SUBMISSION TO THE

REVIEW OF THE INSURANCE CONTRACTS ACT

SUBMISSION ON THE SECOND STAGE OF THE

REVIEW OF THE INSURANCE CONTRACTS ACT

27 April 2004

Introduction

1. This is the Law Council's written submission on the second stage of the Review of the Insurance Contracts Act (the "Review"), which covers the *Insurance Contracts Act 1984* (Cth) (the "IC Act") other than section 54 of the IC Act,[1] following the release of the Review's *Issues Paper* on the second stage of the Review. This submission addresses the matters within the interest and expertise of the Law Council.

2. The submission follows on from earlier submissions and appearances in person by the Law Council before the Review, in relation to both the first and second stages of the Review. These representations taken together are the whole of the Law Council's comment to the Review.

3. The Law Council's views are set out in this submission point by point in response to the questions in the Issues Paper. The Law Council does not wish to repeat those. However, one point is made frequently throughout the Law Council's specific responses, and that is the need for further consideration and review.

4. The Review has been given a wide-ranging task in a limited timeframe. Regardless of whether all the Law Council's views on the need for further review are agreed with, it is clear that there will be further areas for review after the conclusion of this Review. The Law Council recommends a reference to the Australian Law Reform Commission ("ALRC"), given its previous extensive work in relation to insurance, to address further issues arising from this Review.

The Law Council of Australia

5. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

6. The constituent bodies of the Law Council are, in alphabetical order:

   - ACT Bar Association;
   - Bar Association of Queensland;
   - Law Institute of Victoria;
   - Law Society of the ACT;
   - Law Society of NSW;
   - Law Society of the Northern Territory;

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[1] Section 54 of the IC Act was the subject of the first stage of the Review.

- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- the Victorian Bar; and
- Western Australian Bar Association.

7. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

8. The Law Council represents, through the representative Law Societies and Bar Associations, lawyers who act both for claimants, and for insurers and defendants. The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

Previous representations to this Review

9. Representations have already been made to the Review by the Law Council as follows:

- written submissions to the Review of 16 October 2003 (on the first stage of the Review); 23 December 2003 and 27 February 2004 (on the second stage of the Review); and 21 April 2004 (on the first stage of the Review); and

- meetings with the Review on 23 February 2004 (on the second stage of the Review) and on 29 March 2004 (principally on the first stage of the Review).

The Law Council's response to the specific questions in the Review's *Issues Paper* on the second stage of the Review

1.1 Do the requirements of the FSRA [the *Financial Services Reform Act 2001* (Cth)] reproduce or replicate the IC Act in any specific notable areas (other than the standard cover provisions)? For example, does there need to be any specific rationalisation of pre-contractual disclosure requirements on insurers under the IC Act, given the FSRA disclosure regime?

1.2 If so, to what extent are changes necessary to reduce the duplication of information for insureds (while not materially diminishing consumer protection)?

10. Broadly speaking the requirements of the FSRA and the IC Act in relation to disclosure to consumers are about the same issue, but the relevant provisions are not identical.

11. In principle, the Law Council supports rationalisation of the provisions under both Acts, but this would need to be done carefully, and in consultation with consumers, to ensure that the rationalised requirements were satisfactory. Perhaps the Review could recommend a process for rationalisation; this could be by way of an ALRC inquiry.

1.3 What sort of other insurance, if any, should be allowed to be bundled with a contract for the purposes of compulsory workers' compensation legislation, and still be covered by the exclusion in subparagraph 9(1)(e)(i) of the IC Act?

1.4 Should paragraph 9(1)(e)(i) of the IC Act be amended? If so, how?

1.5 What difficulties might arise if the exclusion in subparagraph 9(1)(e)(i) of the IC Act is extended?

12. The Law Council believes that the High Court decision of *Moltoni Corporation Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149 has clarified the understanding of sub-paragraph 9(1)(e)(i) of the IC Act, and that no amendment of the provision is required.

1.6 Would bringing insurance of water transportation of goods for non-commercial purposes within the scope of the IC Act have any significant negative consequences?

13. The Law Council defers comment on this question pending release of the draft report on this stage of the Review.

1.7 Should the scope of application of the IC Act to products issued by discretionary mutual funds and/or direct offshore foreign insurers be modified? In particular:

- is it desirable for the IC Act to apply to products issued by DMFs as though they were contracts of insurance, having regard to their discretionary nature;
- are there provisions in the IC Act that cause difficulties as they currently apply to contracts issued by Lloyd's and DOFIs; and
- what, if anything, should be done to make the IC Acts application to products issued by DOFIs more effective?

1.8 Are there any other insurance-like products which should be subject to the IC Act?

14. The Law Council does not have a substantive view on these questions at this time. The issues raised, such as prudential regulation and behavioural requirements, are much broader than can properly be dealt with in the present Review.

15. From a policy point of view there is now a clear tension between authorised insurers, and the very much enhanced prudential standards that they have to meet, on the one hand, and on the other hand the fact that DMFs and DOFIs are virtually unregulated under Australian law, yet are able to operate in competition. This is a major policy issue for government to address. The Law Council notes that there is presently a separate Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers.

2.1 Aside from the application of section 22 to renewals, are the provisions of the IC Act as they apply to renewals, extensions, variations and reinstatements of insurance contracts appropriate? If not, which provisions and circumstances have given rise to difficulties?

16. The Law Council believes that, putting to one side the issue of the application of section 22 of the IC Act to renewals (on which the Law Council's position is set out below in answer to question 4.10), the provisions of the IC Act as they apply to renewals, extensions, variations and reinstatements of insurance contracts are appropriate.

2.2 Are there any notices or documents required in writing under the IC Act that should always require traditional writing rather than being communicated electronically?

2.3 For those documents that could be communicated electronically, what safeguards or protection measures should be included for recipients? For example, should there be requirements such that:

- the recipient must consent to electronic communication;
- the communication is capable of being retained and printed;
- the communication is clear and readily understood;
- that place and time of origin is certain;
- that any contractual information can be downloaded or printed; or

any other requirements?

17. The Law Council supports electronic communication of documents under the IC Act in principle, subject to two conditions:

- the requirements for electronic communication under the IC Act should be harmonious with those in relation to other transactions; and
- there being appropriate safeguards, noting those referred to in question 2.3 above.

4.1 Should there be a reconsideration of the mixed objective/subjective test of the insured's duty of disclosure?

18. The Law Council believes that there is no need for a reconsideration of the mixed objective/subjective test of the insured's duty of disclosure.

4.2 Should there be a revised duty of disclosure applying to all policies whereby potential insureds are required to answer honestly all of a series of specific and relevant questions put to them by an insurer?

4.3 Should section 21A be repealed?

4.4 Should section 21A be extended to include life insurance?

4.5 Should insurers be required to inform insureds what information is relevant to their decision to accept their risk or not?

19. The Law Council would be interested to hear the views of industry and consumer advocates. Therefore it is not appropriate for the Law Council to respond at this time, and will wait at least until the draft report on stage 2 of the Review is published.

4.6 Should the duty of disclosure requirements be streamlined so that the duty that applies to new contracts of insurance also applies at the time of renewal or variation of contracts?

20. Yes, subject to what is said below in answer to question 4.8.

4.7 Should the phrase 'relevant to the decision of the insurer whether to accept the risk' found in paragraph 21(1)(a) and subsection 26(2) of the IC Act be amended following the High Court of Australia's decision in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)*? If so, why and what is a suggested replacement?

21. The Law Council believes that paragraph 21(1)(a) and subsection 26(2) of the IC Act should not be amended, because the Law Council considers that the question should be left for the High Court to reconsider if appropriate. It is not necessary to legislatively respond to this. Depending on how the case law develops, legislative intervention may be called for in the future.

4.8 Should warnings be given by the insurer to the insured advising them that:

- an insurer does not verify facts made by an insured until a claim is made; and
- the duty of disclosure still applies between the completion of a form seeking insurance and the date the contract comes into effect?

22. Yes. The provision of the warnings by insurers in those situations referred to in question 4.8 above would be fair, and could be expected to lead to a reduction in consumer disputes later on.

4.9 Should section 25 of the IC Act be expanded to include a non-disclosure by a life insured?

23. Amending the IC Act as suggested would be a significant extension, and the Law Council believes that to justify this would require more extensive evidence and consideration.

4.10 Should the section 22 obligation that is imposed on insurers be extended to renewals and variations of contracts?

24. The Law Council supports the extension to renewals and variations of contracts of the section 22 obligations imposed on insurers, namely to inform the insured in writing of the general nature and effect of the duty of disclosure. The reason for this position is that the Law Council is concerned that at present insureds are often unaware of their disclosure obligations in relation to renewals and variations.

4.11 Should section 22 be amended so that it emphasises the importance of giving honest answers and the effect of failing to do so or of making misrepresentations?

4.13 What is the best way of ensuring insureds understand the importance of the duty of disclosure message that is given to them by insurers?

25. The Law Council believes that what is important is fulfilling the objective of informing insureds of their duty of disclosure, rather than the precise

language of the IC Act. The Law Council believes that rather than amend section 22 of the IC Act, the prescribed form of writing in the regulations[2] should be amended to provide a clearer, plain English, notification of the duty of disclosure. An additional reason for amending the Insurance Contract Regulations 1985, rather than section 22 of the IC Act, is that because they are easier to amend, regulations are more responsive to change than statutes.

26. The present prescribed notices for duty of disclosure for contracts of general insurance and life insurance[3] do not deal explicitly with misrepresentations and honesty. The notices should be broadened out to do so.

27. The best way of ensuring insureds understand the importance of the duty of disclosure message that is given to them by insurers is for insureds to receive a clear, plain English notice. A prescribed form of writing that achieves that goal should be provided in the Insurance Contract Regulations 1985. As raised in question 4.11, the prescribed form of writing should emphasise the importance of giving honest answers and the effect of failing to do so or of making misrepresentations.

4.12 Should the requirements for oral disclosures apply to all contracts of insurance (not just certain 'eligible contracts of insurance')?

4.14 Should the regulations provide a form of words to be used to be given orally to satisfy the duty of disclosure for contracts that are not 'eligible contracts of insurance'?

28. No. Although these proposals may seem to appear attractive, they would not be practical. Among issues raised would be aligning oral disclosure requirements under the IC Act with analogous requirements of the FSRA.

4.15 Should section 69 provide that an oral duty of disclosure given to one insured or their agent be deemed to be given to all insureds who are parties to the proposed contract of insurance?

29. It makes practical sense to allow an oral duty of disclosure to be given to a number of insureds by being given to one insured or their agent. However, the Law Council considers it unfortunate from a policy perspective that the consequences of a fraudulent non-disclosure by that one insured (or agent) given the oral duty of disclosure could be to

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2 See Insurance Contracts Regulations 1985 regulation 3 and schedule 1.

3 Insurance Contracts Regulations 1985 schedule 1, parts 1 and 2 respectively.

defeat the interests of the innocent insureds.[4] To avoid this outcome, the Law Council recommends that an oral duty of disclosure should be deemed to be given to all the relevant insureds only if written notice is subsequently given to all insureds individually.

4.16 Should subsection 21(1) be amended so that where a number of contracts are sold at the same time (that is, there is a bundle of contracts) the insurer is obliged to inform the insured only once of its duty to disclose?

30. Yes, provided that the notice which is given refers specifically to all of the contracts and that there are separate duties of disclosure. The concern sought to be addressed here is that there are specific underwriting risks under each policy.

4.17 Should the law be amended so that where an insured uses the services of an intermediary any non-disclosure or misrepresentation made by the intermediary to the insurer is said to be that of the insured?

4.18 Should any limits be placed on this 'sheeting home' of the non-disclosure or misrepresentation to the insured?

4.19 Is this a significant concern requiring legislative action, or of relevance only in unusual cases and therefore not a high priority?

31. The Law Council considers that the issue, where an insured uses the services of an intermediary, of whether any non-disclosure or misrepresentation made by the intermediary can be sheeted home to the insured is not a significant concern requiring legislative action.

32. The Law Council believes that this issue can be left for decision by the courts. The *Issues Paper's* quotation from the *Permanent Trustee* case[5] is a tentative conclusion of three justices. It is not necessary to respond legislatively to this now. Depending on case law, legislative intervention may be called for in the future. Any such intervention would need to be the subject of debate.

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4 See *Advance (N.S.W.) Insurance Agencies Pty. Limited v Matthews* (1989) 166 CLR 606.

5 The quotation, at footnote 26 on page 18 of the *Issues Paper*, is from *Permanent Trustee Australia Limited v FAI General Insurance Company Limited (in liq)* [2003] HCA 25 at paragraph 30 per McHugh, Kirby and Callinan JJ: "*the knowledge of which the subsection* [subsection 21(1) of the IC Act] *speaks, either actual or constructive, is the knowledge of the insured, and not of any insurance intermediary… This is at least to suggest that the reference to the insured is intended to be a reference to the insured personally and not to its agent or broker. However, it is not essential to our reasons to determine this point.*"

5.1 Does the PDS regime effectively duplicate the requirements of the standard cover provisions in terms of purpose and outcomes? If so, how are the standard cover provisions duplicated and why is that problematic?

5.2 If there is problematic duplication between the PDS regime and the standard cover regime (either in whole or in part), how best could duplication be addressed (for example, through amendment of the IC Act, the creation of new regulations under the FSRA or a combination of both)?

5.3 Are there any reasons why the 'notification of unusual terms' should not occur in relation to all, or some, insurance policies or clients?

5.4 Under the IC Act, if an insurer cannot prove that disclosure of unusual terms occurred before the contract was entered into, then the insured will receive standard cover. Under the PDS regime, the onus is with the insured to pursue compensation for loss or damage resultant from an insurer's breach of the regime. Is the additional consumer protection element provided by the standard cover provisions still necessary?

5.5 Alternatively, do the remedies available under the standard cover provisions mitigate the need for remedies under the FSRA, in relation to prescribed contracts? If so, should further remedies be provided under the IC Act?

5.6 Are there any other issues that should be considered in relation to the operation of the PDS regime and the standard cover provisions?

33. As was said above in answer to questions 1.1 and 1.2, broadly speaking the provisions in the FSRA and the IC Act in relation to disclosure to consumers are about the same issue, but the provisions are not identical.

34. As stated in answer to questions 1.1 and 1.2, in principle, the Law Council supports rationalisation of the provisions under both Acts, but this would need to be done carefully, and in consultation with consumers, to ensure that the rationalised requirements were satisfactory. As noted in answer to questions 1.1 and 1.2, perhaps the Review could recommend a process for rationalisation, such as by way of an ALRC inquiry.

5.7 Should the standard cover regulations be retained? If so, is it feasible to modernise the regulations? If not, how could the policy intention of the standard cover regulations be otherwise achieved?

35. The Law Council believes that the standard cover regulations should be retained.

5.8 Does the interpretation in *Hams* case give effect to the policy intention of section 35 of the IC Act? If not, what would amount to 'clearly informing' the insured as to how an insurance contract differs from the standard contract?

5.9 Could the requirements under section 35 of the IC Act be better dealt with by expanding the operation of section 37? If so, how could section 37 be expanded to maintain or improve the current standard cover regime?

36. The Law Council considers that the decision in the *Hams* case[6] is contrary to the policy intention of section 35 of the IC Act. The Law Council respects the reasoning of the *Hams* decision, particularly in deciding that the words in parentheses in section 35(2) of the IC Act. "*whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise*", mean that it is likely that in most cases the provision of a proposed contract containing departures from standard cover will in and of itself satisfy the requirement to "clearly inform".[7] However, the Law Council does consider the outcome to be unfortunate from a policy perspective.

37. In answer to the second part of question 5.8, the Law Council believes that it would be preferable for something along the lines of "drawing the provision to the attention of the insured" to be the criterion for "clearly informing" the insured as to how an insurance contract differs from the standard contract.

38. With reference to question 5.9, the Law Council supports the legislative overruling of *Hams* case, along the lines suggested in the previous paragraph.

6.1 Is the restriction in section 15 of the IC Act on remedies available to the insured for unfair contractual terms still appropriate? If so, are there any remedies under other laws that should be similarly restricted in the context of insurance contracts?

39. Kelly and Ball[8] suggest that section 15 of the IC Act does little to restrict actions available to an insured because that section specifically does not restrict or preclude relief in the form of compensatory damages.

40. Notwithstanding Kelly and Ball's suggestion that the provision has little effect, the Law Council believes that section 15 is no longer appropriate (if it ever was). The Law Council believes the section is anomalous, and

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6 *Hams v CGU Insurance* [2002] NSWSC 273.

7 Ibid esp at paragraphs 241-243.

8 Kelly and Ball, *Insurance Legislation Manual* (3rd ed 1995).

that insureds should have access to the same statutory remedies as other contracting parties generally would have. The Law Council recommends that section 15 of the IC Act should be repealed.

6.2 Should the prescribed interest rate be increased so as to provide an incentive to insurers to finalise claims?

6.3 Should it be made clear in the IC Act whether compound interest is available in addition to the prescribed interest under section 57? If so, how?

6.4 Are contractual remedies sufficient for insureds, or should there be an opportunity to obtain damages for consequential loss, punitive or exemplary damages in tort for unreasonable delay in payment of claims?

41. In its submission of 27 February 2004, the Law Council raised the issue of bad faith by an insurer,[9] and that the Law Council would like considered in the second stage of the Review how to enhance compliance by insurers with the principles quoted below in footnote 3. The Law Council is pleased to see these questions 6.2-6.4, which go to this issue.

42. The Law Council believes that there should be incentives for insurers to finalise claims. Question 6.2, asking whether the prescribed interest rate should increase, should be answered "Yes". Question 6.3 should be answered in favour of clarifying the availability of compound interest under normal principles: "Yes, by amending the IC Act or by regulation as necessary".

43. Question 6.4 raises whether there should be a tort of bad faith available to insured against their insurer. This is a question that would need extensive consideration. The Law Council would consider the ALRC should undertake this.

44. If an insurer deals unreasonably with a genuine claim then real problems are posed for individual insureds, which cannot just be addressed by way of regulatory measures. However, the Law Council would consider a tort of bad faith tort just in respect of insurance to be nebulous. The

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[9] On this, the Law Council stated at page 2 of that submission:

> "*What the Law Council is referring to by bad faith is non-compliance with any of the following positive principles:*
>
> *1. That the insurer must adjust a claim within a reasonable time.*
> *2. That the insurer must cooperate with the insured when a claim is made (for example, by replying to correspondence within a reasonable time).*
> *3. That the insurer must specify why a claim is being denied.*
> *4. That the insurer must attempt to find a reason to pay a claim, rather than attempt to deny the claim.*
> 5. *That the insurer must observe 'good faith and fair dealing'.*"

Law Council would be prepared to provide further submissions on the issues raised by questions 6.2-6.4.

7.1 Should there be a statutory definition of 'fraud'?

45. No. The interpretation of this term should be left flexible to the interpretation of courts in specific cases, with regard to earlier case law.

7.2 Should an insurer be entitled to avoid a policy for immaterial non-disclosure or misrepresentation?

46. No. If a non-disclosure or misrepresentation is immaterial then, by definition, it is inconsequential or irrelevant.

7.3 Should section 29 of the IC Act be repealed? Alternatively, should it be partially repealed so its application is limited to whole of life and endowment policies?

7.4 If section 29 should be repealed or partially repealed, should life insurers be able to use the remedies that are available under section 28 or is there another approach that would be preferable?

7.5 Should the different categories of insurance, for example life insurance and general insurance, be dealt with in separate parts of the IC Act?

7.6 Should the three year time periods mentioned in section 29 be repealed?

7.7 How should bundled contracts be dealt with where there has been a misdescription or a non-disclosure by an insured?

7.8 Should the wording in subsections 29(1), (2) and (3) of the IC Act concerning 'the contract' and 'a contract' be made certain?

7.9 Should section 30 provide other remedies where there has been a misrepresentation or non-disclosure concerning age?

47. *Prima facie* there is no compelling case for amending the IC Act as suggested by this question. These issues will need to be carefully discussed before repealing provisions of the IC Act. There needs to be consideration of how the life insurance legislation would respond to such changes.

7.10 Should the interest rate used in section 30 be the same as that used in section 57?

48. The Law Council notes the apparent anomaly that the interest rates in sections 30 and 57 of the IC Act differ. The Law Council does not have a view on the question.

7.11 Should Division 3 of Part IV of the IC Act apply to non-superannuation group life schemes?

49. The issue would appear to need to be considered in detail beyond the scope of the Review.

7.12 Section 60 of the IC Act provides the circumstances in which an insurer can cancel a contract of general insurance. Should there be a similar provision for when a contract of life insurance should be cancelled?

50. The Law Council is reluctant to recommend changes to the present circumstances in which a contract of life insurance can be cancelled without thorough consideration of the issue.

51. Section 100 of the *Life Insurance Act 1945* (Cth) prevents an insurer from cancelling a life insurance policy where at least three years premiums have been paid on the policy and the surrender value of the policy exceeds the sum of the amount of the debts owing in respect of the policy and the overdue premium. If the insurer is entitled to cancel the policy, it must give the insurer at least 28 days notice.[10]

52. By virtue of section 59(3) of the IC Act, consideration was given to the *Life Insurance Act 1945* when the IC Act commenced. In the Law Council's view there would need to be a good deal more in the way of submissions before such a radical departure from the current situation, as is suggested in question 7.12, was taken. One would have to ask what the supporting evidence for such a departure was.

7.13 Should insureds have a statutory right to cancel policies on notice and receive a pro-rata refund?

53. There would need to be further consideration of this issue. Life insurance is not analogous to general insurance, and so the position in respect of both types of insurance would need to be considered separately. There are specific provisions in Part VII of the Consumer Credit Code which are relevant. This issue would need to be considered in conjunction with the IC Act, the Life Insurance legislation, and the Consumer Credit Code.

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[10] See Kelly and Ball, *Insurance Legislation Manual* (3rd ed 1995) commentary on section 59 of the IC Act.

7.14 Is there a need for clarification under section 58 of the IC Act with respect to what is a renewable policy?

54. No. The Law Council does not believe that clarification is required.

7.15 Should section 58 be amended to harmonise the notice of cancellation of statutory policy with section 60, that is 14 days?

55. This question is not expressed clearly. However, it seems to mean that 14 days notice would be provided for cancellation, replacing the present regime under section 59 of the IC Act. The Law Council would be interested to hear the views of industry and consumer advocates. Therefore it is not appropriate for the Law Council to respond at this time, and will wait at least until the draft report on stage 2 of the Review is published.

7.16 Should the laws relevant to cancellation of policy be brought together under one statute? Is the IC Act the appropriate statute?

56. It is not appropriate at this time to bring together under one statute the laws relevant to cancellation of policy. This issue should be left to the next comprehensive review of insurance law.

7.17 Is there a need to clarify section 59? If so, how?

57. No. The Law Council does not believe that clarification is required.

7.18 Should the period of notice for the cancellation of policies be reviewed? What is the appropriate period of notice where the reason for cancellation is a fraudulent claim?

58. The Law Council would be interested to hear the views of industry and consumer advocates. Therefore it is not appropriate for the Law Council to respond at this time, and will wait at least until the draft report on stage 2 of the Review is published.

7.19 Should interim contracts of life insurance be able to be cancelled without notice, in the same way that general insurance contracts are?

59. There would need to be further consideration of this issue, addressing the *Life Insurance Act 1995*.

7.20 Should the IC Act allow an insurer, in relation to a contract placed by an intermediary, the option of issuing a cancellation notice or avoiding the contract ab initio (on providing proper notice) when the premium remains unpaid for a specified period after the contract's commencement date?

7.21 What should be the minimum notification requirements for an insurer of its intention to cancel?

60. The Law Council would be interested to hear the views of industry and consumer advocates. Therefore it is not appropriate for the Law Council to respond at this time, and will wait at least until the draft report on stage 2 of the Review is published.

8.1 Should section 31 be repealed? If so, why?

61. No. Section 31 of the IC Act should be retained. It is appropriate for a court to have the discretion to disregard the avoidance of a contract of insurance because of fraud, where (to paraphrase section 31 of the IC Act) it would be harsh and unfair not to do so and the insurer is not prejudiced, or the prejudice is only minimal or insignificant.

8.2 Should section 31 be expanded so it also applies where it is alleged there has been innocent non-disclosure or misrepresentation?

62. No. The Law Council considers that such an expansion would be unfair to the insurer.

8.3 Should other entities other than the courts (for example, dispute resolution bodies) be allowed to disregard minor misrepresentations and non-disclosures? Is legislative change required to enable this to occur?

63. The question differs from the last dot point preceding the questions, which appears to be the basis for the question, and which is as follows: "*Section 31 should be expanded so that entities other than the courts (for example, dispute resolution bodies) can disregard an insurer's avoidance of the policy*".

64. The Law Council would not support allowing relevant minor misrepresentations and non-disclosures to be disregarded. However, the Law Council would support expanding section 31 of the IC Act so that entities other than courts (such as dispute resolution bodies) can disregard an insurer's avoidance of the policy of the issue because of fraud, where (to paraphrase section 31 of the IC Act) it would be harsh and unfair not to do so and the insurer is not prejudiced, or the prejudice is only minimal or insignificant.

8.4 Are technical changes to section 58 required? If, so which ones and why?

65. The Law Council is not satisfied of the need for change, and so supports the present state of section 58 of the IC Act. This issue could be left to the next comprehensive review of insurance law.

8.5 Should section 45 be amended so as not to advantage offshore insurers as against Australian insurers? If so, should any amendment be limited to any classes of insurance policy?

66. Section 45 of the IC Act should be amended so that there is consistency as between offshore and Australian insurers.

8.6 Should the meaning of 'specified' in subsection 45(2) be clarified?

67. In *HIH Casualty and General Insurance Limited v Pluim Constructions Pty Ltd* [2000] NSW CA 281 the New South Wales Court of Appeal (Mason P, Handley JA and Foster AJA) unanimously held that an "other insurance" condition of an insurance policy did not sufficiently specify the other insurance so as to invoke section 45(2) of the IC Act.

68. Mason P (with whom Handley JA and Foster AJA agreed on this issue) referred to the ALRC's Report on Insurance Contracts, the IC Act's Explanatory Memorandum and the academic literature in Sutton, *Insurance Law in Australia* (3rd ed 1999), Derrington and Ashton, *The Law of Liability Insurance* (1990) and Kelly and Ball, *Insurance Legislation Manual* (3rd ed 1995). Finally, Mason P referred to the unreported decision of Robyn QC DCJ of the Queensland District Court in *Austress-PSC Pty Ltd and Carlingford Australia General Insurance Limited v Zurich Australian Insurance Limited* (delivered 1 May 1992). The import of these sources is as follows:

- The ALRC saw no valid justification for "other insurance" clauses except in limited cases, including true excess liability policies.

- The academic literature was divided as to the meaning and application of the word "specified" in section 45(2) of the IC Act. Sutton was of the view that the other insurance "*need not be precisely named but must be sufficiently described so as to be capable of identification*" whereas the other academics were of the view that the other policy should be actually identified.

- In *Austress-PSC Pty Ltd*, Robyn QC held that section 45(2) of the IC Act was "*to be construed as requiring reference to 'other*

> *insurance' to be specific, as opposed to a description in general words capable of extending to the other insurance, if the provision under examination is to survive being struck down by sub s(1)… [T]he underlying notion is that the Assured and Insurer have tailored their own bargain to take account of the impact of other contracts*".

69. In the final analysis, Mason P considered it "*unnecessary to seek the definitive meaning of the sub-section, although the policy of s45(1) suggests... that the exception in sub s(2) should be construed narrowly...*".[11]

70. However, Mason P did leave open the possibility "*that a contract of insurance need not actually have been formed and/or commenced before it is capable of being specified within s45(2)*."[12] His Honour also stated that "*it is possible that a clearly defined class of insurance such as 'X's Standard Construction Policy with an excess of Y' would suffice*".[13]

71. Some assistance in relation to the meaning of the word "specified" may also be derived from the High Court of Australia's decision in *Leros Pty Ltd v Terara Pty Ltd* (1992) 66 ALJR 399 in which the Court considered the meaning of the word "specified" in section 137 of the *Transfer of Land Act 1893* (WA). The High Court held in that in the context of that legislation that the word "*should be understood in the sense of 'mention definitely or explicitly'*".

72. It is submitted that the meaning of the term "specified" in section 45(2) of the IC Act needs to be clarified, and in particular it is necessary to signify whether a reference in an excess of loss policy to the underlying insurance solely by reference to a class of insurance is sufficient to invoke section 45(2).

8.7 Should the legislative intent of section 46 of the IC Act be clarified? If so, how?

8.8 Should the legislative intent of section 47 of the IC Act be clarified? If so, how?

8.9 Should section 47 directly address waiting periods that are imposed before cover is provided for some trauma conditions?

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11 See *HIH Casualty and General Insurance Limited v Pluim Constructions Pty Ltd* [2000] NSW CA 281 at paragraph 44.

12 Ibid at paragraph 48.

13 Ibid at paragraph 48.

73. Section 46 of the IC Act concerns loss that occurred as a result, in whole or in part, of a defect or imperfection in a thing which is insured. Section 47 of the IC Act is an analogous provision in respect of an insured person's pre-existing sickness or disability. The Law Council believes that the answer to these questions is "No". Clarification of the provisions is not necessary.

9.1 Is there a need for amendments to the IC Act provisions to deal expressly with co-insureds?

- Should there be any additional notification requirements warning prospective insureds of the risks of entering into a contract with other co-insureds?
- Would it be desirable to introduce the distinction between joint and composite policies into the IC Act?
- Should insured contracts in favour of co-insureds be required to state whether it is intended to be treated as a joint or composite policy?

9.2 Are there any other measures that would be desirable to address the difficulties faced by co-insureds?

74. The issues in *MMI General Insurance Ltd v Baktoo* [2000] NSWCA 70 raise a philosophical question as to whether there should be a move from the traditional legal view to what is termed a "socially realistic" approach. The issue is too difficult to deal with here, and probably goes beyond the scope of the Review.

75. The Law Council affirms that an important social issue is being recognised here in these questions, but believes that they need further consideration. The Law Council suggests that this should be by the ALRC. There could be other ways of dealing with the problems these questions go to, for example by the Family Court. One can be critical of the way in which courts have construed contracts of insurance as joint or composite. However, the issues are complicated and merit further consideration.

10.1 Should the legislative intent of subsection 48(3) be clarified?

76. No. The Law Council does not believe that clarification is required.

10.2 Should sections 20 and 48 be consolidated?

77. No. The Law Council does not believe that this is necessary.

10.3 Should the 'persons' referred to in section 48 be limited to existing beneficiaries at the time the contract of insurance was entered into?

78. The Law Council does not have a view on this question.

10.4 Should section 13 also apply to third parties?

79. There was a division of opinion on this question in the Law Council's working group formed to assist with this Review. It is a parallel issue with those concerning innocent co-insureds (see questions 9.1 and 9.2 above), and might also be dealt with by the ALRC.

10.5 Should life insureds have a statutory right to bring an action against the insurer to enforce payment of the policy proceeds if payable under the contract?

10.6 Should the limitation of having the life insured also being the policy owner be addressed? If so, how?

80. The Law Council believes that the answer to question 10.5 is "Yes". In response to question 10.6, the limitation should be addressed by deeming the life insured to be a policy owner for the purposes of enforcement.

10.7 Should section 51 be expanded to make its remedy available to claimants in other situation? If so, what are the situations?

81. The remedy in section 51 of the IC Act should be extended to apply against companies in any case where one would need leave to proceed against the company, including the company being in administration or liquidation, or wound up (which is analogous to death of a natural person). The Law Council is conscious that this broad recommendation would need to take account into procedural issues in order to be implemented (including notification of the liquidator/administrator among other issues), and also that the situation where the insurer itself is in administration, liquidation, or has been wound up, needs to be taken into account.

10.8 Should subsection 51(1) be limited in respect of the insured's 'liability in damages' for tort and contract?

82. The Law Council does not support this suggestion on the information available in the *Issues Paper*.

10.9 Should section 51 specifically override section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and its State and Territory equivalents?

83. The Law Council would answer this question "Yes", subject to the subject matter of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) - and its State and Territory equivalents - being adequately dealt with by section 51 of the IC Act.

10.10 Should the words 'reasonable enquiry' be legislatively defined with a list of actions prescribed?

84. No. The circumstances of actual cases can be very varied. It is better to leave the legislative language deliberately broad, rather than attempt to anticipate what actions would be necessary in order to make "reasonable enquiry".

10.11 Should section 32 apply regardless of whether a person is a member of the superannuation scheme when they apply for the cover?

10.12 Should section 32 be extended to encompass all group scheme arrangements, such as employer and industry schemes?

85. The Law Council believes that the answer to these questions on the information available in the *Issues Paper* is "No".

11.1 Should the law be amended so that interim cover expires on the date mentioned in the contract of insurance itself? Alternatively, should interim covers be exempted from section 59 of the IC Act so that they can be cancelled without notice?

86. No. The Law Council does not believe that either change is necessary.

11.2 Should there be an amendment to section 9A of the *Life Insurance Act 1995* to bring interim covers for continuous disability policies within the definition?

87. The Law Council is not satisfied of the need for change, and so believes that this question should be answered "No".

11.3 Should the rule in paragraph 67(2)(a) of the IC Act regarding application of monies recovered by subrogation be removed, or should it be made clear that the it is the lesser amount of the two rules in paragraphs 67(2)(a) and (b) to which an insured is entitled?

11.4 Should pre-loss agreements regarding application of monies recovered by subrogation that provide lesser rights to the insured that those in subsection 67(2) be permitted? Should section 67 be redrafted to clarify that is the outcome?

11.5 Should section 67 of the IC Act provide for insureds to receive amounts representing interest out of monies recovered by subrogation?

11.6 Should section 67 of the IC Act be redrafted to remove the assumption that monies recovered under subrogation are always recovered by insurers (as opposed to insureds)?

88. Section 67 of the IC Act seems to have the potential to reduce the recovery that the insured would be entitled to at common law. The lack of clarity about section 67, shown in the *Issues Paper's* discussion at pages 52-55, would seem to reflect that the issues discussed do not ordinarily arise (and thus have not been determined judicially).

89. The issues raised by these questions seem to be peripheral, and probably can be left to judicial decision (noting that legislative intervention may be desirable in the future, depending on the development of case law). The Law Council does not, however, have a view on these questions.

11.7 Should the rules of subrogation in Part VIII of the IC Act apply to third party beneficiaries as if they were insured?

11.8 If so, is there any need for legislative change, having regard to the terms of subsection 48(2) of the Act?

90. The Law Council regards these questions as peripheral, but believes that the answer to question 11.7 is "Yes", and to 11.8 is "Yes if it is necessary to implement the yes answer to question 11.7".

27 April 2004