



Secretary  
Insurance Contracts Review  
C/- Department of the Treasury  
Langton Crescent  
Parkes ACT 2600

14 October 2003

Dear Sir,

**Submission on section 54  
Marketform Group**

This submission is made on behalf of the Marketform Group which includes Marketform Limited, Marketform Managing Agency and Syndicate 2468 at Lloyd's. The Marketform Group writes insurance business in Australia. Marketform Limited writes medical malpractice business on behalf of a consortium of Lloyd's syndicates, led by Syndicate 2468. Syndicate 2468 also writes other types of liability business in Australia.

The Marketform Group adopts and supports the submission made by Phillips Fox in relation to s54 of the Insurance Contracts Act. In addition to the comments made by Phillips Fox on behalf of a number of insurers, the Marketform Group would like to make the following further comments on its own behalf.

It is the medical malpractice business of Marketform Limited (Marketform) which was most significantly affected by the High Court's decision in *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd. (FAI v AHC)* Therefore this submission will concentrate on the impact of that case on the medical malpractice business.

When the High Court delivered its decision in *FAI v AHC*, Marketform's initial reaction was to cease writing Australian business. However, after seeking legal advice Marketform amended its policy wordings to restrict the definition of "claim" (to require the issue of proceedings) and to remove any requirement or option to notify circumstances likely to give rise to a claim. These amendments were made with the sole objective of minimising the possibility of late notification under the principles of the *FAI v AHC* decision. For the reasons set out in the Phillips Fox submission, notification after expiry of the policy period creates significant prejudice and commercial problems for "claims made" insurers, particularly in relation to business which is potentially "long tail" in nature such as medical malpractice.

Marketform writes medical malpractice business in over 40 countries around the world. It does not write in countries which do not recognise and uphold claims made policies. It does not write occurrence based primary medical malpractice cover.

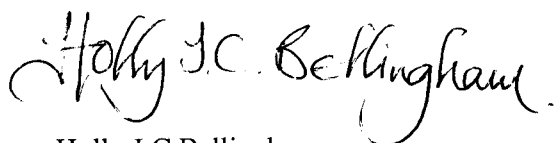
Marketform currently writes primary medical malpractice insurance for over 240 individual Australian hospitals and medical establishments\* and therefore holds a significant slice of the Australian medical malpractice insurance market.

Marketform is writing Australian business in the belief and anticipation that Australian courts will not apply s54 to s40(3) notifications. Were it not for this belief, Marketform would not be writing Australian medical malpractice business. If further judicial pronouncement or legislation renders this belief incorrect, it is likely that Marketform will cease writing Australian medical malpractice business.

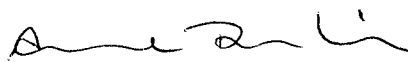
Marketform would like to offer clients policies which include the option to notify circumstances likely to give rise to a claim but so long as *FAI v AHC* is good law, it is not commercially viable to do so. It has been our experience that insured clients would like the option to notify circumstances likely to give rise to a claim. Removal of the "circumstances" clauses has caused confusion amongst our clients. Marketform policies retain an exclusion for claims arising from incidents occurring before inception of the policy, if the insured "*knew or should reasonably have foreseen that such... (incident).. might be expected to be the basis of a claim*". It is incongruous to have such an exclusion and yet not offer a "deeming" extension for circumstances of which the insured becomes aware during the policy period. It is artificial to rely on the statutory "deeming" provision in s40(3). A significant amount of staff time has been spent explaining the effect of the amendments and the implications of s40(3) to concerned clients.

The amendment to s54 which is proposed by Phillips Fox would allow underwriters to reinstate the option to notify circumstances likely to give rise to a claim as part of the policy itself. This would give reassurance to clients yet enable underwriters to write business on a truly "claims made" basis.

Yours faithfully



Holly J C Bellingham  
Chairman



Anne Durkin  
Corporate Lawyer

\* Primarily private hospitals but includes radiology and pathology practices, medical centres, fertility clinics and a small number of alternative or complementary therapy practitioners