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16 April 2004

The Secretary
Insurance Contracts Act Review Secretariat
Department of Treasury
Langton Crescent
CANBERRA ACT 2600
By email: icareview@treasury.gov.au

Dear Secretary

Insurance Contracts Amendment Bill

This letter is a response to your letter to Stakeholders seeking comments on proposed legislative amendments to sections 40 and 54 of the *Insurance Contracts Act*. We also take this opportunity to include some submissions in respect of the recommendations contained in the report into the operation of section 54.

1 Likely problems with section 40

The report contained a recommendation that insurers should be required to notify insureds, not earlier than one month and not later than seven business days prior to the expiration of the relevant policy, of the importance of notifying facts or circumstances, unless the insured is, to the insurer's knowledge, advised by an insurance broker. It is this recommendation which has found legislative form in the proposed subsections 40(2A) and (2B).

We submit that the Review Panel should reconsider this recommendation.

It is submitted that it is unnecessary and will lead to difficulties in execution. A notice will already have been given as to the effect of subsection 40(3) before the contract was entered into pursuant to the requirements of subsection 40(2). On renewal the insured has a duty of disclosure and almost invariably in this class of policy has to complete a proposal which specifically asks whether the insured is aware of any facts that might give rise to a claim.

2 Problems of proof where broker involved

We submit that the relief intended by sub-section 40(2B) will prove to be illusory. It is hard to envisage circumstances in which the insurer would ever know with

sufficient certainty that the insured was advised by an insurance broker. The broker at policy inception may not be the broker at renewal or, even if the same broker is used, the insured may not be relying on the broker for advice. To take advantage of the proposed subsection 40(2B) an insurer will have to prove the following:

- it became aware of something;
- the awareness related to something done by an insurance broker over whom the insurer has no control;
- the awareness occurred during a specified period starting 30 days before the expiry of cover and ending 7 days before the expiry of cover;
- the insurer will have to be aware that the insurance broker made the insured aware of the information required in writing;
- The writing will have to be a clear informing within the meaning of the proposed subsection 40(2A).

The proposed subsection 40(2B) does not even require that the contract be arranged by an insurance broker in the course of the insurance broker's business.

For all these reasons we consider that the proposed subsection 40(2B) will have no real effect and should be deleted. It should be sufficient to give notice to the insured or a person acting as an agent for the insured.

3 Consistency with section 58 notice

The period starting 30 days before expiry and ending 7 days before expiry does not coincide with the period required by subsection 58(2) requiring notice whether the insurer is prepared to negotiate to renew or extend the cover 14 days before expiry. It is submitted that, if the notice has to be given, it should be given with the section 58 notice. Further, it is desirable that regulations prescribe a form of writing which may be used for giving the notice with statutory endorsement similar to that contained in section 22 of the IC Act.

4 Extension reporting period

The proposed subsection 40(3) provides for an extended reporting period of 45 days. We consider that this period is too long and does not serve the interests of either insured or insurer. Market information indicates that the standard extended reporting period is no more than 28 days and we submit that this period be adopted.

The longer the extended reporting period, the greater the likelihood that something extra has occurred during the new policy period to trigger the notification, so that it is not a genuine reflection of awareness prior to expiry. It can give rise to serious policy shopping issues. Further, we have been informed that, if an extended reporting period is longer than 28 days, the market will charge for it, increasing the premium to the disadvantage of insureds.

Finally, insureds and their brokers may be given a false sense of comfort by the proposed subsection. It is hard to imagine circumstances in which notice was delayed for 45 days after the insurance cover provided by the contract expired but nevertheless notice was given as soon as it was reasonably practicable.

We submit that extended reporting period be limited to a maximum of 28 days.

5 More than one insured and section 48 claims

It is submitted that the proposed amendments do not deal satisfactorily with the situation where there is more than one insured or where there is a claim by a person entitled to claim pursuant to section 48.

As suggested in paragraph 2 above, it seems to us that the information required by subsection 40(2A) should be allowed to be given to a person acting as an agent for the insured, the solution adopted in section 58. However, we do not see any reason why the information required by subsection 40(2A) need be given to a person who may be entitled to claim pursuant to section 48.

The position may be different with respect to notices that may be given by the insured pursuant to subsections 40(3) and 54A(1). It may be sufficient if any insured gave the notice, or even that notice given only by a party entitled to claim pursuant to section 48 should be sufficient. The critical requirement is that the insurer knows of the facts that might give rise to a claim. It does not seem to matter from what source the insurer gains that knowledge. This would also avoid the possibility of co-insureds being indemnified under different policies.

6 Scope of section 40(1)

Leaving to one side the inelegancies of drafting, subsection 54A(2) does not mirror subsection 40(1) but subtly changes it. Subsection (a) defines a claims made policy whereas subsection (b) defines a claims made and notified policy. However, because there has been no amendment of the definition in subsection 40(1) there is a risk of inconsistency between subsection 40(1) and the new section 54A. We recommend that subsection 40(1) be amended so as to cover both claims made and claims made and notified policies, adopting the wording in the proposed section 54A.

7 Royal Assent

Section 4 of Schedule 1 dealing with Application could be interpreted to mean that the amendments will apply to contracts of liability insurance entered into on the day the Act receives the Royal Assent and to contracts entered into after the end of 28 days following Royal Assent. The result would be that the amendments will not apply to contracts for liability insurance entered into between days 2 and 27 after the Act receives the Royal Assent. It would be clearer if it were stated that the amendments apply to policies entered into 28 days or more after the date of Royal Assent.

We turn now to the four questions which were asked in the letter to Stakeholders and reply as follows:

1 We consider that the draft Bill is consistent with the recommendations made in the report into section 54.

2 We do not consider there is a need to define what a 'claim' is. Without a statutory definition the courts will apply the entirely satisfactory common law definition that a claim is the positive assertion of a legal entitlement to damages. We see no more reason to define claim than there is to define such other expressions in the sections as 'become aware' or 'as soon as practicable'.

3 We do not consider that there is a need for greater prescription in regard to the disclosure obligations under section 40, save for regulation prescribing a form of notice which may be used, as recommended in paragraph 3 above.

4 We recommend that an amended section 54A apply to all policies of general insurance. We note from page 25 of the report on the operation of section 54 concern that insurers might draft around section 54 by converting occurrence policies to claims made policies. If, as a matter of principle, such an outcome should be avoided, we do not consider that the amendment should be limited to a specified class of insurance contracts. This would in our submission create unnecessary rigidity. A satisfactory amendment would be to exclude from the operation of section 54 any class of contract prescribed by regulation or declared by ASIC.

Finally, the report and draft Bill only address the operation of s54 in the context of the notification of facts which might give rise to a claim under claims made and notified policies. There is a further issue, of broader application, which the Review Panel should, in our view, take the opportunity to address.

In *Kelly v New Zealand Insurance Co Ltd* (1996) 9 ANZ InsCas 61-317 the Supreme Court of Western Australia considered a home and contents insurance policy which gave the insured during the currency of the policy the right to apply for indemnity against accidental loss or damage to specified personal items which would not otherwise be covered by the policy. Section 54 protection was refused on the basis that it did not apply to a deliberate failure to expand the scope of cover. However, in *Drayton v Martin* (1996) 137 ALR 145 and in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 it was held that section 54 applied even when the failure to notify a claim was the result of a deliberate choice rather than an inadvertence. It is therefore uncertain whether *Kelly v New Zealand Insurance Co Ltd* would now be considered good law. Kirby J in *Australian Hospital Care* case seemed to give some approval on the basis that section 54 did not apply to omission of facts which seeks to alter the substance, core, effect or essence of a policy. It is uncertain whether this represents the views of the majority of the High Court.

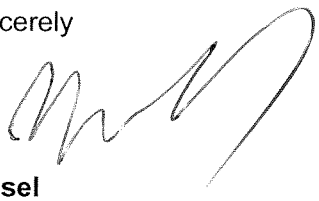
Other examples are policies which add as insureds subsidiaries acquired during the period of insurance or add to the property insured assets acquired during the period of insurance.

The simplest amendment would be to provide that a failure to exercise a right, choice or liberty shall not be an omission for the purposes of section 54.

Alternatively it could be provided that section 54 does not apply to a deliberate failure of an insured to extend cover under any general insurance policy.

We would be glad to expand on these comments in consultation at your convenience.

Yours sincerely



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