



29 April 2013

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Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

and via email: economics.sen@aph.gov.au

Dear Secretary

Insurance Contracts Amendment Bill 2013

1. I refer to the announcement of 21 March 2013 referring the provisions of the *Insurance Contracts Amendment Bill 2013 (the Bill)* for inquiry and report. Thank you for the opportunity to comment. Thank you also for the extension of time in which to do so.

Background

2. This is the second attempt to introduce changes to the *Insurance Contracts Act 1984 (the Act)* which has been the subject of debate and consultation since 2003. The first attempt lapsed when Parliament was prorogued in 2010. At the time the general substance of the amendments was supported by the Law Council. It does not appear that the Society commented at that time.
3. The latest proposed amendments do vary slightly from the 2010 Bill but more so by additional topics rather than amendments of substance to the 2010 Bill.
4. The Bill attempts to correct historical deficiencies in the Act. The Society generally supports the amendments. We provide the following comments on a selection of the proposed amendments in the Schedules.

Schedule 1 – Scope and Application of the Act

Part 1 - Utmost Good Faith

5. The Bill makes a breach of the duty of utmost good faith a breach of the Act. The duty of utmost good faith is a statutory term of a contract of insurance (existing

section 13). The Explanatory Memorandum suggests this change is intended to provide a foundation for extra-contractual action by ASIC under the Corporations Act (see proposed section 14A). It will also enliven the existing penalty provisions of section 76A. The combination of the amendment to section 13, the insertion of section 14A, and the continued existence of section 76A would seem to expose corporate insureds, but not personal insureds, to penalties under section 76A.

6. The status and effect of the duty of utmost good faith on interested third parties has been the subject of debate. The proposed amendment makes it clear that the duty extends to 'a third party beneficiary under the contract'. It does not quell other issues.

Parts 2 and 3 - "Bundled" insurance contracts

7. "Bundled" workers compensation and compulsory third-party contracts are to be exempt from the Act. Other "bundled contracts" are to be exempt only in respect of elements which would be exempt if they were stand-alone contracts.
8. This amendment is an appropriate measure to prevent technical exclusions of the Act.

Schedule 2 – Electronic Communications

9. The proposed amendments seek to modernise the delivery of notices etc. under the Act.
10. While there is the potential for delivery to be more problematic than in the days of "Registered Post", the amendments are a reflection of the realities of present communication.

Schedule 3 – Power of ASIC

11. The proposed amendments appear consistent with the intent discussed at paragraph 5 above.

Schedule 4 – Disclosure and Misrepresentations

Part 1 – Insured's duty of disclosure

12. There is an initial policy question about the balance of power between insurer and insured. The amendments move the balance in favour of the insured. Although the inclusion of additional objective factors to the existing mixed test is welcome, because of the retention of the subjective elements the amendments will not remove the general uncertainty about an insured's duty of disclosure. Removal of the

subjective elements would however weigh the Act heavily in the favour of the insurer.

13. The proposed change to s.21(1)(b) purports to offer some guidance in the analysis of the subjective component of the test. It involves the introduction of a new concept, "factors". This is in addition to the word 'circumstances' in the first part of the sentence, which already introduces the subjective component. We suggest that, with some change of word-order, it is not necessary to introduce the new concept of a "factor", and thus argument to what that new concept may encompass. We suggest alternative wording at paragraph 17 below.
14. The proposed factors are in fact good ones. With some hesitation, we suggest consideration of a third: - "regulatory framework".
15. The reason for this is that in the case of businesses or professionals for which or whom licences are required, insured businesses often need to undertake training and make risk management declarations in order to trade. Directing an insured to think about those declarations will direct an insured, fairly, in our contention, to issues that would be relevant to an insurer about whether to accept a risk and if so on what terms.
16. Our hesitation to propose a third "factor" arises from respect for the process that has led to the present amendments, and a reluctance to introduce further change if it will derail passage of the Bill.
17. Nonetheless, the wording of s. 21(1)(b), in our respectful opinion, could be improved as follows:

'a reasonable person could be expected to know to be a matter so relevant in the circumstances, including but not limited to:

- I. The nature and extent of the insurance cover to be provided under the relevant contract of insurance; and*
- II. The class of persons who would ordinarily be expected to apply for insurance cover of that kind; and*
- III. Any applicable licensing or certification requirements and conditions.'*

Part 2 – Eligible contracts of insurance

18. This Part is tied-in with the duty of disclosure obligation. It again has the effect of moving the balance of power towards the insured, by requiring insurers to ask more directly for disclosure of risk information, and constraining their ability to shift a

general burden of disclosure onto insureds. It runs the usual risks of formalism and trying to define a number of contingencies and pre-determine outcomes. The removal of any “catch all” question assumes that an insurer can anticipate all possible risks and ask questions about them. Contrary to Explanatory Memorandum paragraph 1.56, there will be facts or circumstances that only the insured can know. While the change has the potential to improve certainty for insurers, that will be improved certainty of liability. The exclusion of the “catch all” is a significant shift of the existing balance between insurer and insured.

19. By definition, an “eligible contract of insurance” is new business. If the change to section 21A is intended to extend to renewal, then we suggest there needs to be a correlative change to the regulation.
20. We also query whether there has been adequate reflection on the practical consequence of the removal of the “catch all” for insurers who might otherwise have elected to be bound by section 21A, even though the product offered is not one of the traditional classes. Regulation 2B(2) contains an extended definition of ‘eligible contract of insurance’. According to the explanatory memorandum that inserted that extension, the change was intended to effect an “opt in”. We query if whatever was intended to be achieved by permitting an “opt in” to section 21A might be undone by the removal of the “catch all”.
21. The enhancement of the insurer’s obligation to advise the insured of their duty of disclosure is an appropriate allocation of responsibility.
22. New section 31A seeks to extend the “non-disclosure” obligations to life insurance contracts and non-insureds. It is a corollary to the principle underlying section 21. It does place a higher onus on those taking out insurance, particularly on a third party’s life, but is a reasonable provision of relevant information to insurers.

Schedule 5 – Remedies of Insurers’ Life Insurance Contracts

23. *Unbundling of contracts* - The proposed amendments (section 27A) seek to ensure that any misrepresentation or non-disclosure applies to each specific contract where there are “bundled contracts”. This is good consumer protection.
24. *Remedies for non-disclosure and misrepresentation* - The amendments seek to introduce a formula for “variation” after the first three years of the life of the policy whilst recognising the varied products on the market since the inception of the Act. The proposal does seem cumbersome, but that is a matter for the insurance industry.
25. *Remedy for misstatement of date of birth* - This provides for variations to the contract to take into account the correct date. It is sensible.

26. *Cancellation of contracts* - This seeks to extend the provisions applicable to general insurance contracts to life insurance contracts and is sensible.

Schedule 6 – Third Parties

27. There are substantial amendments proposed dealing with the rights of third parties and generally appear to deal with some inadequacies in the current Act on this topic and appear sensible.

Schedule 7 – Subrogation

28. The proposed amendments appear appropriate in dealing with previous criticisms as to the operation of s.67.

Thank you for the opportunity to consider this matter.

Yours sincerely

John White
PRESIDENT