no distinction between the impact of a *"desertification"* process in rural and regional Australia, as a result of the withdrawal of banking and other financial services. I suggest that implicit in this view is the recognition that access (geographical) based financial exclusionary effects may have occurred in the period prior to the Inquiry.[430]

The FSI considered that cost and efficiency change strategies either alone or as output from sector merger and acquisition trends among sector service providers may have resulted in the withdrawal of banking and other financial services. The Inquiry indicated a preferred reliance upon Trade Practices legislative anti-competitive provisions to address these issues. The Inquiry report does not suggest alternative states remedial strategies that would apply where there the use of the TPA provisions would not have been relevant. Nor does FSI Report comment on financial exclusionary effects that may arise from cost and efficiency strategies implemented in a non-Merger and Acquisition environment.[431] I suggest it is important to note that the FSI Final Report was released at a time when the prevalence of access (geographic) based denial financial exclusionary effects had been systematically examined and reported upon by Leyshon and Thrift (1994, 1995, 1996), discussed earlier in Chapter One.

429

430 Inquiry Final Report at p.703.

431 Inquiry Final Report at p.469

5.2.ii. Background - Post Wallis Inquiry – The CLERP Program 1997 – 1999

Following the release of the Wallis Inquiry Final Report in April 1997, the Australian federal government launched a process for the development of appropriate policies to implement FSI recommendations that had been accepted. The resultant Corporate Law and Economic Reform Program (CLERP) commenced in December 1997, and subsequently set out a total of nine policy areas for review:

CLERP 1: The reform of Accounting Standards
CLERP 2: Fundraising
CLERP 3: Directors duties and corporate reforms
CLERP 4: Takeover reporting and procedures
CLERP 5: Electronic Commerce
CLERP 6: Financial markets and investment products
CLERP 7: Streamlined corporate reporting and document lodgement
CLERP 8: Cross Border insolvency
CLERP 9: Corporate accountability and disclosure and audit reform

Despite the title's stated focus, policy review proposals comprising CLERP 6 were directly relevant to my inquiries in that CLERP 6 provided a framework to identify the objectives of financial market regulation and the development of a regulatory regime to achieve those objectives.

CLERP 6 saw the role of regulation in financial markets as not principally being to eliminate consumer risk from the decision making process relating to financial products and services. CLERP 6 envisaged a responsibility of ensuring that investors (particularly Retail investors) understood the risks involved in particular products and made informed decisions about the suitability of the product or service to their needs.[432] This fundamental principal appears throughout the reform proposals. Specifically, it includes the necessity of establishing a suitable disclosure regime to facilitate understanding and related proposals for the establishment of a general standard of disclosure[433] that would follow the disclosure requirements already in force for issuing of financial products Prospectus.[434]

[432] CLERP6 at 28. The role of financial markets and regulation.
[433] CLERP 6 at 107.S.1022.
[434] S.1022, Corporations Act (Cth).

My inquiries have not identified any proposal for the establishment of regulatory processes that addressed Hanratty's (1997)[435] concerns set out in a commentary on the Wallis Inquiry Final Report that included the impact of full recovery of the costs of financial products or services resulting in geographic access-based financial exclusionary effects, or adverse terms and conditions embedded in the product or service by way of contract condition-based financial exclusionary effects, including general insurance products and services.

CLERP 6 makes it clear that transparency of process, not protection of the consumer against the adverse impact arising from the structure of the particular financial product or service, is of principal concern in the decision-making process of (Retail) Clients.

5.2.ii. Background - Impediments to Action – Judicial Review and Negotiations.

The FSI recommendations and the transitional stages of policy development, consultation, and acceptance were introduced by the Australian Parliament into the draft Financial Services Reform Bill in 2000 (FSR). The FSR Bill progressed through to the Committee stage where it was reviewed and recommended for approval. However, echoing concerns over access (geographical) based financial exclusionary effects considered earlier in the context of the earlier FSI[436], the Parliamentary Committee review indicated concern over the potential for adverse impact on the level of financial services available in rural areas.[437]

Concurrent with the commencement of legislative processes, which introduced substantial financial services reforms in mid-2000, was the emergence of a range of judicial issues arising from the Australian government's assumption of regulatory powers over corporations, formally vested in the individual Australian States. This came in the wake of a High Court of Australia decision upon the validity of arrangements between the Australian Government and the States.[438] Meanwhile, the FSR Bill was delayed. The earlier FSR Bill was withdrawn and an amended FSR Bill was introduced into Parliament in April 2001. During the course of the parliamentary review of this Bill, the Bill was referred to the same Parliamentary Joint Committee which had reviewed the 2000 FSR Bill.

[435] Ibid at p.7.
[436] JCCS 2000 FSR Bill Report August 2000 at Part 5.1.
[437] Parliamentary Joint statutory Committee on Corporations and Securities, Report on the Financial Services Reform Bill, August 2000, Canberra, Section 4 and Conclusion Clause 5.2.
[438] R v Hughes (2000) 202 CLR 535, Paragraphs 30-46.

The Committee reiterated their earlier concerns regarding the impact of the proposed legislation upon the delivery of financial services in remote and rural areas.[439] I regard these concerns as identifying geographic access based denial financial exclusionary effects as an issue embedded in the overall FSR process.

5.3. The Australian Financial Services Reform Legislation

The principles underlying the amended version of the proposed Financial Services Reform legislation (FSR) are summarised as being to secure:

> *"(a) confident and informed decision-making by consumers of financial products and services while facilitating efficiency, flexibility, and innovation in the provision of those products and services; and*
>
> *(b) fairness, honesty, and professionalism by those who provide financial services; and*
>
> *(c) fair, orderly, and transparent markets for financial products; and*
>
> *(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities".*[440]

These principles may be more simply but comprehensively stated as:

i. Achieving contract content certainty through comprehensive product disclosure of the nature and scope of the financial products and services provided, and thus facilitating informed choices by potential consumers.
ii. Harmonisation of the regulation of the financial product and service delivery processes in order to realise an expectation of process certainty and related dispute resolution powers on the part of consumers.
iii. Minimising systemic risk exposures by harmonising the financial market regulatory processes enhancing the expectation of sustained market stability.

The above elements were effected by a sequential process involving the repealing of large portions of the existing Federal Corporations legislation and introducing a complex set of proscriptive requirements imposing a rigorous process of detailed product processes, and distribution controls the enforcement of which by a range of civil and criminal sanctions.

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[439] Parliamentary Joint statutory Committee on Corporations and Securities, Report on the Financial Services Reform Bill, August 2001, Canberra, Clauses 5.62 and 6.2 refer.
[440] FSR Bill Clause 760A, now Section 760A Corporations Act (2001).

Whereas submissions from the principal financial services sector stakeholders to the JCCS 2001 inquiry largely supported the proposed regulatory framework[441], it is apparent there was concern that a number of systemic policy and process issues arising from the proposed regulatory framework had not been fully addressed. It was noted that substantial amendments to the new processes would inevitably be needed in future years.[442]

The Committee suggested that the FSR Bill 2001 had not sought to directly address earlier concerns expressed by the same Committee regarding the failure of the FSR Bill 2000 with respect to the potential for access (geographical) financial exclusionary effects arising from the withdrawal of access to financial products and services in rural and remote areas.[443]

5.4. Methodology and Analysis – Intent and Impact

I now expand my brief overview of the complex regulatory framework introduced by the FSR 2001 Bill to an examination of the actual intent and impact of the legislation situated within the specific context of my Study.

I regard the selection of an appropriate analytical framework as being critical to the relevance of the outcomes of the analysis. I have therefore selected an analytical framework that facilitates a systematic inquiry into legislative intent. I regard the basic rules relating to statutory interpretation as providing a relevant framework, conditional on its direct relevance to the jurisdiction within which the statute occurs. Here, I note that although the adoption of an interpretative framework involving the *"doctrine of reasonable expectations"*, where ambiguity in interpretation occurred, is relevant to the review of legislation in a consumer protection context, it is not relevant to the Australian federal jurisdiction within which the FSR legislation resides.[444]

Australian statutory interpretation principles provide guidance on the relevant analytical framework within which to identify the intention of the Australian FSR 2001 proposals. These reforms were subsequently enacted as major amendments to the Australian Corporations Act (Cth) 2001. Current Australian statutory interpretation principles are set out in the Acts Interpretation Act (Cth) 1901 and interpreted by judicial review.

[441] JCCS FSR 2001 Report Paragraphs 4.4-4.13.
[442] JCCS FSR 2001 Report Paragraphs 4.14-41.16; 6.2-6.53.
[443] JCCS FSR 2001 Report Paragraphs 2.16 and 2.17.
[444] J.A. Tarr (2001) at 117ff.

The more recent amendments to this statute provide the preliminary steps in establishing a contemporary framework within which to determine statutory intention.[445] Pearce and Geddes (2001) suggest that an initial stage in this process would involve determining whether guidance on statutory intent can be drawn first from *"intrinsic"* evidence (from within the legislation),[446] and subsequently from a limited range of statute-specified sources *"extrinsic"* to the legislation contemporaneous to the enactment of the legislation.[447]

I then applied this analytical process to the determination of the intent of Chapter 7 of the Act. The Object of the Chapter in the Corporations Act (Cth) 2001 FSR is contained in Section 760A of the Act, reiterates those principles to which I have already referred to above.

Although the statement clearly establishes the intent of the legislation and the link with those two-stage processes preceding the legislation discussed earlier, the statement provides limited *intrinsic* guidance as to the intent if any for the legislation to have any positive effect on the incidence of the financial exclusionary effects, identified and discussed earlier in Chapters Two, Three, and Four of my Study. As a consequence I have proceeded to using the alternative *extrinsic* sources to establish the intent of the legislation, the rationale for which appears below.

In Chapter Two, I identified the existence of a broad range of contract condition-based financial exclusionary effects in the insurance contracts as prescribed by statute.[448] In addition, I identified and analysed domestic insurance contract forms available from Australian domestic general insurers displaying the effect of the use of the statutory right of derogation from the statute prescribed *"standard cover"* described earlier.[449]

Chapter Seven of the Corporations Act (2001), which sets out the principal provisions of financial services reform legislation, clearly defines *"consumers of financial products"*, set out in Section 760A(a) above, in terms of domestic consumers *(a Retail Client)* who are distinct from those other consumers *(wholesale clients)* of financial products and services. The Act states that *"Retail Clients"* are individuals or small business consumers receiving financial goods or services of the following types:

[445] Acts Interpretation Act (Cth) 1901, Section 15 AB as enacted in 1984.
[446] Pearce and Geddes (2001) at 33ff.
[447] The extrinsic sources are those set out in Acts Interpretation Act (Cth) 1901, Section 15AB(2)(a)-(h).
[448] Insurance Contracts Act (Cth) 1984, Section 34.
[449] Insurance Contracts Act (Cth) 1984, Section 35(2).

(i) *"a motor vehicle insurance product (as defined in the regulations); or*

(ii) *a home building insurance product (as defined in the regulations); or*

(iii) *a home contents insurance product (as defined in the regulations); or*

(iv) *a sickness and accident insurance product (as defined in the regulations); or*

(v) *a consumer credit insurance product (as defined in the regulations); or*

(vi) *a travel insurance product (as defined in the regulations); or*

(vii) *a personal and domestic property insurance product (as defined in the regulations); or*

(viii) *a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph."*[450]

A review of the relevant Corporations Regulations (Cth) 2001 as to what constitutes general insurance products as identified in (i)-(vi) above, suggests that the scope of those general insurance products defined in the Corporations Regulations is analogous to the scope of "*standard cover*" defined in the Insurance Contracts Regulations (Cth) 1985.

However, an issue arises as to whether this similarity was intentional or merely coincidental. The relevance of this question is significant given the outcome of my earlier analysis in Chapter Two, where I identified contract condition-based financial exclusionary effects embedded in the provisions of the "*standard cover*".

Assuming the apparent similarity was a coincidence, it may be argued that the similarity between the provisions of the separate contract categories under two distinct statutes was not intended to import the contract condition-based financial exclusionary effects embedded in the "*standard cover*". Conversely, were it intentional, it would follow that its consequences were also no less intentional, making "*standard cover*" the principal determinant of a consumer of general insurance products and services being regarded as a *"Retail Client"* under the financial services reform provisions introduced in the Corporations Act (Cth) 2001. Such categorisation results in the *Retail Client* receiving a far higher level of product and service disclosure than that afforded to the other consumer category comprising *Wholesale Clients*.[451]

[450] Corporations Act (Cth) 2001, Section 761G(5)(b)(i) to (viii), and as defined in the Corporations Regulations (Cth) 2001, Division 2, Regulations 7.1.11 to 7.1.17B.

[451] Corporations Act (Cth) 2001, Chapter 7, Parts 7.7, 7.8, and 7.9 generally contain requirements and procedures relating to product and service disclosure, accompanied by enforcement processes relating to non-compliance with these requirements.

As a consequence I undertook an examination of relevant *extrinsic* sources of intent. These *extrinsic* sources may be summarised as follows, accompanied by my assessment of relevance providing an explanation of the question of intent set out above.

Figure 5.1. Statutory Provisions: Extrinsic Sources to determine Legislative Intent[452]	**Comment as to relevance**
2(a) Text in the same document containing the Act as printed by the Government Printer	Not relevant
2(b) Report of an external inquiry submitted to Parliament	Not relevant
2(c) Report of a Parliamentary Committee made to Parliament before the provision was enacted.	Not relevant
2(d) Any Treaty or International Agreement referred to in the Act.	Not relevant
2(e) Explanatory Memorandum relating to the Bill provided to Parliament prior to the time of enactment of the provisions.	Relevant.
2(f) Ministerial Second Reading Speech relating to the enactment of a provision.	Not Relevant[453]
2(g) Any document declared by the Act to be relevant for the purposes of determining intent.	Not Relevant
2(h) Any relevant material in the official record of Parliamentary proceedings, including official record of debates.	Relevant[454]

The assessment above suggests that in the particular instance of determining the statutory intent of Section 760A of the Corporations Act (Cth) 2001, the use of *extrinsic* sources is restricted to 2(e) and 2(h) above. These relate to the Explanatory Memoranda incorporating Regulation and Financial Impact Statements accompanying the Legislation when introduced into Parliament, and illustrate the impact of the subsequent restrictive interpretation in *Harrison's Case*[455] that effectively precludes the use of Source 2(h).

[452] Acts Interpretation Act (Cth) 1901, Section 15 AB – Use of extrinsic material in the interpretation of an Act, Sub Section 2(a)-(h).
[453] Harrison v Melham (2008) NSWCA 87, Spiegelman CJ, Paragraph 12-15.
[454] Ibid, Paragraph 15.
[455] Ibid.

Four Explanatory Memoranda incorporating Regulation and Financial Impact Statements accompanied the progression of the FSR Bill through the Australian Parliament in 2001.[456] The Explanatory Memoranda accompanying the introduction of the initial draft legislation placed particular emphasis on the significance of the Policy changes embodied in the legislation. Included among the Policy changes resulting from the FSI and CLERP 6 processes discussed earlier were legislative changes addressing the implications of the introduction of the consumer category of *"Retail Clients*" who were to be afforded additional consumer interest protection through a multi-tiered Provider product and service disclosure regime.[457]

According to the Explanatory Memoranda the use of a threshold on a product (utilisation) value test, based on purchase price determining that a person or an entity was a *Wholesale Client*, was initially capped at $500,000. However, the Memoranda also noted that applying such a threshold to the purchase price of a general insurance product could unintentionally exert an adverse impact on the clear separation between "Wholesale" and "Retail Clients", stating:

> *"few (if any) policies would exceed the product-value test…with the result that all purchasers of general insurance policies would be Retail Clients".*[458]

The Explanatory Memoranda then suggest that introduction of additional criteria could define *"Retail Clients"* within a general insurance context. They would, for instance, access advice on one of a series of general insurance products listed in the proposed FSR legislation, identified as:

> *"based primarily on the concept of "standard cover" in the Insurance Contracts Act 1984, plus a couple of additional categories of policies also regarded by industry as "consumer" policies."*[459]

[456] House of Representatives Document # 39202 and Senate Document #42243 accompanied the introduction of the FSR Bill, while Supplementary Explanatory Memoranda accompanied the subsequent introduction of amendments and new clauses to the House of Representatives and Senate.
[457] Encompassing Financial Services Guides; Statements of Advice and Products Disclosure Statements.
[458] Explanatory Memorandum (House of Representatives) # 39202, Paragraph at 8 Clause 2.28.
[459] Ibid.

That the proposed FSR legislation intended to establish a clear link with "*standard cover*" contained in the Insurance Contracts Act (Cth) 1984 is later reinforced in the Explanatory Memoranda where six of the specific general insurance product types are identified in terms identical to those used in the Insurance Regulations Cth 1985.[460]

I further suggest that any potential ambiguity is eliminated by the following reference in the Explanatory Memoranda:

> *"These types of insurance will be defined in the regulations. The first six listed types of insurance* ***replicate*** (my emphasis) *those defined to mean standard cover in the Insurance Contracts Act and Regulations."*[461]

This statement contained in the FSR Explanatory Memorandum accompanying the introduction of the proposed legislation into the Australian House of Representatives is also included in the Explanatory Memorandum introducing the proposed legislation into the Australian Senate.[462] The enacted legislation reflects the above, in that six specific general insurance product types described in terms identical to those used in the *"standard cover"* are now set out in the Corporations Regulations (Cth) 2001.[463]

I suggest that the replication process has resulted in the FSR legislation clearly intending the references to the six general insurance products identified above to refer directly to the "*standard cover*" prescribed by the Insurance Contracts Act (Cth) 1984 as a determinant of what constitutes a " *Retail Client*" under the FSR legislation. In so doing, the legislation may be regarded as having intentionally and directly copied the "*standard cover*", including those contract condition-based financial exclusionary effects incorporated in "*standard cover*", into a specific application under the FSR.

[460] Explanatory Memorandum # 39202 at p.26 (Clause 6.14) and Insurance Contracts Regulations (Cth) 1985, Part II Standard Cover, Divisions 1-6 .
[461] Explanatory Memorandum # 39202 at p.26 (Clause 6.15).
[462] Explanatory Memorandum # 42243 at pp.30-31 (Clauses 6.22 and 6.23).
[463] Corporations Regulations (Cth) 2001, 7.1.11 -7.1.16.

I further suggest that, while there was clear intention to copy the "*standard cover*" into the FSR legislation, there is no evidence indicating that Parliament was made aware of the structure of "*standard cover*". As discussed earlier in Chapter Three, I noted the existence of evidence indicating that the "*standard cover*" did include contract condition-based financial exclusionary effects, and that this inclusion was a direct consequence of the Australian Law Reform Commission deliberately incorporating those policy conditions containing such effects into the proposed "*standard cover*" on the basis that such inclusion reflected market practices prevailing at the time of their inquiries.

My inquiries indicate that there have not been any subsequent amendments to the relevant Corporations Regulations (Cth) 2001 that provided descriptions of the first six of those general insurance products used as a determinant under the FSR of consumers who fall within the "*Retail Client*" category.

I now consider the second part of Chapter Five Objective One, namely the impact of the FSR legislation as enacted on the general insurance process. Earlier in this chapter, I briefly considered the financial product and service disclosure regime introduced in the legislation to address the overall policy objectives of the legislation, with the principal focus on ensuring that *"Retail Clients"* were properly and fully informed of the scope of the financial products and services in a manner enabling an informed choice about using a product or service.

The implementation of the disclosure regime in compliance with FSR legislation requirements entailed substantial costs, which Pearson (2009) doubts were well-spent seeing as how uncertainty prevails over whether the objectives were secured.[464] My inquiries sought to identify evidence substantiating this view.

The FSR legislation, now incorporated into the Corporations Act (Cth) 2001, makes it clear that the Australian Securities and Investments Commission (ASIC) has a primary role in administering FSR processes in a manner consistent with FSR objectives, with appropriate powers vested in ASIC by the Australian Securities and Investments Act (Cth) 2001. This Act sets out the functions and powers of ASIC, including those specifically relating to financial services and consumer protection.[465]

[464] Pearson (2009), at p.152.
[465] ASIC Act (Cth) 2001, principally in Part 2, Division 1, Sections 11-12HD.

The Act also establishes a process for the on-going oversight of ASIC activities and vests that responsibility with the Australian Parliamentary Joint Committee on Corporations and Financial Services (JCCFS), and setting out specific duties of inquiry and reporting to both Houses of Parliament on ASIC activities.[466]

I have relied mainly on the JCCFS Oversight Inquiries and Reports in the period between 2002, when the FSR legislation came into effect, and 2009. This focus results largely from the interrelated fact of the performance of the JCCFS and ASIC oversight powers being in the public domain, and that all evidence, spoken and written, is readily available for review to determine whether the JCCFS conclusions are supported by that contemporaneous evidence. My review suggests that a recurrent theme appears in the JCCFS statutory oversight inquiries in mid-2005, at which time the FSR regime had been fully operational since March 2004. At that time the Committee noted:

> *"The emergence of voluminous Product Disclosure documentation indicating the risk averse behaviour of Providers as a way of minimising non-compliance with the ASIC statute-based disclosure requirements."*[467]

During the course of the inquiry, the JCCFS had noted the inherent tension between the ASIC view of the regulatory responsibility precluding a reduction in the high level of disclosure compliance costs, as considered by Pearson (2009) earlier, and the alternative view stating it was ASIC's responsibility to ensure that the FSR disclosure regime obligations imposed on providers were:

> *"doing what the law intends, protecting consumers at a reasonable cost to business".*[468]

While this theme continued through subsequent inquiries, it also became apparent that structural issues were emerging regarding the suitability of the FSR disclosure regime to the ability of the financial services sector to move from a principally "*product-producing and product-selling*" environment to one where the principal focus was on advising consumers on the suitability of financial products and services, including general insurance products.[469]

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[466] ASIC Act (Cth) 2001, Part 14, generally at Sections 241-243, and specifically Section 243(a)(i) and (c).
[467] JCCFS Statutory oversight of ASIC Report, 16th May 2005 at Paragraph 2.5
[468] Ibid, at Paragraphs 2.6-2.8.
[469] JCCFS Statutory oversight of ASIC Report, 16th August 2006, at Paragraphs 2.81 and 2.83.

In late 2006, the Committee's view, largely based on ASIC evidence presented at the Inquiry, highlighted a systemic issue centred on the overall adequacy of the FSR disclosure regime's design in securing the restated disclosure objectives, namely to:

> *" i. Increase transparency for consumers to more clearly understand when advice is being provided and when they are being recommended a product for purchase, and; ii. Facilitate the provision of advice to assist consumers in making informed decisions".*[470]

That such questions were raised well after the actual implementation of the FSR regime highlights issues similar to those raised in Chapter Five Objective One analysis. In the earlier instance, the initially proposed process (the Product-Value Test) to differentiate between "*Wholesale Clients*" and *"Retail Clients*" contained a systematic flaw. *"Retail Clients"* were to be provided with a three-tiered product and service disclosure regime. The solution incorporated in the draft legislation, and subsequently enacted, linked the definition of *"Retail Client"* under FSR with consumers of statute-prescribed domestic general insurance products ("*standard cover*"), in which contract condition-based financial exclusionary effects were embedded. I suggest that this outcome raises the question of the extent to which the actual implementation of the FSR regime had been fully scrutinised in a manner identifying the likely consequential risk exposures:

i. Namely, those arising from latent defects, such as the use of external indices taken out of context (such as the "*standard cover*") considered earlier, and
ii. The implications of a risk averse response to proscriptive regulation resulting in a primary focus on the maintenance of compliance, rather than an increased focus on providing appropriate advice to facilitate informed decision-making by Retail Clients.

My view above receives support from a subsequent JCCFS Inquiry into Australian Financial Products and Services JCCFS (2009).[471] The final report of this Inquiry (*The Ripoll Inquiry*) reinforced the earlier views stated above.

[470] Treasury Corporate and Financial Services Regulation Review, November 2006, Australian Treasury, at pp.13, 14.
[471] JCCFS (2009), Inquiry into Financial Products and Services in Australia, Parliamentary Joint Committee on Corporations and Financial Services.

The Inquiry regarded the existing FSR regime arrangements as having encouraged financial product and service Providers to adopt a risk-averse approach to disclosure compliance, instead of structuring product disclosure materials to achieve the FSR objective of properly informing consumers, as per the intentions of Chapter Seven of the Corporations Act (Cth) 2001. The JCCFS cited evidence showing that product disclosure documentation had been principally directed to secure regulatory compliance.[472]

Although the Committee did note the existence of an alternative argument, that there are inherent limitations on the ability of product disclosure to protect consumers in assessing the suitability or otherwise of a particular product,[473] it neither sought to consider the dimensions of these limitations nor developed potential solutions to those limitations.

5.5. Chapter Conclusion – Replication Impact

Chapter Five had a single objective, namely to determine the intent and subsequent impact of recent Australian financial services reforms on the scope and application of financial exclusionary effects occurring in Australian domestic general insurance products identified in Chapter Two.

My analysis identified that the principal intent of Australian financial services reform processes relating to general insurance consisted in ensuring greater certainty in insurance product and service disclosure and product distribution by financial product and service providers in order to enable consumers to make informed choices about products and services with respect to their specific requirements.

I noted that evidence emerging during the policy formulation phase of the financial services reform process, which preceded the legislation, showed that the manner whereby Australian financial products and services were being delivered in the domestic or Retail market sector could result in a denial of access to these products and services in regional or rural Australia caused by market rationalisation or altered service delivery modes. This concern was reinforced on two separate occasions during the legislative process, though the resultant statutory changes did not address this financial exclusionary effect based concern.

[472] JCCFS (2009), at Paragraph 5.56.
[473] JCCFS (2009) at Paragraph 5.60.

My Chapter Five analysis draws three conclusions after reviewing the impact of the financial services reforms on Australian domestic general insurance products and services and related financial exclusionary effects. These are as follows:

i. I have identified evidence confirming that the statute-prescribed financial services reform framework *has provided product disclosure certainty of domestic general insurance policy terms and conditions* as a result of the introduction of a standardised three-tiered product and services disclosure regime.

However, I note that the potential impact of this financial service reform initiative would appear to have been subsequently largely negated by the emergence of a trend for increasing complexity of the product and service disclosure process as a risk-averse compliance response to proscriptive financial services reform based regulatory requirements. This trend has reached an extreme stage where significant and adverse impact on the possibility of effective product or service disclosure by providers appears to have made effective disclosure unattainable.

ii. I have identified evidence from the legislative reform process that shows that insurance contract risk-based access denial and contract condition-based financial exclusionary effects have been brought within the scope of the financial services reform framework by a process of "*replication".* This outcome resulted from FSR legislation adopting a solution to the previously identified inadequacies of the proposed financial services reform criteria used to distinguish between a consumer who was a "*Retail Client*", who is to be provided with a three-tier product and service disclosure regime, and other consumers of financial products and services. The latter consumer category regarded as "*Wholesale Clients"* were to receive product disclosure information based on the presumption that they possess a more detailed understanding of the product or service as evidenced by their use of insurance products other than statute-prescribed *"standard cover".*

Extrinsic evidence from those Explanatory Memoranda accompanying the reform legislation clearly acknowledges the decision to use *"standard cover"* prescribed by the Insurance Contracts Act (Cth) 1984 as the sole determinant as to what constitutes a "*Retail Client"* for insurance product and services under the insurance related provisions of the reform legislation. My analysis in Chapter Two identified that those *"standard cover"* contained broad-based evidence of risk-based access denial and contract condition-based financial exclusionary effects.

I therefore argue that the use of *"replication"* to utilise the *"standard cover"* provisions in the financial services reform legislation has effectively embedded financial exclusionary effects contained in specific provisions in the reform legislation.

While I regard the decision to *"replicate"* the *"standard cover*" provisions in the reform legislation as being deliberate, there does not seem to been any awareness of the existence of financial exclusionary effects in statute-prescribed provisions. This absence of awareness exists regardless of the fact that the Australian Law Reform Commission had previously indicated that *"standard cover"* were designed to reflect the structure of commercial domestic general insurance products available in the market place (1978-1982) that contained policy exclusions, conditions, and general provisions, all of which contained identifiable characteristics of the principal financial exclusionary effects.

3. I have previously identified evidence in the pre-reform legislation phase of concern regarding the existence of instances of geographic access - based denial financial exclusionary effects in the delivery of financial products and services. However, I have not identified evidence indicating intention of the proposed financial product and service reform processes to address these specific financial exclusionary effects. In this context, it bears noting that a subsequent Federal Parliamentary Inquiry in 2004 identified clear evidence of the adverse impact of this specific exclusionary effect in product and services delivery in regional and rural Australia.

4. Finally, my analysis in Chapter Five has identified evidence confirming that the policy decision to *"replicate"* the statute-prescribed *"standard cover"* domestic insurance provisions in the FSR legislation was deliberate and intended to address a definitional defect that had emerged in that legislation.

My earlier analysis in Chapter Two had identified the existence of specific financial exclusionary effects embedded in statute-prescribed provisions. I argue that the specific use of the term *"replicate*" was meant to convey the clear intention to exactly copy the meaning of the term *"standard cover".* I further argue that this intention is reinforced by likeness between the description of domestic general insurance products in the financial services reform legislation and those contained in the *"standard cover"* provisions.

I suggest that the linkage noted above has not been previously identified within the context of *"standard cover"* containing specific financial exclusionary effects. Accordingly, I suggest that this analysis has made an original contribution to the understanding of the impact of the financial services reforms on financial exclusionary effects in Australian domestic general insurance products. More specifically, I have established that the legislative process has effectively embedded specific financial exclusionary effects in domestic general products in order to determine whether a consumer is a *"Retail Client"* under the financial services reform legislation.

Chapter Six – Thesis Conclusion

Conclusion Abstract

Here, I bring together the output of analyses undertaken in Chapters One to Five and Appendix A. Building on Chapter One, which examines the dimensions of financial exclusionary effects, Chapter Two draws attention to the availability of evidence indicating the prevalence of contract condition-based financial exclusionary effects in those Australian domestic general insurance products relating to statute prescribed *"standard cover"* and in those available in the general insurance market during the post-implementation phase of the Australian financial services reform processes.

In Chapters Three and Four, I identified the potential impact of internal and external contextual factors in constraining the scope of general insurance policy risk access denial and contract condition-based financial exclusionary effects, and to arrive at a *"Constraint Profile"*. In Chapter Three I identified the extent to which those internal contextual factors contained in relevant insurance legislation were regarded as providing an adequate constraint on the scope and impact of the two financial exclusionary effects. Chapter Four continued this examination, more closely drawing attention to the impact of external contextual factors contained in legislation external to the general insurance process on the two financial exclusionary effects under review.

I conclude that, in recent years, successive generations of Australian federal policy makers have regarded the interaction between internal contextual constraining factors as constituting an adequate constraint that obviated the necessity for establishing additional constraints in legislation external to the insurance contractual process. This view is clearly reflected in the limitations placed on the application of such legislation to the Australian domestic general insurance contractual process. Evidenced emerged that such limitations were legislated by successive Australian Federal parliaments, and I therefore suggest that these actions reflect a shared policy perspective—that the internal contextual constraints are adequate.

I note that such a view has not been shared by a series of statutory reviews and inquiries in the period 2003 to 2010 that have been more or less unanimous in recommending the introduction of legislative constraints on the general insurance contractual process in order to negate identified financial exclusionary effects regarded as prejudicial to consumer interests.

In Chapter Five I further developed my inquiries. Here, I identified and examined the intention of the Australian financial services reforms introduced at the Federal level in the post-1997 period. I identify evidence of the emergence of definitional defects, in the proposed financial reform legislation, around individual and small business consumers categorised as "*Retail Clients"* leading to a government decision to *"replicate"* the use of insurance legislation prescribed *"standard cover"* as the principal determinant of membership of this category . Based on my earlier identification of a substantial risk access denial and contract condition-based financial exclusionary effect profile of these "*standard cover*", I regard the replication process adopted in the financial services reform legislation as having effectively imported and embedded the same financial exclusionary effects within the post-reform process, where they now remain.

Appendix A reports on the successful outcome of the Pilot Study I conducted to determine the adequacy of my analytical framework in identifying, both, the risk-based access denial and contract condition-based financial exclusionary effect profile prevailing in New Zealand domestic general insurance products. I examine the extent to which an internal and external contextual constraint profile may be identified in the general insurance processes operating in the domestic insurance sector within that jurisdiction.

6.1. Thesis Conclusion Objective.

There is a three-part Objective:

i. To summarise the conclusions arising from Research Studies #1. – 6.

ii. To develop from the first Objective a comprehensive Conclusion which addresses the Thesis Objective which is:

> *"To determine the impact of recent Australian financial services reforms on those financial exclusionary effects prevalent in Australian domestic general insurance products."*

iii. To identify those areas in which I have made an original contribution to the understanding of the overall Thesis Topic and constituent elements, and have established the relevance of my Analytical Framework in identifying the financial exclusionary effect profile of domestic general insurance products within a jurisdiction external to Australia.

6.2. Thesis Conclusion Introduction

I now collectively examine all conclusions reported earlier, at the end of successive Chapters, and also in the Pilot Study contained in Appendix A. I present the Chapter and Pilot Study conclusions in summary form to facilitate review, and draw upon them in forming my overall Thesis Conclusions.

Thereafter, I proceed to bring together the most central elements of my conclusion that address the Thesis Objective. I identify the output that I believe has made an original contribution to the understanding of the field of Financial Exclusionary effects in the context of Domestic General Insurance Products.

6.3. Chapter and Appendix A Pilot Study Conclusion Summaries

6.3.1. Chapter One

The Dimensions of Financial Exclusion: Chapter - Conclusion Summary

My principal objective in Chapter One has been to address the fundamental issue concerning the dimensions of "*financial exclusion*".

I sought to achieve this objective by obtaining answers to five interrelated questions. Analysis of these questions and the conclusions reached are summarised as follows:

i. "*Financial Exclusion*" and "*Social Exclusion*" and how these constructs may be distinguished from each other.

My inquiries have identified significant unanimity regarding *"financial exclusion"* as part of the broader construct of social marginalisation, or *"social exclusion*", which constitutes inability on the part of individuals to access necessary financial products or services in an appropriate form. Most observers appear to agree that *"social exclusion"* is a broader construct involving exclusionary effects arising from the lack of employment, access to health, education, Welfare, law enforcement, housing facilities, and related community services.

Notwithstanding this consensus, there is considerable divergence of opinion on the sources and identity of those service providers not providing access, in which terms such as "*mainstream providers*" or "*regulated and accessible providers*" seek to delineate the source of such exclusionary practices. Moreover, such views appear to be insular in that they do not consider the regulatory environment within which financial product or service providers may be required to operate.

ii. The Area of Impact of Financial Exclusion

I identified significant agreement regarding those areas of impact of financial exclusionary effects, which are understood to encompass the following eight financial product and service areas of activity:

- Transactions Accounts
- Savings Accounts
- Financial Counselling Investment Advice
- Credit
- Insurance
- Home Equity/Mortgage Loan
- Superannuation
- Community Enterprise and Management Support,

I also identified general consensus on the issue that these areas of impact had near universal application and were not regarded as being restricted to specific levels of economic development or to designated socio-economic or cultural groups with purportedly high levels of financial product and services maturity.

iii. The manifestation of Financial Exclusion - Financial Exclusionary Elements

I identified some divergence of opinion as to how financial exclusionary effects are manifested. Although there was disagreement about the structure of individual effects, there was general agreement that the principal elements of financial exclusionary effects were as follows:

a. Product or service ***Access*** denial exclusion comprising:
    i. **Geographic** access-based denial financial exclusion
    ii. **Risk**-based access denial financial exclusion.
b. Consumer segment ***Market*** targeting exclusion
c. Product or service ***Price*** exclusion
d. ***Self-exclusion*** to access by the Consumer
e. Product or service contract ***Condition*****–Based** exclusion

My earlier analysis identified the structure of each of the above effects and the scope of the application of specific financial exclusionary effects, noting that the individual effects are generally regarded as operating in isolation from each other. I identified considerable divergence of view regarding the scope and extent of application of individual financial exclusionary effects, and that component elements of individual effects were sometimes

omitted from consideration or were regarded as being irrelevant, often without substantiation of the reasons for such an omission.

iv. An additional Financial Exclusionary Dimension: Vicarious Exclusionary Effects

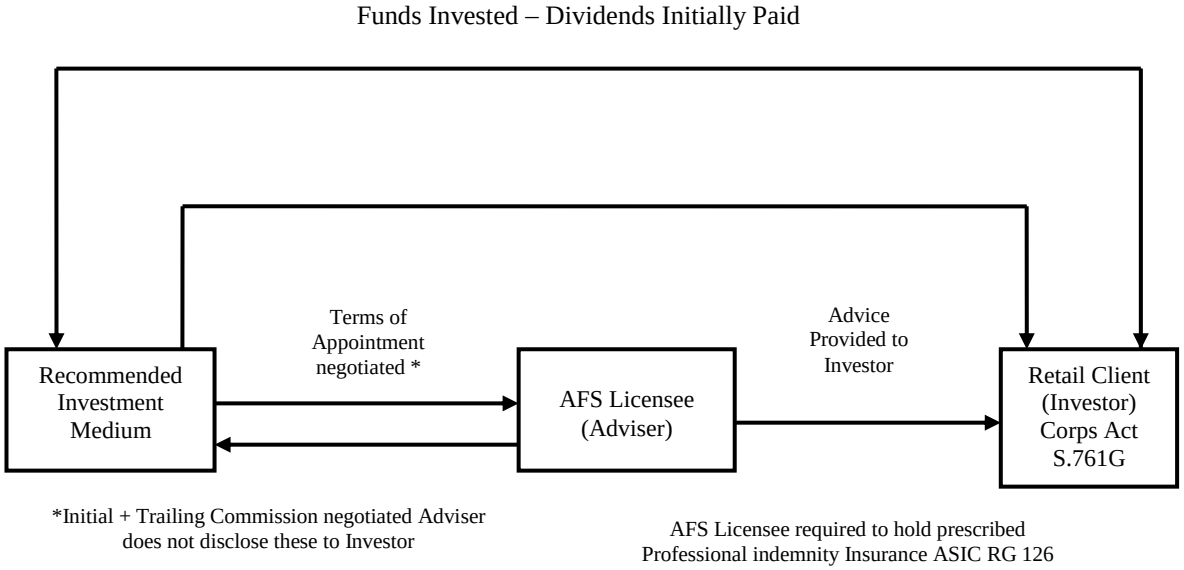
I noted a general view that Financial Exclusionary effects are usually regarded as resulting from direct interaction between the provider of the financial products or services and the *"excluded"* individual consumer. The consumer was regarded as an individual who, in an unmediated relationship with a financial products or services provider, is marginalised directly due to one of the financial exclusionary effects identified earlier.

My analysis indicated that the provision of financial products or services often involved an intermediated process in which a third party was interposed between the product or service provider and the consumer recipient, and that the intermediary's actions may have been a source of a financial exclusionary effect. As a result, I proposed the addition of the *Vicarious Financial Exclusionary Effects* dimension defined as follows:

> *The inability to access necessary financial products or services in an appropriate form as a direct result of the actions of a third party, who is a Party in the transaction, and is an entity other than the producer or distributor of the product or service.*

The figure below (following Chapter One Figure One.1) illustrates the process sequence that may result in *Vicarious Financial Exclusionary* effects. In the instance below, professionally negligent acts involving either fraud or negligence, perpetrated by a third party intermediary, precludes the consumer recipient from recovering compensation for losses arising from having relied on professional investment advice provided by the same intermediary.

6. Figure 1. Vicarious Financial Exclusionary Effect – Schematic



Assume investment *default event* occurs
Retail Client (Investor) claims compensation from Adviser for negligent investment advice
Adviser denies liability - Practice declared insolvent
Adviser lodges claim with PI Insurer who declines claim

Standard PI Policy exclusion precludes indemnity for negligent investment advice exposures or Corporations Act Ch. 7 breaches resulting from dishonest, fraudulent conduct or malicious acts

"Compensation arrangements are not a mechanism for providing compensation directly to consumers"
ASIC RG 126.13 & 14

I suggest that my identification and substantiation of the circumstances in which *Vicarious Financial Exclusionary Effects* may exist is an original contribution to the understanding of the dimensions of Financial Exclusionary effects, particularly in the general insurance impact area, in that evidence is not available to indicate that this dimension has been considered previously.

v. Interaction between Financial Exclusionary Effects

Initially, my review of the literature identified that financial exclusionary effects were generally understood to operate in isolation, with little interaction occurring between individual exclusionary effects. However further analysis suggested I concluded that this perception is unsubstantiated by available evidence, and is probably incorrect.

During the course of my inquiries, I identified evidence indicating, both the manner in which an Australian domestic general insurer utilised interaction between a number of financial exclusionary effects to secure market share in the Australian domestic general insurance market and the prevalence of this practice in the Australian domestic general insurance market.

I identify and report on the outcome of an analysis of the sequential process followed by an Australian general insurer group in which interaction between the following four financial exclusionary effects was utilised to secure market share and apportion that share between subsidiary domestic general insurers:

> Consumer segment ***Market*** targeting exclusion
> Product or service ***Price*** exclusion
> Product or service contract ***Condition*****–Based** exclusion
> Risk-based access denial financial exclusion.

I have identified and substantiated circumstances in which interaction between a variety of financial exclusionary effects may be utilised by insurers. Given that existing literature does not consider and/or analyse the dimensions of this particular dynamic, I suggest that my work in this part of my thesis constitutes an original contribution to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, particularly in the domestic general insurance impact area.

Chapter One Conclusion

In conclusion, and as demonstrated by the Chapter Conclusion Summaries provided above, I suggest that I have secured my overall Chapter One Objective in all of its five constituent parts.

I further suggest that during the course of Chapter One's analysis, I have identified, analysed, and reported on two areas to which I have made an original contribution with respect to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, particularly in the domestic general insurance impact area. These areas are:

i. The identification and substantiation of the circumstances in which *Vicarious Financial Exclusionary Effects* may exist in the domestic general insurance impact area.

ii. The identification and substantiation of the circumstances in which interaction between varied financial exclusionary effects may be utilised by insurers in the domestic general insurance area.

6. 3.2. Chapter Two
Australian Domestic General Insurance Arena: Financial Exclusionary Effects
Chapter Conclusion Summary

My main goal in this chapter was to determine the extent to which financial exclusionary effects could be identified in Australian domestic general insurance policies subsequent to the implementation of the Australian financial service reform regime in 2004. My analysis of 129 domestic general insurance policies issued by those Australian Insurers with an 81% share of the domestic insurance market in Year 2004-2005 indicated that risk access-based denial and contract condition-based financial exclusionary effect elements could be identified in all of the policies reviewed.[474]

[474] Table 2.18 earlier.

My analysis further indicated that a similar financial exclusionary effect profile was also apparent in the statute-prescribed domestic general insurance policies defined as "*standard cover*" that were used to delineate the basic policy conditions contained in Australian domestic general insurance policies, derogation from which was permitted, though only under specific statute-based conditions.

One outcome of my analysis has been to establish an analytical framework in which the scope and conditions of Australian domestic general insurance policies may be systematically reviewed to identify the extent to which risk-access based denial or contract condition-based financial exclusionary effects may be classified and compared against relevant indices. In this instance, the indices would be the financial exclusionary effect profile of statute-prescribed insurance policy conditions as set out in the "*standard cover*" provisions of the Insurance Contracts Act 1984 (Cth).

My analysis indicated that variance between the risk access-based denial and contract condition-based financial exclusionary effect profile of Insurer policies and the lesser incidence of financial exclusionary effects of the statute-prescribed *"standard cover"* existed primarily because the structure of the *"standard cover"* did not include the general conditions and miscellaneous provisions contract sections found in all the reviewed Insurer policies.

The Table below (following Chapter Two Table 2.17) provides a summary of the Contract Condition Financial Exclusionary Effect Element Incidence for both the Statute-Prescribed *standard cover* and the Insurer policies.

6. Table 1. Risk Access Based and Contract Condition- Based Financial Exclusionary Effect: Element Incidence Summary

Element #	Insurer Policies			Statute-Prescribed *standard cover*		
	Policies *(n)*	Element Incidence *(n)*	Element Incidence % of Policies	cover *(n)*	Element Incidence *(n)*	Element Incidence % of cover
1	129	64	50%	5	0	0%
2	129	32	25%	5	0	0%
3	129	125	97%	5	3	60%
4	129	127	98%	5	0	0%
5	129	129	100%	5	0	0%
6	129	127	98%	5	5	100%
7	129	120	93%	5	3	60%
8	129	120	93%	5	3	60%
9	129	129	100%	5	5	100%
10	129	129	100%	5	5	100%
11	129	129	100%	5	0	0%
12	129	129	100%	5	0	0%
13	129	116	90%	5	0	0%
14	129	118	91%	5	0	0%
15	129	88	68%	5	0	0%
16	129	54	42%	5	0	0%
Total	2064	1620	78%	80	24	30%

Further, I suggest that in Chapter Two I identified, analysed, and reported on two areas where I have made an original contribution to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, particularly in the domestic general insurance impact area:

i. The development and implementation of an appropriate analytical framework within which the dimensions of *risk-access based denial and contract condition-based financial exclusionary effects* of Australian domestic general insurance policies may be identified, analysed, and reported on.

ii. The application of the analytical framework above to the identification and analysis of the dimensions of *risk-access based denial and contract condition-based financial exclusionary effects*, and to the comparative relationship between the financial exclusionary effect profile of the following:

a. One hundred and twenty-nine individual Australian domestic general insurance contract wordings forming the basis for those policies issued

or renewed by Australian domestic general insurance providers holding 81% of the Year 2004-2005 domestic insurance market, and

b. Six "*standard cover"* insurance contracts prescribed by the Insurance Contracts Act (Cth) 1984.

6.3.3. Chapter Three

Australian Domestic General Insurance Arena: Financial Exclusionary Effects
Development of an Internal Contextual Constraint Profile
Chapter Conclusion Summary

My principal objective in this Chapter was to determine the extent to which internal contextual factors could constrain the impact of financial exclusionary effects in Australian domestic general insurance policies subsequent to the implementation of the Australian financial service reform regime in 2004. I focused on five internal contextual factors occurring within the Insurance Contracts Act 1984 (Cth). The outcomes are summarised below:

i Insurance Contracts Act (Cth) 1984 – Duty of Utmost Good Faith

The inclusion of the concept of Utmost Good Faith as an implied term in an insurance contract, without a statute-based remedy for breach of the principle, has resulted in the principle being regarded as largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms.

ii. Insurance Contracts Act (Cth) 1984 – Reliance on provisions except in utmost good faith.

This statutory provision has been regarded as having minimal impact as a result of the statutory provision being conditional on the extent to which the insured had received notice of a contract condition or exclusion. As a result, the provision has been regarded as largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms.

iii. Insurance Contracts Act (Cth) 1984 – Judicial relief confined to remedies available under the ICA.

This statutory provision which precludes a party to an insurance contract from seeking judicial relief from the impact of "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, under legislation other than the Insurance Contracts Act 1984 (Cth), with a relevant court decision, limiting the scope of this provision to *"concluded*" insurance contracts. An earlier review of this statutory provision concluded that it was largely ineffectual in addressing systemic contract structural issues. The provision has also been regarded as being largely ineffective in addressing the impact of risk based-access denial or contract condition-based financial exclusionary effects due to the limited nature of the remedies available under the legislation.

iv. Insurance Contracts Act (Cth) 1984 – Permitted variations to statute-prescribed "*standard cover*" – The right of derogation.

When introduced in 1982, statute prescribed "*standard cover*" contained insurance contract conditions and exclusions that were regarded as reflecting insurance industry custom and practice prevalent at the time. Statutory provisions permitted Insurers to derogate from the terms of the: "*standard cover*" conditional on the intending insured having received notice of the proposed variations in writing. As a result, the "*standard cover*" provisions have been regarded as largely ineffective in addressing the impact of risk-based access denial contract condition-based financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms.

v. Insurance Contracts Act (Cth) 1984 – Insurer reliance on use of unusual terms in a general insurance contract is conditional on the insured being provided with prior written notice of the provision.

The statutory provision precluding insurer reliance on the use of "unusual terms" in other than "*standard cover*" is conditioned by the exemption that such terms are permitted where the insurer has provided the intending insured with prior written notice of the term. Again ,this exemption is regarded as rendering ineffective the constraint on the use of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable*" terms.

Although judicial review of the legislation that restricted access to judicial relief that may be available under external statutes in addressing the impact of contract condition-based financial exclusionary effects in *"concluded*" contracts, access to such relief may be permitted against the consequences of risk-based access denial financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms present in the insurance underwriting process.

Chapter Three Conclusion

Three conclusions resulted from my analysis in this Chapter:

i. My analysis has identified a financial exclusionary effect *"constraint profile"* for each of the elements reviewed, from the perspective of the potential impact on the scope and dimensions of risk-based access denial, and contract condition-based financial exclusionary effects.

ii. My analysis indicates that the statute-prescribed *"standard cover"* contain a broad range of risk-based access denial financial exclusionary effects relevant in the pre-contract phase, and that these effects are largely unconstrained by the provisions of Section 15 of the Insurance Contracts Act (Cth) 1984 due to judicial interpretation restricting remedy against *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms to concluded insurance contracts, thus making it inapplicable to the pre-contract phase.

iii. My third and broader conclusion draws attention to evidence available over the past several decades indicating that remedies contained in the Insurance Contracts Act (Cth) 1984 against insurer action, falling within the scope outlined in ii. above, have been largely ineffective in addressing such issues. This has been mainly due to interaction between remedies available for insurer non-compliance containing the implied term *"Utmost Good Faith"* and the statute-based conditional right of insurers to derogate from the provisions of "standard cover", even including varied or additional contract terms that may adversely impact insureds.

The Figure below (Chapter Three Figure 3.7) provides a suggested internal contextual based constraint profile based on the impact of the insurance contract related structural factors on the risk-based and contract condition-based financial exclusionary effects under study.

6. Figure 2	Internal Contextual Constraint Profile: Risk-based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
Factor – Contract Structure						
i. Duty of Utmost Good Faith ICA 1984 Section 13	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
ii. Non reliance on adverse terms ICA 1984 Section 14	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
iii. Judicial relief for insurance contracts ICA 1984 Section 15	RBAD				Nil Section 15 ICA effect	
	CCBD				Section 15 ICA effect	
iv." *Standard Cover*" Derogation ICA 1984 Section 35	RBAD				Nil Section 15 ICA effect	
	CCBD				Nil Section 15 ICA effect	
v. Notice of unusual terms ICA 1984 Section 37	RBAD				Nil Section 15 ICA effect	
	CCBD				Interaction between Section 37 and Section 15	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect **Constraint effect of Section 15 ICA 1984 (Cth)**
Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* term.**

Shaded area above indicates specific constraint assessment

My analysis in Chapter Three acknowledged extensive use of existing studies of specific aspects of the Insurance Contracts Act (Cth) 1984. In particular, I have focused on the extent to which the specified statutory provisions provided relief against the impact of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* actions by insurers.

I noted that remedies available under that Act have previously been regarded as being largely ineffectual due to the interaction between limitations attaching to several statute-specific remedies and the statute-authorised conditional right of insurers to derogate from statute-prescribed domestic general insurance *"standard cover*".

This analysis utilised an existing analytical framework to identify and analyse the impact of five contextual factors within insurance contracts on financial exclusionary effects identified in Chapter Two. In successfully completing and reporting on this analysis, I have made an original contribution to the understanding of the dimensions and extent of the possible constraints on Financial Exclusionary effects arising from contextual factors internal to the domestic general insurance policy process.

6.3.4. Chapter Four Australian Domestic General Insurance Arena: Financial Exclusionary Effects - Development of an External Contextual Constraint Profile - Chapter Conclusion Summary

i. Racial Discrimination Act 1975 (Cth) – It is unlawful to refuse to supply goods or services to a person by reason of race, colour, national, or ethnic origin of that person.

Judicial relief for the consequences of a breach of this legislation where an insurance contract had been "concluded" would be confined to limited remedies available under the Insurance Contracts Act (1984) Cth, thus restricting the relief available from the impact of contract condition-based financial exclusionary effects. Conversely, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms found in the insurance underwriting process. Relevant court decisions suggest that insurers may receive partial protection against litigation seeking judicial relief, where it can be shown that the action of the insurer was *"reasonable having regard to the circumstances".*

ii. Sex Discrimination Act 1984 (Cth) – It is unlawful to discriminate against a person on the grounds of that person's gender and it is unlawful to discriminate against a woman on the grounds of that woman's pregnancy or potential pregnancy.

As considered above, judicial relief for the consequences of such a breach where an insurance contract had been "*concluded*" would be confined to limited remedies available under the Insurance Contracts Act (1984) Cth, thus limiting the relief that would be available from the impact of contract condition-based financial exclusionary effects. However, as considered earlier, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying "*harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, such as those found in the insurance underwriting process.

However, the anti-discrimination statute provides a specific conditional exemption to an insurer from the application of the statute, where the discrimination is in terms of an insurance policy offered to or which may be obtained by the prospective insured, where the discrimination is based on actuarial or statistical data, and where it is reasonable having regard to that data. This limited statutory exemption could negate access to relief sought from external statutes to address the impact of risk-based access denial financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms, such as those that would be found in the insurance underwriting process.

iii. Disability Discrimination Act 1992(Cth) – It is unlawful to discriminate against a person on the grounds of that person's disability.

And

iv. Age Discrimination Act 2004(Cth) – It is unlawful to discriminate against a person on the grounds of that person's disability.

The statutory provisions relating to disability and age discrimination largely follow those relating to sex discrimination, with judicial relief available for the consequences of a breach of the provisions of these statutes where an insurance contract had been "concluded", though it would be confined to the limited remedies available under the Insurance Contracts Act (1984) Cth. In other words, only limited relief would be available for the impact of contract condition-based financial exclusionary effects.

However, access to judicial relief may be available under external statutes in addressing the impact of risk-based access denial financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, such as those that would be found in the insurance underwriting process.

These anti-discrimination statutes provide an identical specific conditional exemption to an insurer from the application of the statutory provisions, where the discrimination already exists in terms of an insurance policy offered to, or which may be obtained by the prospective insured, where it is based on actuarial or statistical data, and where it is reasonable having regard to that data. Similar to the Sex Discrimination legislation, this limited exemption could negate the availability of relief being sought from external statutes to address the impact of risk-based access denial financial exclusionary effects embodying *"harsh, oppressive, unconscionable, unjust, unfair or inequitable*" contract terms, such as those that would be found in the insurance underwriting process.

v. Australian Securities and Investments Commission Act 2001 [ASIC Act](Cth) provides for implied warranties that financial services are provided with due skill and care and that the services will be reasonably fit for the purpose for which they were supplied.

The ASIC Act contains an exemption specifically precluding the application of these implied warranty provisions of the statute to "*contracts of insurance*".

The term "*contract of insurance*" is taken to mean a *"concluded*" contract of insurance distinct from a proposed "contract of insurance". Under these circumstances, judicial relief for the *concluded* contract of insurance would fall within the scope of the Insurance Contracts Act (1984) Cth provisions limiting judicial relief to that available under the statute. This, in effect, limits the availability of judicial relief for contract-condition based exclusionary effects resulting from what would otherwise be a breach of the implied warranty provisions of the ASIC Act. Conversely, the Insurance Contract Act based judicial relief constraints are regarded as inapplicable to risk-based access denial financial exclusionary effects in cases where the insurer did not comply with the implied warranty provisions of the ASIC Act. I consider that the provisions of the ASIC Act would apply under these circumstances.

vi. The Corporations Act 2001 (Cth), Chapter 7 requires that a Product Disclosure Statement (PDS) shall be provided by an insurer to an intending insured who is a *Retail Client*, when that person makes an offer to acquire a financial product, in this instance, an insurance contract.

There is no statute-based exemption of general insurance products or services from the requirement to provide a PDS to a "*Retail Client*" as defined under the legislation. The legislative provisions relating to the availability of judicial relief for "*concluded*" contracts of insurance to redress the effects of "*harsh, oppressive, unconscionable, unjust, unfair or inequitable"* contract terms would not be relevant, as those statutory provisions now under consideration specifically relate to the Corporations Act based disclosure requirements by the service provider in both the pre-contract phase, and in the actual contract phase of a financial product or services transaction. These responsibilities are considered to be distinct from those imposed on insurers under the Insurance Contracts Act (1984) Cth, with the latter being inapplicable in this particular context.

As a result of these limitations, the remedies available for breaches of the disclosure responsibilities would include those that are specifically provided in the Corporations Act for breaches of the provisions of that Act by Australian Financial Services Licensees. The availability of these remedies may be regarded as providing an effective constraint on the scope of the financial exclusionary effects under review in this thesis.

vii. Corporations Act 2001 (Cth), Chapter 7 requires that a financial services licensee (including a general insurer) providing services to a *Retail Client* shall have Alternative Dispute Resolution (ADR) processes in place. These would be comprised of internal and external dispute resolution procedures that facilitate the resolution of complaints made in connection with the financial services provided.

Financial services licence conditions require licensees to utilise ADR processes that comply with Regulatory Guidelines prescribed by ASIC. Australian general insurers are therefore required to participate in the Financial Ombudsman Service (FOS) external dispute resolution (EDR) processes at the second stage of a two-part ADR process. ASIC-approved FOS Terms of Reference specify the scope of ADR services provided by FOS.

The services include arbitration on disputes involving general insurance claims handling and settlement as a cost-effective alternative to private litigation in compliance with the provisions of Section 15 of the ICA limiting judicial relief to remedies available under the Act. ADR processes, which seek judicial relief, do not fall within the ambit of Section 15 of the ICA, and include arbitration on disputes that may involve contract condition-based denial financial exclusionary effects.

The FOS Terms of Reference however specifically exclude arbitration of general insurance underwriting dispute, such as those that would relate to risk-based access denial financial exclusionary effects occurring in the insurance underwriting process.

viii. The recently enacted Australian Consumer Law (ACL) "unfair contract terms" provisions now contained in the ASIC Act 2001 (Cth) state that a term in a consumer contract is void if the term is unfair and the contract is contained in a standard form contract.

The ACL unfair contract terms provisions do not apply to general insurance "*standard cover*" which are prescribed contracts under the Insurance Contracts Act (1984) Cth (ICA), due to an exemption contained in the ACL relating to terms that are expressly permitted by a law of the Commonwealth, such as the ICA. As a result, risk-based access denial or contract condition-based denial financial exclusionary effects do not fall within constraints introduced by the ACL.

Explanatory Memoranda accompanying the introduction of the proposed ACL legislation into Parliament indicate that the ACL was not intended to apply to unfair contract terms contained in general insurance products or services, on the grounds that remedies for the impact of such terms were already provided by Section 15 of the Insurance Contracts Act 1984 (Cth).

Chapter Four Conclusion

This analysis gives rise to two main conclusions:

i. My analysis has identified a financial exclusionary effect *"constraint profile"* for each of those external contextual factors reviewed, from the perspectives of risk-based access denial, and contract condition-based financial exclusionary effects.

ii. My analysis has identified the manner whereby specific provisions in one statute may extend to preclude consumer access to relief provisions from the effects of unfair contract terms contained in more recent purpose-specific statutes. Similarly, I have identified a number of instances in which statutory provisions precluding consumer adverse action may also contain provisions exempting the application of those provisions to general insurance products and services. These are summarised in the Figure below (Also see Chapter Four Figure 4.2):

6. Figure 3	External Contextual Constraint Profile: Risk based access denial and Contract condition-based denial financial exclusionary effects					
Contextual Factors/Factor Elements	**Financial Exclusionary Effect**	**Constraint Very Unlikely**	**Constraint Unlikely**	**No Opinion**	**Limited Constraint Likely**	**Constraint Very Likely**
vi.- ix. Racial Discrimination	RBAD CCBD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions Section 15 ICA effect and Conditional impact of external statutory provisions	
vi.- ix. Sex Discrimination	RBAD CCBD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions Section 15 ICA effect and Conditional impact of external statutory provisions	
vi.- ix. Disability Discrimination	RBAD CCBD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions Section 15 ICA effect and Conditional impact of external statutory provisions	
vi.- ix. Age Discrimination	RBAD CCBD				Nil Section 15 ICA effect and Conditional impact of external statutory provisions Section 15 ICA effect and Conditional impact of external statutory provisions	
x. ASIC – Financial Products and Services Implied Warranties	RBAD CCBD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and Nil impact of external statutory provisions	
xi. Insurer Product Disclosure	RBAD CCBD				Nil Section 15 ICA effect and impact of external statutory provisions Section 15 ICA effect and impact of external statutory provisions	
X ii. Internal and External Dispute Resolution Schemes	RBAD CCBD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and impact of external statutory provisions	
xiii. Unfair Contract Terms Legislation	RBAD CCBD	Nil Section 15 ICA effect and Nil impact of external statutory provisions			Section 15 ICA effect and Nil impact of external statutory provisions	

Key: **RBAD** **Risk-based access denial exclusionary effect – Underwriting/Pre-contract phase**
CCBD **Contract condition-based denial exclusionary effect – Concluded Contract phase**
Section 15 ICA effect Indices: ***"harsh, oppressive, unconscionable, unjust, unfair or inequitable"*** **term.**

Shaded area above indicates specific constraint assessment

The Figure above summarises the constraint profile resulting from the effect of external contextual statutory provisions on contract condition-based financial exclusionary effects or risk-based access denial financial exclusionary effects:

i. The significant potential direct impact of the provisions of Section 15 of the Insurance Contracts Act (Cth) 1984 on contract condition-based financial exclusionary effects is apparent in all the external contextual provisions reviewed, though there is minimal evidence available to indicate that Section 15 has been effective in constraining insurer actions that may be regarded as *"harsh, unconscionable, unjust, unfair or inequitable".*

ii. Only 38% of the external contextual provisions reviewed were regarded as having had a direct impact on contract condition-based financial exclusionary effects. 50% were regarded as exerting a conditional impact. The remaining provisions were regarded as exerting no constraining effect.

iii. The significant extent of the conditional nature of the legislation-based external contextual constraints, when interacting with the absence of any Section 15 effect, results in a substantial number of potential risk-based access denial financial exclusionary effects not being subject to contextual constraints from sources reviewed.

My earlier Chapter Three analysis of the impact of internal contextual factors on financial exclusionary effects relied heavily on existing studies of specific aspects of the Insurance Contracts Act (Cth) 1984. In particular, I focused on the extent to which the specified statutory provisions provided relief against the impact of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* actions by insurers.

My Chapter Four analysis of a similar possible constraining impact by a number of external contextual factors showed interaction between external statute-based contextual factors and financial exclusionary effects embedded in domestic general insurance contracts that had not been addressed in existing studies of the subject.

I therefore suggest that my analysis, which has resulted in the external contextual constraint profile set out earlier in Figure 4.2, constitutes an original contribution to the understanding of the dimensions and extent of possible constraints arising from contextual factors external to the domestic general insurance policy process on Financial Exclusionary effects.

6.3.5. Chapter Five Australian Financial Services Reforms 2000 – 2010 Legislative Intent and Impact of reforms on financial exclusionary effects: Domestic General Insurance Products and Services Chapter Conclusion Summary

My Chapter Five analysis identified that the principal intent of Australian financial services reform processes relevant to general insurance was to secure greater certainty in insurance product and service disclosure by financial product and service providers, and in the distribution process of those products, in order to enable consumers to make informed choices regarding the suitability of domestic insurance products and services to their specific requirements.

I noted that evidence, which had emerged during the policy formulation phase of the financial services reform process, preceding the legislation, showed that the manner in which Australian financial products and services were being delivered in the domestic or Retail market sector could result in a denial of access to products and services, caused by the withdrawal of the supply in regional or rural Australia resulting from market rationalisation or altered service delivery modes. This concern was reinforced by the emergence on two separate occasions during the legislative process that the proposed statutory changes did not address this financial exclusionary effect based concern.

These conclusions in Chapter Five are summarised as follows:

i. Evidence was identified confirming that the statute-prescribed financial services reform framework has provided product disclosure certainty of domestic general insurance policy terms and conditions as a result of the introduction of a standardised three-tier product and services disclosure regime.

However, it was noted that the potential impact of this financial service reform initiative appears to have been subsequently negated by growing complexity of the product and service disclosure process as a risk-averse compliance response to proscriptive financial services reform-based regulatory requirements. This trend towards complexity is regarded as having reached a point where the possibility of effective product or service disclosure by providers has become minimal.

ii. There is evidence from the legislative reform process showing that insurance contract risk-based access denial and contract condition-based financial exclusionary effects have been brought within the scope of the financial services reform framework by a process of "*replication".* This resulted from reform legislation having adopted a solution to the inadequacies of the proposed financial services reform criteria that were used to distinguish between a consumer who was a "*Retail Client*", qualifying for a three-tiered product and service disclosure regime, and other consumers of financial products and services. Extrinsic evidence from Explanatory Memoranda accompanying the reform legislation clearly acknowledges the decision to use the *"standard cover"* prescribed by the Insurance Contracts Act (Cth) 1984 as the sole determinant of what constitutes a "*Retail Client"* qualifying for insurance product and services under the provisions of the reform legislation. My earlier analysis in Chapter Two identified that the *"standard cover"* contained broad-based evidence of risk-based access denial and contract condition-based financial exclusionary effects.

I therefore argue that use of the process of *"replication"* to utilise the *"Standard Cover"* provisions in the financial services reform legislation has effectively embedded financial exclusionary effects in the financial services reform legislation.

Although I regard the decision to *"replicate"* the "*standard cover"* provisions in the reform legislation as being deliberate, I have not identified evidence of any prior awareness of the existence of financial exclusionary effects in the statute-prescribed provisions. This absence of awareness exists despite the Australian Law Reform Commission having previously indicated that *"standard cover"*, when originally proposed, were designed to reflect the structure of commercial domestic general insurance of the time (1978-1982) that included policy exclusions, conditions, and general provisions, all of which were identifiably characterised by the principal financial exclusionary effects.

iii. In the pre-reform legislation phase, I have identified concern regarding the existence of geographic access-based denial financial exclusionary effects in the delivery of financial products and services. However, I have not identified any specific intention in the proposed financial product and service reform processes to address the specified financial exclusionary effects. It is notable that it was in this particular context that a subsequent Federal Parliamentary Inquiry in 2004 identified clear evidence of the adverse impact of this specific exclusionary effect on product and services delivery in regional and rural Australia.

Earlier in Chapter Two, I identified the existence of specific financial exclusionary effects embedded in the statute-prescribed provisions. I argue that the specific use of the term *"replicate*" was intended to convey the clear intention to exactly copy the meaning of what was conveyed by the term *"Standard Cover".* I further argue that this intention is reinforced by the description of domestic general insurance products in the financial services reform legislation that is identical to those contained in the *"standard cover"* provisions.

I suggest that overlap of meaning and intention, noted above, has not been previously identified within the context of "*standard cover"* containing specific financial exclusionary effects. Accordingly, I suggest that my analysis constitutes an original contribution to the understanding of the impact of the financial services reforms on financial exclusionary effects in Australian domestic general insurance products embedded by legislative process in domestic general products that are used to determine whether a consumer is a *"Retail Client"* under the financial services reform legislation.

6.3.6. – Appendix A. Pilot Study New Zealand Domestic General Insurance Policies: Application of Thesis Analytical Framework to an External Domestic General Insurance Jurisdiction

Chapter Conclusion Summary

The main goal of this Pilot Study was to determine the extent to which my overall analytical framework was a relevant medium for the identification of the presence and scope of risk-based access denial and condition-based access denial financial exclusionary effects in domestic general insurance products and services available within a general insurance market, other than the Australian domestic general insurance market as considered earlier in Chapter Two.

I followed the processes developed and utilised in Chapters Two, Three, and Four, initially applying the Chapter Two Policy Questionnaire context. I noted that, while there are distinct similarities between the Australian domestic general insurance policy structure and that of New Zealand policies, there are equally strong differences arising mainly from the absence in New Zealand of statute-prescribed insurer general disclosures and complex product disclosures intended for "*Retail Clients*". I discovered that the contract condition-based financial exclusionary effect profile existing in the New Zealand policies reviewed were similar to those identified in Australian policies.

The analysis of the application of internal and external contextual constraint identification processes, provided in Chapters Three and Four, to the New Zealand policies highlighted the relevance of the following factors:

i. Although I have identified that the nature of the internal and external legislative contexts is of critical importance, valid conclusions relating to the New Zealand potential domestic general insurance financial exclusionary effect profile may however be drawn only after detailed consideration of those actual processes relating to the New Zealand general insurance jurisdiction, as distinct to reliance being placed upon comparative conclusions drawn from an analogous jurisdiction.

ii. Whilst it would appear that external contextual constraints may exist, considerable caution should be exercised in ensuring that the similarity is substantive, and not merely reflecting the use of similar terms and phrases. This issue was clearly identified in my examination of the New Zealand anti-discrimination legislation to determine the extent of statutory exemptions permitting behaviour by the financial product or service provider that would otherwise be proscribed.

iii. Judicial interpretation may nullify the potential impact of statute-based external constraints on contract condition-based financial exclusionary effects as a result of determining the extent to which the particular activity was *"fair and reasonable under the circumstances"* to ascertain whether the constraint was in fact valid.

iv. Several instances were identified in which New Zealand statute-based constraints, such as those relating to implied warranties, applied equally to general insurance contracts. This was unlike the situation identified earlier in Chapters Three and Four, where similar Australian legislation excluded the application of the constraint to insurance contracts, as in the instance of Implied Warranties and general Consumer Protection relating to protection against unfair contract terms. However, I have noted that a number of the New Zealand statutory provisions were limited in their potential application as a result of specific statutory provisions.

v. It is demonstrable that the analytical framework I developed and utilised earlier in Chapters Two, Three, and Four, is relevant to and provides an appropriate structure within which to identify and examine the scope and extent of selected financial exclusionary effects in New Zealand general insurance products and services targeted at consumers falling within the category of domestic insureds, including "*Retail Clients*".

My Pilot Study's analysis, in which I utilised the overall analytical framework within a jurisdiction external to Australia, successfully identified a risk-based access denial and contract condition-based denial financial exclusionary effects profile that is relevant to the New Zealand domestic general insurance industry. As I have not identified any existing study that addresses these issues, I suggest that I have made an original contribution to the understanding of the dimensions and extent of the application of Financial Exclusionary effects identified in the New Zealand domestic general insurance jurisdiction.

6.4. Thesis General Conclusion

My Thesis Objective is:

> *"To determine the impact of recent Australian financial services reforms on those financial exclusionary effects prevalent in Australian domestic general insurance products."*

The conclusion I have reached is that, as a result of those evidence I have identified and analysed in the preceding Chapters, specific financial exclusionary effects have become embedded within the overall structure of those financial services which are relevant to contemporary Australian domestic general insurance processes. At the time I commenced my research I did not foresee this conclusion, having approached the overall Topic from the perspective that it was a reasonable assumption that changes implicit in the financial services reform processes, would address such systemic issues as financial exclusionary effects contained in financial goods and services, including domestic general insurance products accessed by Australian consumers.

The processes of my reaching the conclusion above, has necessitated the development, refinement and implementation of an overall analytical framework within which to carry out those sequential research tasks I had selected. The individual Chapter conclusion summaries set out earlier provide guidance as to the issues identified and the outcomes reached.

I have reported in Chapter One on the number of instances where I had found contemporaneous evidence was not presented to support conclusions reached in the literature, particularly those which have regarded financial exclusionary effects as being all pervasive and yet uncontrolled. Whilst such views might be attractive, they did not provide me with evidence I regarded as being necessary to address my Thesis Topic.

I also encountered views may have been misdirected as to the structure of that part of the overall financial system within which domestic general insurance products and services reside. In particular I found that there was an emphasis placed upon there being a direct linear relationship between a financial service provider, such as a general insurer and the consumer insured, without recognition of the fact that such products and services may frequently be distributed by intermediaries.

I have argued that, there is adequate Australian evidence available to support the inclusion of another dimension, *vicarious financial exclusionary effects*, amongst those other well established financial exclusionary effects.

Again reflecting a concern with those views that individual financial exclusionary effects stand apart from each other, I have developed the argument that an alternative situation exists where the interaction between individual financial exclusionary effects is used by general insurers as an effective strategy to distinguish between those market sectors with which they wish to engaged, from those they wish to avoid.

As my Study progressed I found that there was significant evidence available identifying the role played directly or indirectly by legislation in making permissible a financial exclusionary effect which might otherwise have been illegal. I suggest the broad base of this evidence is illustrated by the following:

- Australia – Insurance exemptions to anti-discrimination legislation,
- New Zealand – Insurance exemptions to anti-discrimination legislation,
- European Union – Insurance "core terms" exempted from Unfair Contracts Legislation,
- Germany – Insurance "core terms" exempted from Unfair Contracts Legislation,
- United Kingdom – Insurance "core terms" exempted from Unfair Contracts Legislation,
- Canada – Discriminatory insurance pricing exemptions to anti-discrimination legislation.

The conclusions reached from my data analysis in Chapter Two support the view that two specific financial exclusionary effects, namely risk-based access denial and contract condition-based financial exclusionary effects, may be identified in domestic general insurance products survey in the post-implementation stage of the Australian financial reform processes in 2004 – 2005. Of greater significance however was the fact that I identified and analysed in detail the prevalence of these two specific financial exclusionary effects in those statute prescribed *"standard cover"* insurance policies directed to the individual consumer insured which had been in effect since 1984, effectively dispelling any image that such exclusionary effects were essentially recent and illegal by origin and scope.

I have developed the argument that it is reasonable to assume that financial exclusionary effects exist within a broader socio-economic, socio-legal and regulatory environment, that the existence and operation is constrained by contextual factors both internal and external to be found within that environment. The resultant multi-part contextual analysis suggests that the degree of constraint by those contextual factors selected for review, in fact varied significantly.

I found that that the variation in the overall constraint profile was adversely impacted upon by the effect of one relevant insurance statutory source of judicial relief against the results of *"harsh, oppressive, unconscionable, unjust, unfair or inequitable"* action be insurers, being restricted to concluded insurance contracts.

I found that the impact of this decision firstly, precluded this source of judicial relief from being available to address similar insurer conduct arising from risk-based access denial financial exclusionary effects. Secondly, the existence of this statute based source of judicial relief was subsequently regarded by the Australian Federal parliament as being adequate to address such effects, resulting in a number of consumer protection legislative developments ,which I identified, specifically being excluded from applying to insurance contracts.

I regard the outcome of this interaction between the provisions of a number of statutes upon risk-based access denial and contract condition-based financial exclusionary effects over a number of years, has now assumed more significant proportions following the recent introduction of the Australian Consumer Law.

My sequential analysis had progressed through to the final stage of determining the dimensions and existence of potential constraints upon those two specific financial exclusionary effects identified as occurring in Australian domestic general insurance products. This in turn enabled me to then proceed to determine the intention and subsequent impact of the recent financial services reforms upon those financial exclusionary effects found to occur within the Australian domestic insurance arena. My inquiries identified a clear intention on the part of the proposed legislation to provide both contract and product process certainty to potential product consumers to facilitate their decision making process as to the suitability of the financial products or services for their particular needs.

I identify the fact that defects in the definitional structure of the proposed legislation resulted in that critical definition of "*Retail Clients"* was based upon assumptions largely relevant to two areas of financial products and services, including general insurance. The outcome of my analysis indicated that the legislated solution to the definitional structural issue was to import from the Australian general insurance legislation, those *"standard cover*" the use of which by individuals would define those consumers as "*Retail Clients"*. My earlier analysis identified the prevalence of both risk-based access denial and contract condition based financial exclusionary effects in the *"standard cover"*.

My conclusion was that the selected solution to the financial services substantive definitional issue, had effectively embedded those financial exclusionary effects contained in the "s*tandard cover*" within the then recently introduced financial services reform regime. My analysis indicates that, whilst the intention to use this replacement definition was deliberate and well documented, I did not identify evidence confirming an awareness of the fact that cover and exclusions contained in the statute prescribed "*standard cover"*, when legislated in 1984, were simply designed to be reflective of prevailing Australian domestic general insurance custom and practice at that time.

I complete my Thesis Conclusion by addressing the issue of the impact my research findings upon broader public policy considerations. My findings have directed attention to the existence and extent that risk-based access denial and contract condition-based financial exclusionary effects may be legitimately embedded in the general insurance process by the statutory process. My findings further suggest that this situation also prevails in jurisdictions external to the Australian domestic general insurance market.

Superficially the situation above suggests a substantial conflict may exist between the fact that statute originated financial exclusionary effects may occur and that where those financial exclusionary effects are found in financial products and services, there may have resulted a significant marginalising effect upon those societal groups thus exposed. Given the prevalence in a range of jurisdictions of statute-based exemptions which may result in financial exclusionary effects, this source of marginalisation could be regarded as having major impact, the existence of which should not be ignored from a social policy perspective.

I consider however that further analysis based upon views regarding the Policy Process at a strategic level, may provide guidance regarding this potential conflict. Earlier in this Chapter I identified a number of those jurisdictions where statute approved financial exclusionary effects have been found to exist. I suggest that it is reasonable to assume that the legislative processes prevailing in those jurisdictions involve negotiated outcomes between stakeholders who have sectional objectives to be achieved.

I regard the negotiations to achieve the outcomes above as taking place throughout the policy process, such as occurred in the development of the policies underpinning the Australian financial services reform program later enacted by way of major amendments to the Australian Corporations Act 2001 (Cth). In that instance a process commenced with a broad-based policy review undertaken through the medium of a public inquiry (The Wallis Financial System Inquiry 1996). The recommendations of that inquiry then entered a period of structured review and negotiation via the nine-part Corporate Law and Economic Reform Program (CLERP), during which time public and sectional interest involvement was accessed in the process of formulating the desired changes in direction and content of related policy outcomes.

The CLERP outcomes subsequently formed the basis for the development of proposed legislation, the objective of which was to implement those CLERP outcomes accepted by the elected Australian Federal Government. The resultant draft legislation then entered the parliamentary legislative process, encountering further scrutiny and, in this instance judicial review, before being approved, enacted and subsequently coming to effect as the Financial Services Reform (FSR) legislation.

I suggest that is quite possible that the FSR legislative reforms, now forming part of the Australian Corporations Act 2001 Cth., may be amended or discarded in the future by the same legislative process which saw it initially established, again reflecting the negotiated outcome between relevant Stakeholders at that time.

I suggest my comments above are of direct relevance to the issue now being considered, that being the fact that the adverse impact of specific financial exclusionary effects may prevail as a result of those exclusionary effects having been embedded in statutes as a result of the legislative process briefly outlined above.

It follows that changes to those areas of public policy relevant to financial products and services and those associated financial exclusionary effects, may be brought about in the future by way of negotiated outcomes between relevant stakeholders, which result in legislative changes which remove or modify those statute-based exemptions which initially had permitted the existence of those financial exclusionary effects. Evidence is not available which indicates that general legislation, once enacted and in effect, becomes immutable and incapable of amendment.

What is of relevance is the fact that there has been recognition and negotiated agreement by stakeholders that legislative change is necessary to address the adverse impact of financial exclusionary effects presently prescribed by statute.

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6. 5. Thesis contribution to area of knowledge

In Chapter One, I have identified, analysed and reported on the two areas relating to the dimensions and extent of the application of Financial Exclusionary effects in domestic general insurance to which I have made an original contribution. These areas are:

i. The identification and substantiation of the dimension of *Vicarious Financial Exclusionary Effects* which exist in the domestic general insurance area.

ii. The identification and substantiation of the dimensions of the interaction between a variety of financial exclusionary effects in the domestic general insurance area.

In Chapter Two, I have identified, analysed, and reported on two areas to which I have made an original contribution relating to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, in the domestic general insurance impact area, as follows:

iii. The development of an appropriate analytical framework within which to identify, analyse, and report on the dimensions of *risk-based access denial and contract condition-based financial exclusionary effects* in Australian domestic general insurance policies.

iv. The application of that analytical framework in identifying and analysing the dimensions of *risk-based access denial and contract condition-based financial exclusionary effects*, and in comparing the financial exclusionary effect profile of the following :

a. One hundred and twenty nine individual Australian domestic general insurance policies utilised by those Australian domestic general insurers holding 81% of the 2004-2005 domestic general insurance market

b. Six "*Sstandard cover"* insurance contracts prescribed by the Insurance Contracts Act (Cth) 1984

In Chapters Three and Four, I have identified, analysed, and reported on three areas to which I have made an original contribution relating to the understanding of the dimensions and extent of the application of Financial Exclusionary effects, particularly in the domestic general insurance area, as follows:

v. The identification and reporting on the extent of those internal and external contextual factors that may constrain the impact of the risk-based access denial and contract condition-based denial financial exclusionary effects identified in the Australian domestic general insurance policies.

vi. To establish a contextual *"constraint profile"* that identifies the scope of those constraints identified in v. above.

vii. I have identified the manner in which the provisions of one statute may extend to preclude consumer access to relief provisions against the effects of unfair contract terms contained in other purpose-specific statutes within the Australian domestic general insurance arena.

viii. In Chapter Five my research has identified evidence establishing that a legislative decision to address a definition structural deficiency by way of replicating the statute prescribed domestic general insurance *"standard cover"* for use in the principal financial services reform legislation, in effect embedded in that legislation those contract condition based financial exclusionary effects contained in the *"standard cover"*.

I suggest that this analysis has made an original contribution to the understanding of the impact of the financial services reforms on financial exclusionary effects in Australian domestic general insurance products. More specifically, I have established that the legislative process has effectively embedded specific financial exclusionary effects in domestic general products in order to determine whether a consumer is a *"Retail Client"* under the financial services reform legislation.

ix. In my Thesis Appendix A Pilot Study, I have identified, analysed, and reported on an area to which I have made an original contribution relating to the understanding of the dimensions and extent of Financial Exclusionary effects, in domestic general insurance products and services within an overseas general insurance jurisdiction.

In this instance I applied my analytical framework I have developed and utilised in an Australian context, to facilitate the identification, scope, extent and internal and external constraint profiles of selected financial exclusionary effects in New Zealand general insurance products and services intended for consumers falling within the category of domestic insureds, including "*Retail Clients*". I identified that a contract condition-based financial exclusionary effect profile similar to that identified in Australian domestic general insurance policies also existed in those similar New Zealand insurance policies which I reviewed in the Pilot Study.

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2012

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Appendix A: Pilot Study – New Zealand Domestic General Insurance Policies: Application of Thesis Analytical Framework to an External General Insurance Jurisdiction

Pilot Study – Abstract

I report on the outcome of a pilot study I undertook to determine the relevance of my overall analytical framework in identifying the extent of risk-based access denial and contract condition-based financial exclusionary effects in the general insurance process occurring in a country other than Australia. The pilot study examined domestic general insurance processes currently prevailing in New Zealand, and indicated that my analytical framework was a relevant medium to identify the presence and scope of risk-based access denial and contract condition-based financial exclusionary effects in general insurance products and services within the New Zealand jurisdiction, and the potential for internal and external contextual constraints to impact upon the scope and extent of these exclusionary effects.

A.1. Pilot Study – Objective and Introduction

The principal Objective of the Pilot Study was to determine the extent to which the overall analytical framework of my Thesis was a relevant medium within which to identify the presence and scope of risk-based access denial and contract condition-based financial exclusionary effects in general insurance products and services within a jurisdiction external to Australia. The study was not intended to generate data that could later form the basis to compare the financial exclusionary effect profile of the Australian domestic general insurance sector against that of New Zealand. Rather, it was initiated by my discovery of the relative lack of detailed studies focusing on the nature and scope of financial exclusionary effects in general insurance products and services in Australia, as compared to the breadth of literature on the subject for New Zealand. Accordingly, I emphasise that the Pilot Study does not provide a review of how the Common Law based jurisdiction within New Zealand general insurance operates, only that where this exists, there is some intervention by statute-based prescriptive principles, such as those contained in insurance-specific statutes.[475]

[475] Insurance Law Reform (NZ) Act 1977 and Insurance Law Reform (NZ) Act 1985.

I identified several relevant New Zealand based studies. Morrison and O'Brien (2001) considered the prevalence of geographic access-based financial exclusionary effects resulting from corporate decisions to rationalise the provision of banking services to a specific urban locality.[476] Specifically, they deal with the question of whether sustainable sector-wide conclusions regarding "*desertification"* implications may be drawn from a detailed analysis of a single bank closure event.[477] Subsequently, Woods (2006)[478] re-examined this question by building on an earlier study, in which Geddes (2003) addressed the possible geographic access financial exclusionary effects resulting from the closure of a significant number of New Zealand post offices, and questioning the accuracy of a number of views prevailing *"desertification"* impacts.[479]

A.2. Pilot Study – Data and Methodology

The initial stages of the Pilot Study followed that I applied earlier in Chapter Two. I determined the likely size of the data to be collated, using demographic data indicating the size of the New Zealand general insurance market relative to the Australian market from which I had derived my sample set of evidence, namely insurance policies by general insurers comprising 81% of the Australian domestic insurance market. Application of this approximate metric resulted in the New Zealand Pilot Study, desirably involving 25+ personal lines policies drawn from those available in the domestic portion of the New Zealand general insurance market.[480]

My inquiries indicated that it was necessary to adjust this figure due as a result of a major difference applicable to the structure of the New Zealand general insurance market, though not applicable to the Australian context. In 1974, New Zealand introduced a "*No Fault"* sickness and accident compensation scheme administered by the New Zealand Accident Compensation Corporation under statutory powers granted by what is now the Accident Compensation (NZ) Act 2001.

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[476] At pp.322, 327
[477] Our earlier discussions in Chapter One at pp.19-20.
[478] At p.585.
[479] Argent and Rolley (2000) and Beck and de la Torre (2006) .
[480] Based on the December 2007 data: Australian Population estimate of 21.181 million and New Zealand Population estimate of 4.296 million and 129 Policies being selected for the Chapter Two analysis (net of the "*Standard Cover*").

Dew (2006) regards this scheme as being an *"insurance solution"* that differs from a "social (sic Welfare) insurance solution",[481] and which applies to all New Zealand residents, and which obviates the necessity for a commercial Sickness and Accident Insurance Policy, such as those that exist in the Australian context. As a result of this adjustment, I have settled on a reduced number of 22 individual New Zealand "personal line" or domestic insurance policies to be collated for analysis.

Following the framework established in Chapter Two, I applied a similar Policy Questionnaire,[482] the results of which appear in the Appendix A Tables. During the course of this analysis, I made note of significant similarities between the structure of New Zealand and Australian insurance policies, observing a significant variation in the actual size of the New Zealand policies, primarily due to the absence of those statute-prescribed[483] complex product disclosure requirements applicable in similar categories of Australian domestic general insurance policies.

I found that the Policy Questionnaire was readily applicable to the New Zealand insurance policies under review, and I did not encounter any instances where significant interpretation issues occurred.

A.3. Pilot Study - Analysis

The following analysis of the selected New Zealand Domestic Insurance policies is based on data resulting from the application of the sixteen-part review framework reported earlier in Chapter Two.

[481] At pp.164, 176.
[482] Chapter Two, Figure 2.2 "Contract condition based ffinancial Exclusionary Effects – Policy Questions".
[483] Corporations Act (Cth) 2001, Chapter Seven, Part 7.7 and 7.9.

A.3.i. Contract Condition Financial Exclusionary Effect Element # 1

Appendix A: Table A.1. New Zealand Domestic General Insurance Financial Exclusion Pilot Study – Contract condition–based financial exclusionary effect Element # 1			
Policy Part: Insuring Agreement Element: Scope of Cover - Age	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	15	60%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	0	0%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	20	80%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	5	50%

Note 1. Not available as a separate Policy

This Exclusionary Effect Element is widely distributed across 3 of the 5 domestic general insurance policy classes. with the exceptions comprising Home Building and/or Home Contents and Sickness and Accidents Insurance.

The minimum age of insured persons was stated variously, such as "being under 18 Years of age". Maximum specified insured age was stated at "over 60 years of age" and "60 years on next birthday" and 75 years in the instance of non-travel insurance classes. I noted that in these circumstances cover was conditional upon prior approval being obtained, as was required in a number of travel policies.

The effect of age-related benefit constraints is illustrated in Insurer policies where an accidental death benefit is payable to the estate of a named insured under a motor vehicle insurance policy, where the named insured was killed while driving the insured vehicle. Under these circumstances the death benefit is typically payable only under circumstances in

which the named insured was at least 25 years old at the time of the accident, disqualifying those under 25 years who were killed under similar circumstances, from this policy benefit.

The total exclusion of insurance cover on the basis of age limits under the personal risk based Consumer Credit insurance policies is understood to reflect the financial exclusionary effect element incidence found in these insurance policy classes.

Multi-line insurance policies containing age-related constraints on coverage were included in the Pilot Study primarily because they contained sickness and accident coverage for insured parties.

Statistical Analysis

An exact chi-square test was used for each element to test if a significant difference in element incidence exists between insurers. A p-value < .05 indicates there is a significant difference.

For Element #1 (Age), the chi-square statistic = 12.334 with exact p-value = .004. Therefore a significant difference existed.. Investigation of the contribution of each individual insurer group to the overall chi-square result indicated the element incidence in the home building/contents insurance was significantly lower.

A.3.ii. Contract Condition Financial Exclusionary Effect Element # 2

Appendix A: Table A.2. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition – based financial exclusionary effect Element # 2

Policy Part: Insuring Agreement Element: Scope of Cover - Gender	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	20	80%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	0	0%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

The incidence of this contract condition-based financial exclusionary effect element usually related coverage being unavailable for insurance policy claims arising from pregnancy or childbirth, on the conventional assumption that such conditions are female gender specific.

There was substantial variance in the distribution of the incidence of this exclusionary effect element across the various insurer insurance policies. This appeared to stem from the fact that the majority of the personal risk insurance policies (Sickness and Accident, Consumer Credit, and Travel) contained specific exclusions from coverage of pregnancy or childbirth related claims with the multi-line insurance policies containing gender-related constraints on coverage being identical to the age-related constraints considered earlier. The coverage constraint was found mainly to occur in those multi-line policies providing sickness and accident coverage for parties.

Statistical Analysis

For Element #2 (gender), the chi-square statistic = 18.749 with exact p-value = .000. There was a significant difference between insurers for this element. Home building/contents insurance policies had a relatively low incidence whereas travel insurance policies had a high incidence.

A.3.iii. Contract Condition Financial Exclusionary Effect Element # 3

Appendix A: Table A.3.New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 3

Policy Part: Insuring Agreement Element: Scope of Cover - Occupation	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	20	80%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	40	89%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

Occupation coverage constraints were identified in 91% of the Insurer policies reviewed. The scope of this constraint varied considerably between and within insurance policy classes. The variance in the application of this constraint ranged from the exclusion from cover of professional sports players and professional racing car/road trial and endurance racing drivers, through to coverage being provided for specific occupations, such as farming.

The application of this coverage constraint to Insurer Home Building and/or Home Contents insurance policies usually arose through the policy Insuring Agreement, which specified the occupation of the named Insureds, or the intended function of the insured premises.

The application of the policy coverage occupation constraint under Multi-Line insurance policies was not regarded as being unusual, as these insurance policies essentially comprised a suite of diverse insurance Cover targeted at a specific market sector, such as professional occupations, business insureds, trade persons, or rural farming.

Statistical Analysis

For Element #3 (occupation), the chi-square statistic = 2.875 with exact p-value = 1. There was no significant difference found between insurers for this element.

A.3.iv. Contract Condition Financial Exclusionary Effect Element # 4

Appendix A: Table A.4. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 4

Policy Part: Insuring Agreement Element: Scope of Cover - Domicile	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	40	89%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

Domicile coverage constraints were identified in 95% of the Insurer policies reviewed. The exception was a home and contents insurance policy that did not state any domicile constraints.

New Zealand permanent residency was the primary requirement for insureds in the personal risk insurance policies for sickness and accident, consumer credit, and similar provisions contained in the multi-line insurance policies. My analysis indicated that permanent residency and domicile permitted the insured to access New Zealand Health and Accident Insurance Schemes. This resulted in any insurance coverage converting to an insurance cover, which provided benefits only where the named insured was not indemnified under either of those National programs.

Travel Insurance coverage constraints extend the domicile requirement to limit policy coverage to those individuals who were New Zealand permanent residents and who resided in New Zealand at the time the cover under the insurance policy commenced. This additional domicile-related coverage requirement effectively ensures that the extent of the policy insurance coverage for medical-related expenses is capped by a specified time period or, where the disability continues on return to New Zealand, when the insured falls within the scope of the National Health or Accident Insurance Schemes.

I further noted that coverage constraints under several of the personal risk policies involved interaction between age-related coverage constraints and those relating to domicile, and were regarded as an extension of the above.

Statistical Analysis

For Element #4 (domicile), the chi-square statistic = 3.968 with exact p-value = 1. No significant difference was found between insurers for this element.

A.3.v. Contract Condition Financial Exclusionary Effect Element # 5

Appendix A: Table A.5. New Zealand General Insurance Financial Exclusion Pilot Study
Contract condition–based financial exclusionary effect Element # 5

Policy Part: Insuring Agreement Element: Scope of Cover – Personal interest not insured	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

Insurable interest coverage constraints were identified in all the Insurer policies reviewed. These constraints were manifest as requirements for proof of ownership or evidence of identification of an asset for assessment, the absence of which could prejudice satisfactory finalisation of an insurance claim.

Both, property insurance policies and personal property insurance coverage under the two multi-line policies required minimum proofs of ownership, and value by specific categories of insured items such as jewellery, other personal valuables, electronic media collections, works of art, bullion, and domestic household and personal electrical equipment items. Category proof requirements appeared to vary according to property item value.

There was little variation between proof requirements for home contents, accidental loss or damage of personal effects away from an insured dwelling, and personal effects.

Statistical Analysis

No chi-square is possible as the Element #5 incidence was 100% for all insurers.

A.3.vi. Contract Condition Financial Exclusionary Effect Element # 6

Appendix A: Table A.6. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 6

Policy Part: Exclusions Element: Perils or Activity	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

All Insurer Policies specified either the individual activities which were insurable or the intended function of a dwelling or chattel. This specification usually delineated permitted activities or precluded coverage for specified activities or generic activity classes, such as "professional sports".

Either specification basis exerted a similar effect, namely the identification of the activity uninsurable under the policy. Other than under those circumstances where the prior approval of the Insurer has been obtained, insurance policy activity coverage constraints also occurred in the context of home building and/or home contents insurance where a part of a dwelling was used for a business activity.

A public policy activity-based coverage constraint was apparent where property insurance coverage was denied on the grounds of illegal activity, such as using insured property for an illegal purpose or driving a motor vehicle while disqualified, unlicensed, or intoxicated by drugs alcohol. Similarly, personal risk policies such as sickness and accident policies precluded coverage for losses arising from participation in specified sporting activities including professional sports.

As with other insuring agreement coverage constraints, the two multi-line policies also specified activities to which coverage was either limited or not provided.

Statistical Analysis

No chi-square is possible as the Element #6 incidence was 100% for all insurers.

A.3.vii. Contract Condition Financial Exclusionary Effect Element # 7

Appendix A: Table A.7. New Zealand General Insurance Financial Exclusion Pilot Study
Condition–Based Financial Exclusionary Effect Element # 7

Policy Part: Exclusion Element: Property not included under scope of cover	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	50%

Note 1. Not available as a separate Policy

This contract condition-based financial exclusionary effect element related to the specific exclusion of certain items from coverage. Property-related instances of this exclusionary effect are those where the value of a specific property item exceeds a specified policy threshold that acts as a policy trigger for a further asset value declaration. More generic instances of this exclusionary effect element related to the exclusion of aircraft and motor vehicles from coverage under a domestic home building and/or contents insurance policy. Similarly, these insurance policies imposed specific coverage constraints on the type and value limit of sporting equipment insurable under the policy.

Personal risk exposures insured under sickness and accident or consumer credit insurance policies do not appear to fall under the scope of this coverage exclusion on the grounds that the exclusion relates specifically to property.

Statistical Analysis

No chi-square is possible as the Element #7 incidence was 100% for all insurers.

A.3.viii. Contract Condition Financial Exclusionary Effect Element # 8

Appendix A: Table A.8. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 8

Policy Part: Exclusion Element: Inherent Vice or Vermin	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

This contract condition-based financial exclusionary effect element related to a direct relationship between property loss and the tendency of certain materials to deteriorate internally, due to the essential instability of constituent components or interaction between components, including mould, decomposition, fibre deconstruction, and spontaneous combustion,[484] or due to the action of vermin and other animals. It was also apparent that this exclusionary effect element was frequently linked to policy coverage exclusion arising from wear and tear, rust, or corrosion.

[484] More completely described by Kelly and Ball (2001 -) at 15,0110.55.

As with other instances of exclusionary effects, Insurer travel and multi-line insurance coverage policy exclusions related specifically to property policy component coverage. There was no clear indication noting extension to other policy components.

Statistical Analysis

No chi-square is possible as the Element #8 incidence was 100% for all insurers.

A.3.ix. Contract Condition Financial Exclusionary Effect Element # 9

Appendix A: Table A.9. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 9

Policy Part: Exclusion Element: Extraordinary hazards – Adverse Selection	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

Unlike some of those exclusionary effect elements considered earlier, this contract condition-based financial exclusionary effect element was found to apply equally to all property and personal risk related exposures. Application of this exclusionary effect to property appeared to be directly related to lawful deliberate acts or omissions or acts involving reckless disregard for the consequences by the named insured or related parties. The argument may be advanced that such individual or group behaviour has resulted from the knowledge that insurance will provide indemnity for any resultant financial or pecuniary loss arising from that behaviour.

The scope of the exclusionary effect element under Consumer Credit or the insured personal risk exposures under Travel insurance or including multi-line policies mainly related to professional sporting activities, specific flying related activities, or a wide range of non-professional sporting activities. Similarly, all such policies contained specific policy exclusions relating to claims resulting from pre-existing medical conditions (PEMC), identical to those considered earlier in Chapter Two.

Statistical Analysis

No chi-square is possible as the Element #9 incidence was 100% for all insurers.

A.3.x. Contract Condition Financial Exclusionary Effect Element # 10

Appendix A: Table A.10. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 10			
Policy Part: Exclusion Element: Moral and Morale Hazard/ Non-Disclosure	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	15	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

The scope of this contract condition-based financial exclusionary effect element is partially similar to Element #9, in that this element applied equally to property and personal risk related exposures. The scope of this exclusionary effect was substantial in Insurer Policies in all classes, including 20 (91%) of the policies reviewed. A significant variance between this Element and Element #9 derives from this Element's direct relation to a number of intending insured statutory obligations to properly disclose materials facts relating to the proposed contract.

The review also noted that all the insurance policies conformed to the legal requirement that intending insureds should be advised of their responsibilities relating to the disclosure of material facts and of adverse consequences arising out of non-disclosure. In all instances of policies accessed, there was clear reference in the supporting documentation that non-disclosure of material facts could result in cancellation of the particular insurance policy or denial of a related insurance claim.

Statistical Analysis

For Element #10, the chi-square statistic = 5.883 with exact p-value = .268. No significant difference was found between insurers for this element.

A.3.xi. Contract Condition Financial Exclusionary Effect Element # 11

Appendix A: Table A.11. New Zealand General Insurance Financial Exclusion Pilot Study
Contract condition–based financial exclusionary effect Element # 11

Policy Part: General Condition Element: Non Compliance with claims reporting/evidence requirement	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	15	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	20	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

The General Conditions of those Insurer policies accessed and reviewed contained clear reference to the obligations of the insured to comply with requirements relating to reporting policy-related loss events in accordance with policy provisions and securing appropriate evidence to confirm that loss event.

The nature of these reporting and evidence related requirements appeared to vary depending on the scope of the individual policy, ranging from medical evidence, confirming the nature and extent of illness or disability, to police reports of property related personal effects loss, caused by theft. The policy documentation made it clear that non-compliance with specified reporting and evidence requirements could result in denial of any related insurance claim.

Statistical Analysis

For Element #11, the chi-square statistic = 5.041 with exact p-value = .285. No significant difference was found between insurers for this element.

A.3.xii. Contract Condition Financial Exclusionary Effect Element # 12

Appendix A: Table A.12. New Zealand General Insurance Financial Exclusion Pilot Study
Contract condition–based financial exclusionary effect Element # 12

Policy Part: General Condition Element: Non-compliance with assistance and recovery requirements	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

The General Conditions of all of those Insurer policies reviewed contained clear reference to the insured's obligations to comply with requirements to provide assistance to the Insurer in the resolution of any claim arising under the policy, and similarly to provide on-going (post

claim settlement) assistance to the Insurer in the recovery of all claims related costs by way of Common Law rights of subrogation.

As with Exclusionary Effect Element #11 considered earlier, the policy documentation made it clear that non-compliance with the specified assistance and recovery support requirements could result in denial of any related insurance claim. I argue that the impact of this requirement to comply with the Insurer's right of subrogation is unfair to the insured, given that action may only be commenced following the full and unconditional settlement of the Insured's claim under the relevant policy.

Statistical Analysis

No chi-square was possible as the Element #12 incidence was 100% for all insurers.

A.3.xiii. Contract Condition Financial Exclusionary Effect Element # 13

Appendix A: Table A.13. New Zealand General Insurance Financial Exclusion Pilot Study
Contract condition–based financial exclusionary effect Element # 13

Policy Part: General Condition Element: Non-compliance with other policy specific conditions (dual insurance/driver disqualified/intoxicated)	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

The General Conditions of Insurer insurance policies accessed and reviewed, also contained clear reference to the obligations of the insured to comply with requirements relating to insurance policy specific conditions, such as:

- The insured immediately advising the Insurer of the existence of another insurance policy providing a similar range of indemnities,

- Compliance with a requirement to cancel such a policy within 21 days where the policy relates to sickness and accident insurance cover,

- To not permit another person to drive an insured vehicle while intoxicated or under the influence of drugs.

As with Exclusionary Effect Elements #11 and #12 considered earlier, the policy documentation made it clear that non-compliance with specified requirements could result in denial of any related insurance claim.

Statistical Analysis

No chi-square was possible as the Element #13 incidence was 100% for all insurers.

A.3.xiv. Contract Condition Financial Exclusionary Effect Element # 14

Appendix A: Table A.14. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 14

Policy Part: Excess Element: Standard	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	45	100%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	25	100%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

As identified earlier in Chapter Two there in the context of Australian domestic general insurance policies , the Pilot Study review of New Zealand Insurer policies revealed that all property and financial loss policies contained provisions relating to the payment of a Standard or Basic Excess by the Insured, in terminology relating to domestic personal lines insurance. This policy condition required the insured to pay a portion of the loss as stipulated in the policy, with the Insurer paying the balance of the amount claimed. Similar Claims Excess payment provisions were not identified in those personal risk policies including sickness and accident insurance, consumer credit insurance, and in two other specific policies.

As will be noted from contract condition based financial exclusionary Elements # 15 and #16 that follow, other specific policy condition-related Excess may also apply to claims made under property related policies, the sum of which may amount to a significant contract condition based financial exclusionary effect.

Statistical Analysis

No chi-square was possible as the Element #14 incidence was 100% for all insurers.

A.3.xv. Contract Condition Financial Exclusionary Effect Element # 15

Appendix A: Table A.15. New Zealand General Insurance Financial Exclusion Pilot Study Contract condition–based financial exclusionary effect Element # 15

Policy Part: Excess Element: Risk specific Excess (insured record/driver record)	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	25	100%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	20	44%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	0	0%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	10	100%

Note 1. Not available as a separate Policy

Following from Element # 14 earlier, other Insurer property insurance policies may require a further Excess payment additional to the Standard or Basic Excess considered earlier.

The first of these additional Excess payments was typically found in motor vehicle insurance policies. These are typically related to insured risk specific issues, such as driving record and vehicle specifications, such as make and model, or to an accident claim resulting from someone other than the insured having driven the vehicle. A further policy Excess may also be payable where someone other than a nominated driver was driving the insured vehicle at the time of the accident.

Statistical Analysis

For Element #15, the chi-square statistic = 12.295 with exact p-value = .003. Therefore, there was a significant difference between insurers for this element. Motor vehicle insurers were found to have significantly higher incidence, whereas travel insurers were found to be significantly lower.

A.3.xvi. Contract Condition Financial Exclusionary Effect Element # 16

Appendix A: Table A.16. New Zealand General Insurance Financial Exclusion Pilot Study
Contract condition–based financial exclusionary effect Element # 16

Policy Part: Excess Element: Excess - Age	Insurer Group Policies Reviewed *(n)*	Element Incidence *(n)*	*Element Incidence as % of Cover*
Insurer E, F, G, and H Policies Motor Vehicle Insurance	5	10	60%
Insurer E, F, G, and H Policies Home Building and/or Home Contents Insurance	9	0	0%
Insurer E, F, G, and H Policies Sickness and Accident Insurance	0 Note 1.	0	0%
Insurer E, F, G, and H Policies Consumer Credit Insurance	1	5	100%
Insurer E, F, G, and H Policies Travel Insurance	5	0	0%
Insurer E, F, G, and H Policies Multi-Line Insurance	2	5	50%

Note 1. Not available as a separate Policy

In addition to policy excess payments required under an Insurer policy, the review identified an additional Excess payment required by Insurer motor vehicle insurance policies. This additional Excess related specifically to the age of the named insured, or to the person driving the insured vehicle at the time of an accident resulting in a claim under the policy.

This policy Excess payment appeared to be required where the driver (either the insured or another person) involved in the accident was under 25 years of age. Insurer inquiries indicated that this specific age-based excess was risk-related, and reflected the adverse accident profile of under 25 year old drivers in contrast to that of most other driver age groups.

Statistical Analysis

For Element #16, the chi-square statistic = 9.056 with exact p-value = .02. Therefore, a significant difference existed between insurers for this element. Home building/contents and travel insurers were found to be significantly lower

Appendix A: Table.17 below sets out the distribution of the Exclusionary Effect Elements Incidence across Insurer policy classes:

Appendix A: Table A.17. New Zealand General Insurance Financial Exclusionary Effects Pilot Study Distribution of Exclusionary Effect Elements Incidence across Insurer Policy Classes

Insurer Policy Class	Policies *(n)*	Element Incidence Total *(n)*	Total possible Element Incidences *(n)*	Element Incidence % of Policies
Motor Vehicle	5	340	400	85%
Home Building and/or Home Contents	9	550	720	76%
Sickness and Accident (Note 1)	0	0	0	NA.
Consumer Credit	1	80	80	100%
Travel Insurance	5	340	400	85%
Multi-line	2	150	160	94%
Totals	22	1460	1760	83%

Note 1. Not available as a separate Policy

The Table above suggests that there is some distinction between the Exclusionary Effect Element Incidence profile of property-related insurance policies (Motor Vehicle Insurance and Home Building and/or Home Contents Insurance) and personal risk policies such as consumer credit. The property insurance average Element Incidence is 79% as compared to the 100% of personal risk policies. Neither Travel Insurance policies nor Multi-Line Insurance policies were considered in the above analysis, as both Class types comprise a mixture of property insurance and personal risk Cover.

Statistical Analysis

A chi-square test was applied to Table A.17 to determine if a significant difference in exclusionary effect element incidence exists across policy classes. The chi-square statistic for this test = 38.016 with a p-value = .000. Therefore, a significant difference existed between policy classes. Multi-line insurers were found to be significantly higher whereas home building/contents insurers were found to be lower.

A.4. Pilot Study: Development of a Constraint Profile

Introduction

This stage of the Pilot Study involved identifying the existence of contextual constraints on the contract condition-based financial exclusionary effects identified in the above analysis for insurance policies included in the New Zealand Pilot Study. This analysis follows that of those Australian Domestic General Insurance policies, considered in Chapters Three and Four earlier and sought to identify the impact of internal and external contextual constraints.

Given that the objective of the Pilot Study was to determine the suitability of the analytical framework to a non-Australian general insurance jurisdiction, I elected not to analyse all thirteen potential contextual constraints applied in Chapters Three and Four. Instead, I limited the analysis to the application of the contextual constraints to the following provided in Figure 5.2. below. I have included the Internal Contextual potential constraint arising from the inclusion of notice regarding "unusual policy terms" on the grounds that my earlier analysis of this potential constraint also involved consideration of the Common Law Principle embodied in the *"Contra Preferentem Rule"*, considered earlier in Chapter Three. The selected contextual constraints are as follows:

A.4.i. Pilot Study - Analysis – Internal and External Contextual Constraint Profile

Figure A.1. New Zealand Pilot Study – Analysis - Internal and External Contextual Constraints	
Internal Contextual Constraints	i. Notification of Unusual insurance policy terms (including the impact of the *Contra Preferentem Rule*)[485]
External Contextual Constraint	ii.. Racial Discrimination[486] iii. Sex Discrimination[487] iv. Disability Discrimination[488] v. Age Discrimination[489] vi. Financial Product or Service Implied Warranties[490] vii. ISO - Alternative Dispute Resolution Processes[491] viii. Restrictions on Unfair Contract Terms [492]

A.4.ii.Pilot Study. Analysis - Internal Contextual Constraints – Reliance on Unusual Terms in General Insurance Contracts and the impact of the "Contra Preferentem Rule"

My principle objective in this analysis was to first determine if there was any constraint, imposed either by law or convention, obligating a general insurer to explain to an intending insured, or to an insured under an insurance contract, the meaning of an unusual term in the insurance policy. The second issue concerns whether there is any constraint imposed on an insurer whereby they cannot rely on the unusual term in the absence of being able to provide an explanation.

[485] Chapter Three, Part 3.4.v.
[486] Chapter Four, Part 4.4.i.
[487] Chapter Four, Part 4.4.ii.
[488] Chapter Four, Part 4.4.iii.
[489] Chapter Four, Part 4.4.iv.
[490] Chapter Four, Part 4.4.v.
[491] Chapter Four Part 4.4.vii.
[492] Chapter Four Part 4.4.viii.

Thereafter, I addressed the balance of the question, namely, to what extent does there exist a contextual constraint imposed by the application of the *Contra Preferentem* Rule in addressing situations where an insurer seeks to rely on an ambiguous term contained in an insurance policy. This part of the question is rendered irrelevant in the absence of an insurance contract.

The overall significance of this analysis involves whether or not there exists a factor constraining the impact of a contract condition-based financial exclusionary effect.

I have failed to identify any direct constraint arising from statute law or Common Law principles that would mitigate the adverse impact of a contract condition-based financial exclusionary effect deriving from the Insurer's recourse to an unusual contract term. However, the potential for a direct constraint to exist would result from:

i. The participation of a general insurer in the New Zealand Fair Insurance Code Scheme administered by the Insurance Council of New Zealand (ICNZ), with that participation being obligatory on all ICNZ members. It is important to note that ICNZ membership is not obligatory and that, in 2009, the ICNZ disclosed there were 26 general insurance members who underwrote 95% of general insurance business in New Zealand.[493] While the Fair Insurance Code emphasises insurer disclosure of an insurance policy, it seems that the level of disclosure relates mainly to an insurance contract that is in force, without indicating the scope or extent of the disclosure.[494]

ii. The development of an insured's inquiry, regarding the meaning and application of an unusual policy term, into a complaint that may result in a dispute with the insurer. Membership of the ICNZ requires the insurer to have an Internal Dispute Resolution Scheme in place, and register as a financial service provider under the relevant legislation.[495]

[493] ICNZ Fair Insurance Code 2009, at p.2.
[494] Ibid, at p.1.
[495] Financial Service Providers (Registration and Dispute Resolution) Act (NZ) 2008, Part 2. Registration, Part 3. Dispute Resolution.

iii. However, of the 22 insurance policies reviewed for the purposes of the Pilot Study, only 12 (55%) either mentioned the Internal Dispute Resolution procedures or made direct or indirect reference to compliance with the relevant legislation.[496] Evidence was not available to indicate whether the insurers had alternative means satisfying the statutory requirements for registration and membership of a statute approved IDR.

I also note that Biss and McIntosh (2004), when reviewing the role of internal dispute resolution powers as part of a larger Alternative Dispute Resolution process, did not take into account the potential for Insurers to omit reference to Internal Dispute Resolution procedures.[497]

iv. As discussed later at, access to external dispute resolution processes relevant to the general insurance industry is conditional on the insurer referring the dispute to the Insurance and Savings Ombudsman (ISO), although evidence was not available to indicate whether the insurer always exercised this discretion.

v. Consequently, I argue that the impact of a vicarious constraint on the indiscriminate use of unusual contract terms is only partially effective, as it is conditional on whether the general insurer actually complies with the statutory requirements or the ICNZ Code of Practice.

A.4.iii. Pilot Study Analysis External Contextual Constraints: Race/Sex/Disability and Age Anti-Discrimination legislation

In Chapter Four, I considered the extent to which Australian Anti-Discrimination legislation provided an effective external statutory contextual constraint limiting the scope of the specific related contract condition-based financial exclusionary effects. I now consider the extent to which New Zealand Ant-Discrimination legislation imposes a contextual constraint on the personal risk financial exclusionary effects identified in the Pilot Study.

[496] Refer to Iii.
[497] At p.30.

My research suggests that although there are some similarities in how a potential external contextual constraint may exist, there are also differences in how these constraints may potentially operate.

At the time of my inquiries the principal New Zealand Anti-Discrimination statute was the Human Rights Act (1993) NZ. Rather than relying on individual statutes to address individual discrimination-based risk exposures, the legislation reflects a strategy of using a single statute to address multi-faceted discrimination-based issues, proscribing discriminatory practises on a total of 11 grounds[498]. These include Race, Sex, Disability, and Age.[499] I reviewed the New Zealand provisions relating to these four discrimination grounds in an effort to ascertain the extent, if any, of constraint that may mitigate the impact of adverse condition, or risk-based financial exclusionary effects.

Similar to the Australian Anti-Discrimination legislation considered earlier, the New Zealand Human Rights Act contains specific provisions exempting life and general insurance policies from the prohibition contained in Section 44 of that Act. The prohibition proscribes the provision of goods or services on a less favourable basis on grounds provided in Section 21.[500] This exemption, contained in Section 48 of the Act, restricts the exemption to only three of the prohibited grounds of discrimination. These are:

- Sex
- Disability
- Age[501]

I suggest that the statute-based exemption contained in Section 48 follows the scope of exemptions permitted for life and general insurance products contained in the Australian legislation relevant to the specific grounds of discrimination discussed in Chapter Four earlier.

[498] Prohibited Grounds as identified in Section 21.
[499] Chapter Four, Part 4.5(i) – 4.5(iv).
[500] Section 44(1).
[501] Section 48(1).

The New Zealand Human Rights Commission is the statutory authority responsible for the administration of the New Zealand Human Rights legislation, the functions of which are set out in the legislation.[502] The legislation also establishes a Human Rights Review Tribunal as the statutory body with the responsibility to determine preliminary issues arising from the anti-discrimination provisions of the statute.[503]

That the New Zealand Human Rights Commission has a statute-based right to issue Guidelines regarding Third Party practices, which may be *"inconsistent with, or contrary to this Act",*[504] is directly relevant to my research.

In 2007, the New Zealand Human Rights Commission issued revised Guidelines relating to life and general insurance practices, the interaction between those practices and the Act, and to insurance exemptions contained in the Act.[505] Although these Guidelines similarly address the insurance related issues considered by the Australian Human Rights and Equal Opportunity Commission, they also further develop the concept of "*fair and reasonable under…the circumstances*", in defence of what would otherwise be a proscribed event under the New Zealand legislation. In particular, the Guidelines examine indirect discrimination in the context of "*fairness and reasonableness*".[506]

Consequently, what may initially appear to be a constraint on the application of the Exemption contained in Section 48 is perhaps minimised by applying court-determined parameters to determine what constitutes *"fairness and reasonableness"*, similar to the measures examined earlier in Chapter Four.[507]

[502] Parts I, 3, 4.
[503] Part 4.
[504] Section 5(2)(e).
[505] "Guidelines: Insurance and the Human Rights Act 1993" (2007).
[506] Guidelines, p.6.
[507] Chapter Four, 4.4.(i), as specifically defined in Secretary, Department of Foreign Affairs and Trade v Styles and Anor, 88 ALR 621 at p.634. Waters; Commonwealth v HREOC (1995) 63 FCR 74, and Commonwealth Bank of Australia v HREOC (1997) 150 ALR 1.

Given that the judicial interpretation was addressing Common Law principles, it follows that the decisions, in light of the legislation's silence on these issues, were persuasive in considering what constitutes "fairness " and "reasonableness" in the context of the New Zealand anti-discrimination legislation. I suggest that it follows that limitations on exemptions under the New Zealand statute may be conditioned by judicial interpretation in a similar manner to that which has occurred in Australia.

In light of the above, I suggest that the apparent limitation of exemptions, or absence of exemption signifying an effective constraint on risk-based or contract condition-based financial exclusionary effects, may be nullified by judicial interpretation of the alleged discriminatory practice as *"fair and reasonable under the circumstances".* It therefore follows that the initial presumption, that limitations placed on statute-prescribed exemptions effectively constrained risk-based access denial or contract condition-based financial exclusionary effects in the anti-discrimination arena, may be inaccurate.

A.4.iv. Pilot Study Analysis of External Contextual Constraints: Financial Product or Service Implied Warranties

In Chapter Four, I discussed the emergence of a trend where I encountered a series of instances in which statutory provisions, parallel to situations in the general insurance process, excluded consumer application directed remedies contained in statutes external to the Australian general insurance process. This led me conclude that the scope of risk-based access denial and contract condition-based financial exclusionary effects were only minimally constrained.

In the Pilot Study, I sought to determine the extent to which statutory provisions contained in New Zealand legislation, similar to Australian statutes considered in Chapter Four, constrained the scope of risk-based access denial and contract condition-based financial exclusionary effects in New Zealand general insurance policies.

I selected the provisions of the Consumer Guarantees Act (1993) NZ for review, as the statute indicates a clear link with former provisions of the Australian Trade Practices Act (1974) Cth, now incorporated into the Australian Securities and Investment (ASIC) Act (2001) Cth.[508] The New Zealand legislation states that the consumer guarantee provisions contained in the Act relate to goods and services, such as contracts of insurance, including life insurance and assurance.[509]

My analysis reviewed the provisions in the New Zealand legislation relating to implied warranties relating to services provided with reasonable care and skill that guaranteed reasonable fitness for a particular purpose.[510] I noted similarities between the Australian provisions and those contained in the New Zealand legislation.

It was significant that the current Australian legislation specifically excludes insurance contracts from the scope of the implied warranty provisions. I noted earlier that this exclusion appeared to be based on the presumption that adequate protection was already provided via interaction between the *Utmost Good Faith* provisions contained in the Insurance Contracts Act (1984) Cth and remedies available under Section 15 of that legislation. I suggest that the inclusion of general insurance contracts under the "*reasonable care and skill"* and "*fitness for particular purpose*" provisions of the New Zealand legislation merely reflects the absence of statutory provisions analogous to those contained in the Australian Insurance Contracts Act. It would appear that New Zealand legislation relied on specific implied warranty provisions contained in a more generally relevant consumer protection statute.

[508] Trade Practices Act (Cth) 1974 Section 74(2), now incorporated into the ASIC Act (Cth) 2001, Sections 12ED(1) and 12ED(3).
[509] Section 2(1)*"Services"* (b)(iii).
[510] Part 4, Supply of Services, Sections 28, 29.

Although the Pilot Study focused mainly on establishing the extent to which my analytical framework is relevant to a jurisdiction other than Australia, the framework nonetheless highlights potential areas of variance. Specifically, I am referring to variance in the application of non-insurance specific consumer protection legislation to general insurance products and services. In this particular instance, I argue that whereas implied warranty provisions in the New Zealand Consumer Guarantee Act (1993) constitute a major constraint on contract condition-based financial exclusionary effects, they only exert a minor impact on risk-based access denial financial exclusionary effects in similar products and services.

A.4.v. Pilot Study Analysis of External Contextual Constraints: Alternative Dispute Resolution Processes

Earlier in this Chapter, I considered how a New Zealand General Insurer's membership of an approved Alternative Dispute Resolution (ADR) scheme could indirectly constrain the Insurer's recourse to an unusual insurance policy term to create contract condition-based financial exclusionary effects.[511] I now identify the extent to which the New Zealand general insurance ADR processes identified in the Pilot Study may be regarded as directly and effectively constraining the scope and application of risk-based access denial or contract condition-based financial exclusionary effects, which may occur in the pre-insurance contract phase or after the contract is in operation for the policy term.

I identified earlier a statutory requirement for providers of financial products and services to be registered under the New Zealand Financial Service Providers Act (2008) and to participate in a registered Dispute Resolution scheme. I also noted that, in addition to the statutory requirement, voluntary membership by a New Zealand General Insurer in the Insurance Council of New Zealand (ICNZ) also required the adoption and implementation of the New Zealand Fair Insurance Code, which identifies the role of ADR processes from a consumer protection perspective. However, of the 22 general insurance policies considered in my Pilot Study, only 12 (55%) actually mentioned the existence of dispute resolution processes and the insurer's participation in it.

[511] Part 5.3.3.2.i..

As I am unaware of the extent to which to these insurance policies reviewed in the Pilot Study actually represent prevailing practices in the New Zealand general insurance sector, I refrain from offering an opinion on whether the extent of non-compliance with the New Zealand Fair Insurance Code could be taken as representing the compliance profile of the overall sector.

I have also noted that when in dispute with a New Zealand general insurer, an insured's access to External Dispute resolution processes (EDR) is conditional on the general insurer referring the dispute to the EDR processes for resolution. These EDR processes have been established and managed by the Insurance and Savings Ombudsman (ISO) as an approved dispute resolution scheme under the Financial Services Providers (Registration and Dispute Resolution) Act (NZ) 2008.[512]

Following the analysis used earlier in Chapter Four, I reviewed the ISO Terms of Reference, which, along with the ISO Rules, provide the functions, structure, and operations of the ISO as an approved Disputes Resolution Scheme under Part 3 of the Act above. Similar to the Australian Financial Ombudsman Service (FOS), the ISO Terms of Reference permit the ISO to accept and consider a complaint relating to a concluded insurance contract as a "Service" provided by a Participant (Insurer) in the ISO EDR Scheme.[513] Similar to FOS provisions considered earlier in Chapter Four, the limitations on the powers of the ISO include:

> *"3.2. The ISO shall have no power to consider those parts of a complaint which…relate to:*
>
> *(a) The participant's commercial judgement, assessment of risk, underwriting practices...".*[514]

This limitation within the utilised analytical framework implies that ISO is precluded from addressing complaints involving participating insurer decisions to accept or reject proposals from insureds, on grounds of underwriting or risk criteria. As such, while the ISO may consider complaints arising from insurer decisions regarding the operation of a concluded policy, the ISO may not consider complaints with implications involving risk-based access denial financial exclusionary effects.

[512] Sections 4, 50.
[513] ISO Terms of Reference (November 2010), Clause 2(1)(a).
[514] ISO Terms of Reference, Clause 3.2.

Stevens (2004) identifies the exception contained in TOR 3.2 as extending to preclude the ISO from considering complaints regarding the termination of a concluded insurance contract, other than on the grounds of non-disclosure in relation to an insurance claim.[515]

In conclusion, I have established the relevance of the analytical framework used in Chapter Four to identify the extent to which external contextual constraints may or may not exist on either insurance contract-condition or risk-based financial exclusionary effects. In this instance, I point out that a significant potential constraint may exist in contract condition-based financial exclusionary effects contained in concluded New Zealand insurance contracts falling within those *"Personal Lines"* (or domestic general insurance categories) considered by the New Zealand Insurance and Savings Ombudsman (ISO) Scheme. In contrast, no similar constraint occurs in the context of risk-based access denial financial exclusionary effects, as the ISO does not have the powers to consider such matters. This outcome is identical to those Australian EDR processes earlier in Chapter Four.

A.4.vi. Pilot Study Analysis of External Contextual Constraints: Restrictions on Unfair Contract Terms

In Chapter Four, I examined the extent to which unfair contract terms contained in general insurance policies are restricted by constraints external to the insurance contract.[516] I identified that any potential constraint on what may be categorised as *"unfair contract terms"* resulting in contract condition-based financial exclusionary effects was nullified due to recent Australian legislation exempting those *"standard" Cover"*, the existence of which was largely dependent on Australian State, Territory, or Commonwealth legislation. I also explored reasons for such an outcome. I noted the absence of exemption of the Unfair Contract Terms related consumer legislation on risk-based access denial financial exclusionary effects resulting from application of *"unfair terms"* in the insurance underwriting process.

To reiterate, this Pilot Study does not aim to compare the constraining effects of unfair contract terms related legislation in Australia and New Zealand. Rather, I am mainly concerned with ascertaining whether my overall analytical framework is relevant to non-Australian jurisdiction.

[515] At p.184.
[516] Chapter Four, Part 4.4.viii.

My research based in the New Zealand context identified that formal consumer protection strategies mainly relied on two statutes. The first is the Consumer Guarantees Act (NZ) 1993 relating to the suitability of implied warranties in financial products or services, including insurance products and related services. In my earlier review, I noted that this legislation was minimally relevant to inherent issues arising from unfair contract terms, identified in Chapter Four. The second statute is the Fair Trading Act (NZ) 1986, which emphasises the need to address consumer related issues arising from:

> *"misleading and deceptive conduct, false representation and unfair practices"*.[517]

Similar to New Zealand Consumer Guarantees legislation considered earlier, this statute also uses terms identical to those used in the later legislation on contracts of insurance (life insurance and assurance) encompassed within the definition of "services" covered by the legislation.[518]

However, I argue that the legislation is very clear about one thing—that the referred to *"unfair practices"* do not encompass unfair contract terms included in a contract. Rather, they refer to specific product and services sales practices extending across a broad area, ranging from harassment and coercion to pyramid selling.[519] Consequently, it would appear that the statute, in its capacity as a constraint on unfair contract terms, would apply only in instances where the terms were used to mislead, deceive, and falsely represent the type of process proscribed in legislation.[520]

I therefore conclude that the Fair Trading Act (NZ) 1986 enjoys only limited application, by constraining the scope of contract condition-based financial exclusionary effects arising from the application of unfair contract terms included in an insurance contract within those categories specifically included. Likewise, the legislation enjoys only limited application in the context of risk-based access denial financial exclusionary effects arising prior to the conclusion of an insurance contract.

[517] Fair Trading Act (NZ) 1986, Part 1 Heading.
[518] Section 2.1. Services,(b).
[519] Refer to Sections 17-28.
[520] Specifically within the scope of Sections 9-16.

A.5. Pilot Study Conclusions

My main goal in the Pilot Study was to report on a number of New Zealand domestic general insurance processes. Specifically, I sought to determine the extent to which my overall analytical framework was relevant in identifying the presence and scope of risk-based access denial and contract condition-based access denial financial exclusionary effects in insurance products and services within a non-Australian general insurance market.

I followed my methodology developed and applied in Chapters Two, Three and Four. I accessed 22 New Zealand domestic general insurance policies directed to the individual consumer and small commercial entity sector, and applied the Policy Questionnaire used in Chapter Two. I noted that, whereas there are distinct similarities between the structures of Australian and New Zealand policies, there are equally distinct differences, and these arise mainly from the absence of statute-prescribed insurer general disclosure and complex product disclosure requirements found in Australian policies intended for "*Retail Clients*". My research identified that a contract condition-based financial exclusionary effect profile similar to that identified in Australian domestic general insurance policies also existed in similar New Zealand domestic general insurance policies.

I was able to apply 8 of the 13 internal and external contextual constraint identification processes, developed in Chapters Three and Four, to the New Zealand policies without major difficulty. My analysis highlighted the relevance of the following factors:

i. Although the nature of internal and external legislative contexts is of critical importance, valid conclusions may only be drawn after detailed consideration of the actual processes involved in the jurisdiction that differ from comparative conclusions drawn from an analogous jurisdiction.

ii. Whereas, it would appear that external contextual constraints may exist, I regard it being necessary to ensure that the similarity is substantive and not merely one focused only terms and phrases. This issue was clearly identified in my examination of New Zealand anti-discrimination legislation to determine the extent of statutory exemptions permitting the financial product or service provider to behave in a way that would otherwise be proscribed.

iii. That the potential impact of statute-based external constraints on contract condition-based financial exclusionary effects may have been partly dissipated by

judicial interpretation, which, in an effort to judge the constraint's application, uses a test ascertaining the extent to which the activity was *"fair and reasonable under the circumstances"*.

iv. There were several instances in which New Zealand statute-based constraints, such as those on implied warranties, applied equally to general insurance contracts. This was unlike the situation identified earlier in Chapters Three and Four where similar Australian legislation excluded the application of the constraint to insurance contracts, as in the instance of Implied Warranties and general Consumer Protection relating to protection against unfair contract terms. However, I did note that specific statutory provisions limited the potential application of a number of the New Zealand statutory provisions.

I suggest that I have secured the main objective in my Pilot Study, as there is clear evidence that the analytical framework I have developed and utilised earlier in Chapters Two, Three, and Four, provides an appropriate structure to help identify and examine the scope and extent of selected financial exclusionary effects in general insurance products and services intended for consumers falling within the category of domestic insureds, including "*Retail Clients*".

Finally, I reiterate that in utilising the overall analytical framework within a jurisdiction external to Australia, I have successfully identified a risk-based access denial and contract condition-based financial exclusionary effects profile relevant to the New Zealand domestic general insurance industry. So far, there have been no studies that examine the specific dynamics and relationships that constitute the main subject of my research and analysis. My study therefore constitutes an original contribution to the understanding of the dimensions and extent of the application of those Financial Exclusionary effects identified in the New Zealand domestic general insurance jurisdiction.