Thursday 8 April 2004

The Secretary
Insurance Contracts Act Review Secretarial
Department of the Treasury
Langton Crescent
ACT 2600

RE: Proposed amendments to Sections 54 and 40 of the Insurance Contracts Act 1984 – Insurance Contracts Amendment Bill 2004.

Dear M/s Spry,

Thank you for the opportunity to comment on the exposure draft dated 8 March 2004.

While we naturally support the need for certainty that S.54 should not operate in a manner that allows circumstances that could give rise to claims to be notified after expiry, we are vehemently opposed to the proposed amendments to the Act to procure that certainty, and the high price underwriters are now being asked to pay for that certainty. The rhetoric propounded in support of these amendments, particularly the need for balance between interested parties, is highly questionable. We are also disappointed that the amendments do not address the issue of claims notified after expiry.

It seems common ground that the original drafters of the Act had not intended that S.54 operate in the manner determined by FAI v AHC, and that there was no intention for S.40(3) to be affected by S.54. Following FAI v Perry in 1993, the law in relation to late notification of circumstances was that where notification within the policy period was optional, S.54 did not apply to "cure" the late notification. In 1995, the ISC issued a circular which stated that the law then extant, which found expression in FAI v Perry, **struck a fair balance** between all interested parties.

Now to restore underwriters to the position originally intended by the drafters of the Act, a position supported by FAI v Perry, and by the ISC in 1995, we are now being asked to accept a late notification period of 45 days. The proponents case for this cites logistical difficulties of notification within the policy period, particularly when very close to expiry, but conveniently ignores modern communications technology, disclosure obligations, good faith and timing of awareness of circumstances.

PI consumers are in the main highly educated, literate and articulate people who invariably communicate internally and externally by e-mail, an immediate method of communication. We do not accept that there is a difficulty in professionals reporting (or recognising) circumstances of which they become aware, even very close to expiry. If time was critical, there is no distinction made in the proposed amendments between a matter of which the insured becomes aware on day one or day 365 of the insurance period. There is most importantly and unfairly, no distinction made for matters of which the insured is aware at the time of completing the proposal (which would usually be circa 30

days prior to expiry), but chooses not to disclose those matters, knowing that renewal terms may be affected by the disclosure and that notification may be made after the policy has been renewed.

All PI proposals contain statutory notices of regarding the proponent's duty of disclosure and S40 rights. All PI proposals ask if the proponent is aware of any circumstances that could result in a claim. Surely it's not asking too much to expect a professional person, a person who one would expect to exercise honesty and good faith in their business dealings, to provide an accurate answer to this question. Brokers are continually reminding clients of the need to disclose circumstances as soon as they become aware of them, and if any doubt existed as to whether any matter constituted circumstances, advice is always available and insureds are invariably advised to err on the side of caution.

The proposed amendment simply removes the obligation to give notice at the time of awareness of the circumstances to a time more convenient to the insured, and no doubt to a time severely prejudicial to the underwriter. The proposed amendment will simply encourage insureds to act dishonestly, or at least take a cavalier attitude to disclosure. Non disclosure is already a significant problem for claims made underwriters, and it's estimated that 20% of claim denials are on the basis of known circumstances, and 25% on the basis of late reporting. We regrettably live in a world of diminishing ethical and moral behaviour, and professionals are only too aware of the impact of claims, or circumstances that could give rise to claims, on their renewal terms.

We are also opposed to changes proposed to S.40, and in particular, the conjunction of clauses (a) and (b) under sub-section (2B). Under S.40(2)(a) as it currently stands, the underwriter is not required to inform the insured/proponent of the effect of S.40(3) if the policy was arranged by an insurance broker. PI insurance is usually arranged by an insurance broker, and often a broker specialising in PI insurance. It's ludicrous to now propose that an underwriter must now check with the broker to see if notice (as required by 2(A)) has been given by the broker. This, along with certain other notices to be provided under the Act, is the responsibility of the broker. What is the position if the broker incorrectly advises the underwriters that notice has been given?

To summarise, we strongly oppose the amendments and seek changes to secure certainty that will restore underwriters to the position enjoyed prior to FAI v AHC. We would also like to see late reported claims not being 'cured' by S.54, as contemplated by Option 3 of the Issues Paper on S.54.

I believe that the amendments proposed to provide certainty in relation to late notification of circumstances, will not encourage capacity to the Australian market once underwriters understand that the price for this certainty, is the legitimisation of non disclosure, and disposal of the principal of good faith on the part of insureds.

Yours sincerely

Malcolm Fletcher
Managing Director
Macquarie Underwriting Pty Limited

CC: ICA
Lloyds Australia