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Dear Mr Sellars

EXPOSURE DRAFT: INSURANCE CONTRACTS ACT AMENDMENT BILL 2010

The Insurance Council of Australia Limited¹ (Insurance Council) appreciates the opportunity to provide comment, on an in-confidence basis, on the latest release of the Exposure Draft of the Insurance Contracts Amendment Bill 2010 (the Bill).

Overall, the Insurance Council is pleased that our members' views on the earlier Exposure Draft (our submission of 6 November 2009 refers) have been taken on board and are reflected in the Bill – in particular the provisions relating to electronic communication and non disclosure.

Our comments below relate to some technical/drafting issues which we consider could be addressed in the Bill to provide more clarity and certainty and these will be dealt with in order of the Bill. In some instances, revised wording of particular sections in the Bill are suggested and these are included in the body of this submission and at Attachment A.

DISCUSSION OF THE BILL

Contents and Schedule 6, Part 4

Both the Table of contents (at page ii) and Schedule 6, Part 4 refer to "Rights of third party beneficiaries to recover against insurers". We suggest that this be amended so that it reads "Rights of third parties to recover against insurers". Part 4 is not dealing with rights of third party beneficiaries. Third party beneficiaries are parties who are referred to in the insurance contract as entitled to the benefit of insurance cover (e.g. a mortgagee). Third parties in the context of section 51 are parties that would normally seek to claim against the insured or

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2009 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross premium revenue of \$32.0 billion per annum and has total assets of \$95.2 billion. The industry employs approx 60,000 people and on average pays out about \$97.5 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

third party beneficiary but through section 51 can claim directly against the insurer of the insured or third party beneficiary where they have died or cannot be located. As agreed at our meeting with you on 30 October 2009, this would ensure consistency with references elsewhere in the Bill.

Commencement of electronic communication provisions

In the commencement provisions (page 2), we note that Schedule 2 concerning electronic communication is to commence on a day to be fixed by Proclamation or, if any provisions have not commenced within 6 months of Royal Assent, they commence on the day after the end of the 6 month period.

We acknowledge your explanation that the Bill no longer deals with the specific form of communication used to give notice or other documents required in the legislation but rather it will prescribe "writing". The ability to communicate electronically will be determined by the *Electronic Transactions Act 1999* (ETA) and any regulations made under that Act. However we note that the exemption for insurance contracts from the ETA provided in the *Electronic Transactions Regulation 2000* (ETA Regulation) will need to be amended for this to have effect.

As we understand that this is the Government's intention, we would appreciate advice as to how the timing of the necessary amendments to the ETA Regulation will accord with commencement of the relevant provisions of the Insurance Contracts Act.

Electronic communication of notices

As you are aware, the Insurance Council and its members very much welcome the Government's attention to ensuring technological neutrality for our industry by allowing the ETA to operate in relation to insurance contracts.

Nevertheless, our members consider that, even with the proposed changes to be brought about by the Bill and the removal of the current exemption of insurance contracts from the ETA, there is uncertainty whether a number of electronic communication methods would be available to insurers. Communication of notices electronically will be possible by sending the notice in an email or as an attachment to an email. However, we are concerned that application of the ETA may not enable, for example, provision of notices by hyperlink or by reference to a website.

As explained in our submission of 6 November 2009, ASIC is currently considering the relief it can provide under the Corporations Act to facilitate online disclosure in financial services (see ASIC's Consultation Paper CP121.) Such relief as has been discussed would allow the use of hyperlinks or a website reference. However, our understanding is that ASIC cannot provide the same relief in relation to notice requirements under the Insurance Contracts Act.

It would be to the clear advantage of policyholders and consumers that there be consistency between the means available to satisfy the disclosure requirements of the Insurance Contracts Act and Corporations Act. Our previous submission outlined the business and consumer benefits of allowing these new forms of disclosure.

The Insurance Council therefore submits that a regulation be made under the ETA to achieve this consistency. This should be done at the same time as the ETA Regulation is amended to remove the exemption for insurance contracts. (The Insurance Council would of course also be open to achieving consistency through other means for example through a regulation made under the Insurance Contracts Act.)

Electronic communication – electronic address

We submit that the redrafted 72A (Schedule 2) should be amended to make it certain:

- (a) That notices under the Act may be given to a body corporate at an address they have nominated for the receipt of such notices. This clarity is needed given that the wording of s109X of the Corporations Act does not currently provide certainty that notices will be considered properly served if served at an address other than the body corporate's registered address, even if done so at the request of the body corporate.
- (b) That the last known address of a body corporate or a person to which a notice or other document is sent could include an electronic address.

We therefore propose that section 72A be amended as follows:

72A Method for giving written notices or documents:

A notice, or other document or information that is required or permitted by this Act to be given to a person in writing may be given:

- (a) to a body corporate:
 - (i) in any way in which documents may be served on the body corporate under section 109X of the Corporations Act 2001; or
 - (ii) by sending it to the last-known address of the body corporate; or
- (b) to a natural person:
 - (i) personally; or
 - (ii) by sending it to that person's last-known address

Note: A notice, or other document or information may also be given to a body corporate or a person by electronic communication in accordance with the Electronic Transactions Act 1999 and any regulations made under that Act. This will include giving notice, or other document or information by electronic communication or fax to a last-known email address or fax number.

Section 21B – Schedule 4, Part 2

The Insurance Council and its members suggest that a number of technical drafting amendments with respect to the provisions in the Bill relating to section 21B would clarify the operation of those provisions.

In subsection 21B(4), there is a risk that the 'other request' referred to in paragraph 4(b) might be interpreted to include a request made in accordance with paragraph 2(b). There is a corresponding interpretation risk in clause 21B(5).

Suggested amendments to these clauses are contained in Attachment A.

There is also an interpretation risk that each of subsections 21B(6) and (7) may operate independently to deem the insured to comply with the duty of disclosure such that where the insurer chooses to do both the things referred to in paragraphs 2(a) and 2(b), the insured

may be taken to comply with the duty of disclosure by doing either to the things referred to in paragraph 6(b) or 7(b).

In order to remove possible confusion, suggested amendments to these clauses are also contained in Attachment A, with a proposed new subclause (8).

Section 22 – Schedule 4, Part 3

We note that section 22(4) states that if the Regulations prescribe a form of writing to be used then the writing to be used may be in accordance with the prescribed form. We understand that there is currently no intention to prescribe any particular form but this will be reconsidered in light of experience with the new provisions. We would appreciate your urgent advice if our understanding is incorrect.

Schedule 5, Part 2 – remedies for non-disclosure and misrepresentation

This Part also provides for the amendment of section 28(1) which applies to general insurance. Consequently, we query whether for the sake of complete certainty the application section should also have a provision referring to contracts of general insurance as well as the existing provision relating to life insurance.

Schedule 5, Part 4

Similar to the issue above, this Part amends section 63 which also applies to general insurance. Therefore, it may be advisable to also specify the application provisions that will apply to general insurance

We note the late inclusion of section 14A in relation to the powers of ASIC. It seems to us that ASIC will have such powers by reason of the proposed amendments to section 13, and we do not believe that the clause has further legislative effect. (We refer to paragraphs 4.5 and 4.6 of your earlier draft explanatory memorandum.) However, the Insurance Council understands that this clause may have been included to confirm such powers for greater certainty.

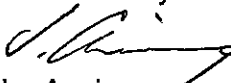
The draft explanatory memorandum said inter alia concerning the section 13 amendment that:

"ASIC has indicated that one example of the type of conduct leading to a permanent banning order is a pattern of persistent contraventions that indicate systemic failures or a general lack of understanding of, and regard for, compliance. Isolated breaches of the duty would not be expected to result in ASIC contemplating a banning order."

The Insurance Council suggests that it would be helpful for the explanatory memorandum to indicate a similar attitude to the exercise of ASIC's powers under the proposed section 14A.

If you have any questions in relation to the above submission, please do not hesitate to contact me on 02 9253-5121 or janning@insurancecouncil.com.au

Yours sincerely


John Anning
General Manager Policy - Regulation

Changes to exposure draft section 21B

1 Changes to subsections (4) and (5):

1.1 In subsection (4)(b), add after the words 'also requests', the words ', other than by a request made in accordance with paragraph 2(b),'

1.2 In subsection (5)(b), add after the words 'also requests', the words ', other than by a request made in accordance with paragraph 2(a),'

2 Change subsection (6) to read:

(6) If:

(a) the insurer:

(i) makes a request in accordance with paragraph 2(a);
and

(ii) does not give the insured a copy of any matter previously disclosed by the insured and does not make a request in accordance with paragraph 2(b);
and

(b) before the contract is renewed the insured discloses, in answer to each specific question, each matter that:

(i) is known to the insured; and

(ii) a reasonable person in the circumstances could be expected to have disclosed in answer to that question;

the insured is taken to have complied with the duty of disclosure under the renewed contract in relation to that matter.

3 Change subsection (7) to read:

(7) If:

(a) the insurer:

(i) gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph 2(b); and

(ii) does not make a request in accordance with paragraph 2(a); and

(b) before the contract is renewed, the insured:

(i) discloses any changes to the matter; or

(ii) if there is no change to the matter - informs the insurer that there is no change to the matter;

the insured is taken to have complied with the duty of disclosure under the renewed contract in relation to that matter.

4 Add a new subsection (8):

(8) If:

(a) the insurer:

(i) makes a request in accordance with paragraph 2(a); and

(ii) also gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph 2(b); and

(c) before the contract is renewed, the insured:

(i) does the things referred to in paragraph 6(b); and

(ii) does the things referred to in paragraph 7(b);

the insured is taken to have complied with the duty of disclosure under the renewed contract in relation to that matter.

5 Other consequential changes to section 21B are required to ensure correct numbering and cross referencing.