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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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**INSURANCE CONTRACTS AMENDMENT BILL 2007**

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EXPLANATORY MEMORANDUM



(CIRCULATED BY AUTHORITY OF THE PARLIAMENTARY SECRETARY TO THE TREASURER, THE HON CHRIS PEARCE MP)

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# Chapter 1
# Glossary

1.1 The following abbreviations and acronyms are used throughout this explanatory memorandum.

| ***Abbreviation*** | ***Definition*** |
|---|---|
| ALRC | Australian Law Reform Commission |
| ASIC | Australian Securities and Investments Commission |
| Bill | Insurance Contracts Amendment Bill 2007 |
| ET Act | *Electronic Transactions Act 1999* |
| IC Act | *Insurance Contracts Act 1984* |
| Panel | The Panel appointed by the Government to review the IC Act in two stages and which made its final report to the Government in June 2004 |

# Chapter 2
# Outline and Financial Impact Statement

## Outline

2.1 The Insurance Contracts Amendment Bill 2007 (the Bill) gives effect to the Government's response to recommendations made by a review of the *Insurance Contracts Act 1984* (the IC Act), announced on 10 September 2003. This review was conducted by a Panel comprising Mr Alan Cameron AM and Ms Nancy Milne (the Panel) and delivered its final report in January 2005.

2.2 The Panel's main conclusion was that the IC Act was generally working satisfactorily to the benefit of insurers and insureds. However, the Panel found it was necessary for there to be a series of amendments to the IC Act given the passage of time since the Act was enacted, developments in the insurance market since that time and judicial interpretation of IC Act provisions.

2.3 As a consequence, the Panel made detailed recommendations for reform to address most of the issues arising from the above factors that had been identified. This Bill is intended to give effect to many of these recommendations. In some areas the Panel's recommended approach was modified to take account of subsequent consultations by the Government with stakeholders on the details of the proposed amendments.

## Major elements

2.4 The following is a brief summary of the measures included within the Bill, outlined under their particular Schedule number.

## Schedule 1 — Scope and application

2.5 Schedule 1 to the Bill contains amendments relating to the scope and application of the IC Act. It amends the IC Act so that:

- failure to comply with the duty of utmost good faith is a breach of the IC Act;

- contracts of insurance that are entered into or proposed to be entered into for the purposes of workers' compensation law continue to be exempt under the IC Act notwithstanding that they also include cover against employer liability at common law to pay damages for employment related personal injury;

- contracts of insurance that include elements of cover which are exempted from the IC Act and cover which falls under the IC Act are treated as exempt only in respect of the exempt elements;

- the IC Act applies to contracts of insurance that provide cover in respect of the water transportation of personal or domestic goods in non-commercial quantities; and

- the IC Act extends to contracts of insurance that cover Australian insureds or Australian risks, irrespective of the location of the insurer or the place the policy is entered into.

Date of effect: The amendments regarding transportation of goods by water will commence twelve months after Royal Assent. The amendment concerning the extension of territorial coverage to direct offshore foreign insurers (DOFIs) will commence six months after Royal Assent and the remaining amendments will commence on Royal Assent.

## Schedule 2 — Electronic communication

2.6 Schedule 2 of the Bill amends the IC Act to allow for notices under the IC Act to be given in electronic format if certain pre-conditions are met. The amendments also allow regulations to be made that require certain notices to be given in hard copy format

Date of effect: Six months after Royal Assent.

## Schedule 3 — Powers of ASIC

2.7 Schedule 3 of the Bill amends the IC Act to give the Australian Securities and Investments Commission (ASIC) a statutory right to intervene in any proceeding relating to matters arising under the IC Act.

Date of effect: On Royal Assent.

## Schedule 4 — Disclosure and misrepresentation

2.8 Schedule 4 of the Bill amends the IC Act so that:

- the mixed objective/subjective test in section 21 of the IC Act, which is used to determine if an insured has met their duty of disclosure, is clarified by requiring reference to a number of non-exclusive factors in its application;

- the Act provides, in respect of eligible contracts of insurance, that an insurer must ask proposed insureds specific questions under section 21A as a condition of enforcing the insured's duty of disclosure. This requirement will now apply on renewal of an eligible contract of insurance as well as inception, and 'catch all' questions will no longer be permitted;

- an insurer must notify the insured, before the contract of insurance is entered into, that the duty of disclosure obligations continue until the time the policy is actually entered into;

- the Act provides for a prescribed form of words to be used to inform all insureds of their duty of disclosure obligations; and

- any person who is not the insured but proposes to become a life insured under a contract of life insurance is subject to a duty to disclose, as well as a duty not to misrepresent, and the insurer must give this person notice of the duty before the contract is entered into.

Date of effect: The amendments will take effect 12 months after Royal Assent. This delay in commencement is to allow insurers an opportunity to amend their business practices in response to the new rules regarding the operation of the duty of disclosure and notification of that duty.

## Schedule 5 — Non-standard provisions

2.9 Schedule 5 of the Bill replaces the current requirement under sections 35 and 37 of the IC Act that insurers 'clearly inform' insureds about certain contractual terms with the requirement that insurers present the information in a 'clear, concise and effective' manner.

Date of effect: The amendments will take effect 24 months after Royal Assent. The delay in commencement is to allow insurers an opportunity to amend their disclosure documents where necessary to meet the new 'clear, concise and effective' requirement.

## Schedule 6 — Remedies of the parties

2.10 Section 14 of the IC Act currently prevents parties from relying on a provision in a contract of insurance where to do so would be a breach of the duty of utmost good faith. Schedule 6 of the Bill extends this principle to cover provisions that are implied or imposed into the contract of insurance by the IC Act itself.

Date of effect: On Royal Assent.

## Schedule 7 — Remedies of insurer: life insurance contracts

2.11 The IC Act contains provisions which prescribe remedies for insurers that may be used where a person who became insured under a contract of insurance either misrepresented or did not disclose matters that should have been disclosed prior to entering the contract. Section 28 deals with general insurance and section 29 deals with life insurance.

2.12 In some cases, these remedies in respect of contracts of life insurance are inappropriate. As such, Schedule 7 of the Bill amends the IC Act so that:

- the remedies in section 29 are limited to contracts of life insurance that provide cover in respect of death or contracts that contain a surrender value — other types of life insurance are dealt with under a new section 28A that offers similar remedies to section 28;

- life insurance contracts which combine more than one type of cover are 'unbundled' for the purpose of applying the relevant remedies for non disclosure and misrepresentation;

- the insurer can avoid a life insurance contract to which section 29 applies on the basis of non-disclosure or misrepresentation only if the insured would not have entered that particular contract (as opposed to the current standard of

any life insurance contract) if the subject of the non disclosure or misrepresentation had been known; and

- insurers are entitled to change the expiration date of a life insurance contract where that date has been calculated by reference to the insured's incorrectly stated date of birth.

Date of effect: The amendments regarding unbundling of life insurance contracts and entitlement of insurers to change expiration dates apply on Royal Assent. The amendments regarding changes to the remedies for particular contracts of life insurance commence 12 months after Royal Assent. The delay in commencement is to allow insurers an opportunity to factor into their affairs the changes to available remedies.

## Schedule 8 — Restrictions on insurers' contractual rights and remedies

2.13 Section 31 of the IC Act vests courts with the power to disregard insurer avoidance of a contract of insurance on the grounds of fraudulent misrepresentation by the insured if the court considers it would be harsh and unfair not to do so. Similar powers are available under section 56 with respect to fraudulent claims by persons other than the insured.

2.14 Schedule 8 amends section 31 so that relief can be given not only in cases of avoidance for fraudulent non-disclosure or misrepresentation, but also in cases of reduction of liability by insurers on the grounds of innocent failure to disclose or innocent misrepresentation.

2.15 Currently, the IC Act provides for a statutory extension of a contract of insurance if the insurer fails to notify the insured that their policy was due to expire. Within the IC Act are rules regarding the amount of premium that must be paid if someone makes a claim against such an extended policy, and these depend on whether there is a total loss of the insured property and the time the claim was lodged.

2.16 Schedule 8 amends the IC Act so that an insured who makes a claim against a contract of insurance whose cover has been extended under the Act must pay the full premium due under the original contract, irrespective of whether there is a total loss of insured property or when during the statutory extension the claim is made.

Date of effect: The amendments to expand section 31 to cover innocent non-disclosure and misrepresentation will apply to

contracts entered into 12 months after Royal Assent, so that insurers have an opportunity to factor in the changes to available remedies to their businesses. The amendments to the premium payable if a claim is made during a statutory extension will apply to contracts entered into six months after Royal Assent.

## Schedule 9 —Third party beneficiaries

2.17 Schedule 9 of the Bill amends the IC Act so that:

- individuals that are not the insured, but have rights under a contract of insurance ('third party beneficiaries'), have access to particular rights and obligations currently held by insureds;
- the circumstances in which an individual may proceed against an insurer where the insured, or third party beneficiary, is unavailable are increased;
- remedies for misrepresentation and non-disclosure are available in relation to contracts of life insurance that are offered as part of a scheme that is unrelated to superannuation;
- remedies are available in respect of any misrepresentation or non disclosure that occurs between the time an insured becomes a member of a superannuation scheme and when they apply for insurance cover.

Date of effect: Schedule 9 commences 12 months after Royal Assent. The delay in commencement is to allow insurers a reasonable opportunity to factor the new rights and obligations of third party beneficiaries into their business operations.

## Schedule 10 — Subrogation

2.18 Schedule 10 of the Bill amends the IC Act so that:

- section 67 of the IC Act, which deals with the allocation of monies recovered when one party subrogates for another in an insurance claim, is revised to reflect wording of a draft provision dealing with subrogation proposed by the

Australian Law Reform Commission in its Review of the Marine Insurance Act 1909 (Cth);

- Part VIII of the IC Act, which relates to subrogation, applies to claims made by third party beneficiaries as well as insureds.

Date of effect: Schedule 10 commences six months after Royal Assent. The delay in commencement is to allow insurers an opportunity to factor the new rules regarding subrogation into their business operations.

## Schedule 11 — Claims made and claims made and notified policies

2.19 Schedule 11 of the Bill amends the IC Act to insert a new subsection 40(1), introducing a new definition of claims made and notified insurance. Schedule 11 of the Bill also inserts a new subsection 40(3).

2.20 Subsection 40(3) currently applies to claims made and notified policies. These policies work in such a way that where an insured notifies their insurer of facts that might give rise to a claim during the policy period, the insurer is obliged to cover that insured for any claim that eventually arises.

2.21 Substituted subsection 40(3) retains this right, however the new subsection allows insureds an additional 28 days after their policy expires in which to notify their insurer of any facts that arose during the policy period. The new subsection also requires insurers to disclose to insureds the effect of failing to notify such facts.

2.22 Schedule 11 also introduces a new section 54A which will allow insurers to refuse to pay a claim where the insured has made a late notification to the insurer of facts that might give rise to a claim (that is, the notification occurs more then 28 days after the expiration of the relevant policy).

Date of effect: Schedule 11 commences 28 days after Royal Assent and would only apply to contracts of insurance entered into on or after that date. In that regard, it would be approximately 12 months after commencement before an insurer would be required to provide disclosures under the new subsection 40(3) or provide an extended reporting period.

**Request for comment**

Some requests for comment appear in the 'Notes on clauses' part below regarding commencement dates of specific measures. However, comments are welcomed about the proposed dates of effect for any of the measures.

In many cases, the amendments apply only to contracts 'entered into' after commencement (see descriptions of the application of specific measures). If the definition of 'entered into' in subsections 11(9) and (10) of the IC Act were to apply to the application provisions, the amendments may apply to contracts that are first entered into, renewed, varied, extended or reinstated on after the commencement dates.

Would the application of the amended provisions to variations, extensions etc cause difficulties? If so, should the phrase 'entered into' be given a special definition just for the purposes of the application provisions?

## Financial Impact Statement

2.23 The Insurance Contracts Amendment Bill 2007 will have no financial impact on the Commonwealth.

# *Chapter 3*
# *Regulation Impact Statement*

# Chapter 4
# Notes on clauses

## Schedule 1 — Scope and application

4.1 Schedule 1 of the Bill contains a range of provisions to change and/or clarify the scope and application of the IC Act. The provisions relate to:

- breaches of implied terms and the duty of utmost good faith;
- exemptions for 'bundled' workers' compensation contracts;
- application of exemptions to 'bundled' contracts generally;
- interaction with the Marine Insurance Act 1909; and
- contracts with foreign insurers.

### Part 1 — Duty of utmost good faith

***(Report recommendations 1.2 and 10.1)***

***Breach of the duty of utmost good faith***

4.2 There is implied into all contracts of insurance, pursuant to section 13 of the IC Act, a provision that requires each party to that contract of insurance to act towards the other party in respect of any matters arising under or in relation to the contract, with the utmost good faith.

4.3 Under the current law, one of the few ways by which parties to a contract of insurance may enforce compliance with this implied duty of utmost good faith is through private legal action. However, this may present too great an expense for some parties, particularly insureds, and does not provide long-term solutions to systemic breaches of utmost good faith committed over time.

4.4 The amendments to section 13 of the IC Act address this issue by making a breach of the duty of utmost good faith a breach of the IC Act. Such an amendment allows ASIC to commence or continue

representative action on behalf of an insured against an insurer pursuant to section 55A. That is because the pre-conditions to ASIC undertaking representative action on behalf of an insured are that the insured or insureds have suffered damage or that there has been a breach of the IC Act.

4.5 The amendments to section 13 will also have the result that breaches of the duty of utmost good faith (and consequently the IC Act) by an insurer may enable ASIC to access various remedies under the *Corporations Act 2001* in relation to Australian Financial Services Licences. These remedies include a banning order under section 920A of the Corporations Act, suspension or cancellation of the insurer's financial services licence, the imposition of conditions on the licence or the acceptance of an enforceable undertaking not to act in a particular manner.

4.6 Banning orders are made by ASIC. They have the effect of prohibiting the affected person from providing all financial services, or one or more specified types of financial service. They may be permanent or last only for a specified period. 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.

4.7 A breach of the IC Act for failure to comply with the duty of utmost good faith implied into all contracts of insurance will not be an offence and will not attract any penalty under the IC Act.

***Third party beneficiaries***

4.8 Third party beneficiaries are not the insured under a contract of insurance but are named in its terms, either individually or as part of a class, as persons to whom any benefits provided by the contract extend. It follows therefore that they should have access to some of the rights and obligations under the IC Act which extend to insureds.

4.9 As third party beneficiaries are not parties to the contract of insurance, they do not benefit from the duty of utmost good faith which is implied by the current section 13.

4.10 Proposed subsection 13(4) addresses this fact by extending the duty of utmost good faith to third party beneficiaries, however the duty will only commence after the contract is entered into. This is because

applying the duty pre-contractually would be impractical. Further, the duty of utmost good faith will be of most relevance for third party beneficiaries where they wish to make a claim under a contract of insurance, as countenanced by subsection 48(2).

**Request for comment**

Should subsection 14(1) also be extended to third party beneficiaries?

### Commencement

4.11 By operation of Item 3 to Schedule 1 and clause 2, the amendments in Part 1 will apply to all contracts of insurance entered after Royal Assent.

### Part 2 — 'Bundled' workers' compensation contracts

***(Report recommendations 1.3)***

4.12 Paragraph 9(1)(e) of the IC Act exempts from the scope of the Act actual or proposed contracts of insurance which have been entered for the purposes of a state or territory law that relates to workers' compensation or compensation for death or injury to a person arising from the use of a motor vehicle.

4.13 In practice, some contracts of insurance offer employers cover of the type described in paragraph 9(1)(e) and another type of cover. A particular example is contracts of insurance that bundle both cover for compulsory workers' compensation purposes and cover for liability to employees at common law arising from employment related personal injury.

4.14 The question arises as to whether such 'bundled' contracts of insurance are exempt or not from the scope of the IC Act. The Panel recommended that, in the case of the example described above, the most effective solution to overcome uncertainty about application is to make the entire contract exempt from the scope of the IC Act. In other examples of contracts of insurance that bundle exempt and non-exempt types of cover, the Panel considered it not desirable to rule the entire contract either in or out of the scope of the Act. That situation is dealt with in Part 3 of Schedule 1, which is immediately below.

4.15 Item 4 of Schedule 1 includes a new paragraph 9(1)(f) that exempts from the operation of the IC Act insurance contracts entered (or proposed to be entered) that bundle compulsory workers' compensation cover and cover for an employer's liability at common law for damage suffered due to employment-related personal injury.

**Request for comment**

The proposed amendment has been developed to resolve potential uncertainty that may have been created as a result of the decision in *Moltoni Corporation Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149. Does the draft wording address the circumstances in the *Moltoni* decision? If not, how could the proposed wording be improved?

4.16 By operation of Item 5 to Schedule 1 and clause 2, the amendments in Part 2 will apply on or after Royal Assent.

## Part 3 — 'Bundled' contracts generally

***(Report recommendation 1.4)***

4.17 A contract of insurance may contain one or more types of cover to which the IC Act does not apply, and one or more types of cover to which the IC Act does apply.

4.18 As was the case for the bundled contracts of insurance dealt with specifically in Part 2 of Schedule 1 described above, the Panel recommended that the exemption from the scope of the IC Act in subsection 9(1) of the Act be applied to each aspect of a bundled insurance policy as if it were a separate contract.

4.19 Item 6 of Schedule 1 introduces new subsections 9(1A) and 9(1B). These subsections provide for how to 'unbundle', for the purposes of applying the exemptions in section 9, contracts of insurance that provide two or more different types of cover. A hypothetical example of different types of cover might be, for example, compulsory third party insurance covering personal injury or death arising from use of a vehicle, combined with cover for damage to the vehicle concerned. Contracts of insurance that contain more than one type of cover, one of which is exempted and one of which is not (for this discussion called Cover A and Cover B), would be likely to contain some provisions that relate solely to Cover A, some that relate solely to Cover B and some that relate to both Cover A and Cover B.

4.20 To create 'unbundled' contracts for the purposes of applying the exemption provisions, two notional contracts would be constructed. The first notional contract would comprise only those terms of the initial contract that are relevant to Cover A. The notional contract would also contain, as a consequence of subsection 9(1B), any terms of the initial contract that are relevant to both Cover A and Cover B.

4.21 Similarly, the second notional contract would comprise those terms of the initial contract that are relevant to Cover B only and the terms that are relevant to both Cover A and Cover B.

4.22 Once the notional contracts are determined then the exemption provisions in subsection 9(1) are applied to each as if that contract were really a separate contract of insurance or proposed contract of insurance.

4.23 It may be the case that there are more than two types of cover bundled within a contract of insurance, in which case, more than two notional contracts of insurance will need to be developed at the first stage. However, irrespective of whether there are two or more kinds of exempt covers, or two or more kinds of non-exempt covers, or both, the result of applying the unbundling process in subsections 9(1A) and 9(1B) will be that only those contractual terms that relate to the exempt cover type(s) are exempt from the operation of the IC Act.

**Request for comment**

Will the unbundling process using notional contracts as proposed in new subsections 9(1A) and 9(1B) be able to be applied effectively? If not, what alternative processes for unbundling contracts would be possible?

4.24 By operation of Item 7 of Schedule 1 and clause 2, the amendments in Part 3 will apply to any contract of insurance entered before or after Royal Assent.

## Part 4 — Exclusions from the Marine Insurance Act 1909

***(Report recommendation 1.5)***

4.25 Paragraph 9(1)(d) of the IC Act excludes from the scope of the IC Act actual or proposed contracts of insurance to which the *Marine Insurance Act 1909* (the Marine Insurance Act) applies. By comparison, section 9A of the IC Act exempts from the scope of the Marine Insurance

Act particular contracts of marine insurance and applies the IC Act to their terms.

4.26 The Panel recommended that contracts of insurance taken out over the transport by sea of personal or domestic goods (for example, for the purposes of moving house) should be covered by the IC Act rather than the Marine Insurance Act. However, insurance over carriage of personal/domestic goods in commercial quantities should remain a matter for the Marine Insurance Act.

4.27 Item 8 of Schedule 1 gives effect to the Panel recommendation by inserting a new subsection 9A(1A) into section 9A. This subsection provides that the Marine Insurance Act does not apply to a contract of marine insurance which covers water transportation of property that is wholly or substantially used for personal, domestic or household purposes by the insured, a relative of the insured or any person with whom the insured resides.

4.28 As a result, contracts of marine insurance of this type will fall within the scope of the IC Act. A further consequence is that such insurance will no longer fall within the ambit of the exemption in sub-regulation 7.1.17(2) of the Corporations Regulations 2001 so insurers offering those policies will also need to comply with disclosure requirements under the *Corporations Act 2001* applicable to personal and domestic property insurance products. This means the regulatory treatment of those products will be consistent with the treatment of other comparable products (for example, insurance covering the land transport of personal/domestic goods).

4.29 By operation of Item 9 in Schedule 1 and clause 2, the amendments in Part 4 will apply to contracts of marine insurance entered into at least twelve months after Royal Assent.

**Request for comment**

The draft amendments use wording to cover the concept of 'domestic or household goods' that is based on wording from the current Corporations Regulation 7.1.17(1). Is this wording appropriate?

If so, is there a need for any other elements of regulation 7.1.17 to be incorporated into the draft amendment?

## Part 5 — Application of Act: contracts with foreign insurers

***(Report recommendation 1.6)***

4.30 Section 8 applies the IC Act to all contracts of insurance whose 'proper law' is (or would be, without an express provision to the contrary) the law of a State or Territory in which the Act applies. Subsection 8(2) provides that the Act cannot be avoided by inserting a 'choice of law' clause in the contract.

4.31 The current provision draws on principles of private international law. Determining whether the 'proper law' governing a contract is the law of a State or Territory involves the application of private international law rules. The Panel recommended that a more direct statement about the intended scope of operation of the IC Act would assist.

4.32 Item 10 of Schedule 1 gives effect to this Panel recommendation by introducing a new subsection into section 8. This new subsection extends the operation of the IC Act to cover not only those situations where the 'proper law' of the contract is the law of a jurisdiction where the Act applies. Subsection 8(1A) applies the IC Act to:

- contracts of insurance that are entered into with persons that are domiciled in a State or Territory to which the Act extends, irrespective of where the risk that is the subject of the contract is located; and

- contracts of insurance that cover risks of loss or damage occurring in a State or Territory to which the Act extends.

4.33 By operation of Item 12 of Schedule 1 and clause 2, the amendments in Part 5 will apply to all contracts of insurance entered into from six months after Royal Assent.

**Request for comment**

Is the proposed application of the IC Act to contracts covering Australian risks likely to be problematic in the context of international insurance contracts?

Is there a risk that foreign courts will not give effect to the proposed new subsection 8(2)?

## Schedule 2 — Electronic communication

***(Report recommendations 2.1 and 2.2)***

4.34 The Panel analysed the increasing use of electronic communications in the context of the IC Act. Currently, the IC Act is exempt from the coverage of most of the operative parts of the *Electronic Transactions Act 1999* (the ET Act) which provides that, in general, where a Commonwealth law requires a notice to be given in writing, then it may be given by electronic communication if certain conditions are met.

4.35 As the Panel expressed support for the notion of updating the IC Act to allow for communication by electronic means, an amendment will be made to the Electronic Transactions Regulations 2000 to remove the current exemption so that communications under the IC Act will be subject to the ET Act. Schedule 2 of the Bill will also amend various provisions of the IC Act to recognise that the Act is subject to the ET Act.

4.36 However, whilst the Panel felt that the IC Act should be amended to allow for various notices and communications to be made electronically, this was to be subject to particular safeguards, including:

- clarity;
- consent and nomination by the recipient of an information system for that purpose;
- ability to print and retain the communications; and
- certainty of time and place of origin and receipt.

4.37 The Panel also recommended the IC Act be amended so that particular communications may be prescribed as needing to be made by traditional means in addition to, or instead of, electronically.

4.38 Item 1 of Schedule 2 amends the current regulation-making power in section 72 concerning legibility of writing. The purpose of this expansion is so that the regulations may deal not only with the content and legibility of the notice or other document itself, but also material that may accompany the notice or other document which goes to Panel concerns regarding clarity.

4.39 As one example, this power will allow regulations to be made that prohibit the embedding of certain types of 'pop up' windows or animated displays in statutory notices. Such pop-up windows and displays are an element of a number of contemporary Internet sites. The power may also allow the making of regulations that provide that the content of an important statutory notice is able to be digested by the recipient without interruption by automated distractions.

4.40 Items 2 and 3 of Schedule 1 are a response to Panel concerns that the recipient of an electronic communication should first nominate an information system for that purpose. These items introduce a new concept of 'appropriate address' whereby a natural person may nominate an address to which they would like communications sent, which can be an electronic address such as email, for the purposes of section 77. If such an address is nominated, it will be the 'appropriate address'.

4.41 If no nomination is made, the appropriate address will be the residential or business address of the natural person that is last known to the person giving the notice or other document. Under subsection 77(1B), a natural person may change or cancel their nominated address, by notice in writing. If the notice is being given to an insurer that is a body corporate, paragraph 77(1)(a) permits the notice to be given in any way in which documents may be served on a body corporate. The proposed amendments to section 77 regarding appropriate address only affect natural persons, so the rules in the ET Act regarding electronic communications to bodies corporate would apply largely without modification by the IC Act. Accordingly, the requirement in subsection 77(1B) for a natural person to give a notice 'in writing' regarding a change of appropriate address would not necessarily require a traditional paper communication.

4.42 The significance of the 'appropriate address' is that, under an amended subparagraph 77(1)(b)(ii) (by operation of Item 2), notices and other documents that are required to be given to natural persons can be either given to them in person or sent to their 'appropriate address'.

4.43 Under new subsection 77(1C), an additional safeguard is included that requires anyone sending an electronic communication for the purposes of the IC Act to have, at the time of sending that communication, reasonable grounds to expect that the intended recipient will be readily able to save the notice and subsequently print copies of it.

4.44 This requirement is a response to the Panel concern that appropriate safeguards should exist to ensure that persons receiving an electronic communication have the ability to print and retain that communication. The requirement is modelled on changes to the Uniform Consumer Credit Code and is an addition to current requirements concerning accessibility under the ET Act.

4.45 For example, subsection 9(1) of the ET Act provides that any communication required by a Commonwealth Act may only be done electronically if:

- at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and

- the person to whom the information is required to be given consents to the information being given by way of electronic communication.

Section 14 of the ET Act contains rules about time and place of receipt and dispatch of electronic communications.

**Request for comment**

Should a natural person be able to change or cancel their 'nominated address' under subsection 77(1B) by electronic communication?

How does the additional safeguard proposed in subsection 77(1C) materially add to the 'readily accessible and useable for subsequent reference' requirement in the ET Act?

How does the context of the IC Act justify including additional requirements on saving and printing, and departing from the generic rules on electronic communication as set out in the ET Act?

What actions should an insurer demonstrate to show they had reasonable grounds to expect that an intended recipient could readily save the notice or other document and subsequently print copies of it?

How would the proposed amendments affect communication by facsimile? Is this an electronic communication and is this relevant to communications in the insurance context?

Should bodies corporate be subject to the 'appropriate address' rule in proposed subsection 77(1B), or is their situation adequately dealt with by application of paragraph 77(1)(a) and the ET Act?

4.46 Subsection 77(1D) introduces a new regulation-making power that allows for regulations to be made about electronic retention (that is, storage) of electronic documents and access by the person to whom they were sent. This provision is also modelled on recent changes to the Uniform Consumer Credit Code and is intended to allow regulations to be made that would, for example, require an insurer to retain electronic copies of notices sent under the IC Act for a certain period, and allow access to them by the affected insureds for the purposes of future reference.

4.47 New subsection 77(1E) is another amendment modelled on recent additions to the Uniform Consumer Credit Code. The subsection gives effect to the Panel recommendation that, notwithstanding the general rule that communication can be by electronic means, there should be a facility to require specific notices or other documents under the IC Act to be given in hard copy format. It is anticipated that few documents would be specified as requiring a hard copy. Any notice or other document that is specified for the purposes of subsection 77(1E) would also be able to be sent electronically.

**Request for comment**

Are there any notices or other documents under the IC Act that are of sufficient note that their sending in hard copy should be mandated under subsection 77(1E)? If so, is it possible for the requirement to send communications in hard copy to be waived if the intended recipient requests receipt of the communication electronically?

Section 14 of the ET Act contains rules regarding the timing for receipt of electronic communications. Where a document is sent by hard copy pursuant to a regulation made under subsection 77(1E) and also electronically, is there a need to clarify which date of dispatch and/or receipt (if different) is effective for the purposes of the IC Act? If so, should the date of the electronic communication, or the hard copy communication, be treated as the effective date for the purposes of the IC Act?

4.48 By operation of Item 4 to Schedule 2 and clause 2, the amendments in Schedule 2 will apply to all contracts of insurance entered into at least six months after Royal Assent.

**Request for comment**

Is the proposed transition period of six months necessary, or could Schedule 2 commence from Royal Assent?

## Schedule 3 — Powers of ASIC

***(Report recommendation 3.1)***

4.49 Part IA of the IC Act gives the Australian Securities and Investments Commission (ASIC) responsibility for the general administration of the Act and vests in ASIC a number of specific powers to support this role, such as the power to obtain documents.

4.50 The Panel recommended that ASIC should also be given a specific power to intervene in proceedings arising under the IC Act. Item 1 of Schedule 3 inserts a new section 11F into the IC Act that gives ASIC powers to intervene in matters arising under the Act. The provision is similar in form to the existing power that ASIC has to intervene in matters arising under the Corporations Act 2001 (section 1330). It allows ASIC

to be represented in the proceedings by a staff member, a delegate, a solicitor or counsel.

4.51 By operation of Item 2 to Schedule 3 and clause 2, the amendments in Schedule 3 will apply to all relevant proceedings commenced after Royal Assent.

## Schedule 4 — Disclosure and misrepresentations

4.52 Schedule 4 amends the manner in which the IC Act deals with particular types of disclosure and misrepresentations. The changes relate to:

- clarifying how the duty of disclosure test is applied;
- requiring the prescribed words for oral disclosures notifying insureds of their duty of disclosure to be used in relation to all contracts of insurance (not merely eligible contracts of insurance);
- in relation to eligible contracts of insurance, amending the law to make the duty of disclosure apply on renewal of a contract of insurance and remove the option for insurers to ask 'catch all' questions';
- amending the law regarding circumstances in which an insurer must provide an insured with a reminder as to when their duty of disclosure obligation applies; and
- in relation to contracts of life insurance, amending the law so insurers must give life insureds, who are not the insured under the relevant contract of insurance, notice of their duty of disclosure.

### Part 1 — Insured's duty of disclosure

***(Report recommendation 4.1)***

4.53 Sections 21 and 21A of the IC Act are key provisions that govern the insured's duty of disclosure obligations. Section 21 imposes a requirement for an insured, before a contract is entered into, to disclose

various matters. What must be disclosed is determined by reference to a test that contains both subjective elements (what the insured knows to be relevant to the insurer's decision) and objective elements (what a reasonable person in the circumstances could be expected to know would be relevant to the insurer's decision).

4.54 The Panel noted that the mixed subjective/objective test has not been applied consistently. In particular, there was doubt about whether the objective element of the test requires or permits reference to intrinsic matters such as the education, cultural background or level of business acumen of an insured.

4.55 The Panel recommended that the objective part of the test (that is, 'a reasonable person in the circumstances') could be clarified by setting out non-exclusive factors to which the court may have regard, relating to:

- the type of cover to be provided;
- the class of persons who normally apply for that type of cover (for example, if it is the type of cover normally provided to sophisticated business clients or to unsophisticated consumers); and
- the circumstances in which the insurance contract was entered into, including the type and extent of questions asked by the insurer.

4.56 Item 1 gives effect to the Panel recommendation by expanding the objective element of the test in paragraph 21(1)(b) to include a list of non-exclusive factors to which the court may have regard when determining whether a reasonable person in the circumstances could be expected to know a matter was relevant to the decision of the insurer whether to enter the contract of insurance.

4.57 By operation of Item 2 to Schedule 4 and clause 2, the amendments in Part 1 of Schedule 4 will apply to all contracts of insurance 12 months after Royal Assent, irrespective of whether those contracts have been entered before or after that day.

**Request for comment**

What factors, besides those proposed, should a court/insurer have regard to when determining what an insured must disclose to meet the objective element of their duty of disclosure?

Should the objective test in section 21 be applied having regard to the individual circumstances of the particular insured? If so, what circumstances?

Will the additional factors proposed for inclusion in section 21 assist users of the IC Act to understand the insured's duty of disclosure obligation, or do they unnecessarily add to complexity?

Is the proposed 12 month transitional period for the commencement of amendments in Part 1 of Schedule 4 appropriate?

## Part 2 — Eligible contracts of insurance

***(Report recommendation 4.2)***

4.58 Section 21A of the IC Act supplements the general provisions regarding the duty of disclosure in section 21, but only in relation to certain 'eligible contracts of insurance'. 'Eligible contracts of insurance' are defined as contracts that provide general insurance cover commonly sought by individual consumers such as motor vehicle, home contents and travel insurance.

4.59 Section 21A requires the insurer to ask the insured specific questions that are relevant to the insurer's decision on whether to accept the risk. However, it is also permissible for the insurer to ask the insured a 'catch all' question, which requires an insured to disclose 'exceptional circumstances' that a reasonable person could be expected to know would be relevant to the insurer's decision whether to accept the risk, and which would be unreasonable for the insurer to ask a specific question about (subparagraph 21A(4)(b)(iii)).

4.60 Section 21A only applies when a contract is first entered into — it currently has no application to renewals (subsection 21A(1)). The Panel recommended two key changes to section 21A.

4.61 The Panel noted that the requirements under section 21A do not apply on renewal, but for the purposes of other provisions, a renewal is treated as entry into a new contract (subsection 11(9)). Accordingly,

renewal of an eligible contract of insurance would trigger the general duty of disclosure provisions under section 21 which, as discussed in the notes to Part 1 of Schedule 4, can be onerous for insureds in comparison with the framework for eligible contracts under section 21A.

4.62 The Panel recommended that section 21A should operate even in relation to renewals. As a consequence, Item 3 of Schedule 4 omits the former exemption for eligible contracts of insurance entered by way of renewal from the new subsection 21A(1).

4.63 This change will mean that any insurer wishing to rely on the duty of disclosure must again ask the insured specific questions at the time of renewal. In practice, this could be met by providing insureds with a copy of answers previously given and requesting an insured to provide any necessary update. However, it would not be mandatory for insurers to take that approach – instead they may choose to ask specific questions in the same manner as on initial inception.

4.64 The phrase 'entering into' a contract is defined in subsection 11(9) as extending not only to new contracts and renewals, but also variations and reinstatements. While the definition of 'eligible contract of insurance' was previously limited to contracts for 'new business', the definition of 'eligible contract' in the regulations has been revised so that section 21A will also apply at the making of any agreement between the parties to renew, extend, vary or reinstate the contract.

**Request for comment**

The revised definition of eligible contract means the requirements of section 21A will apply in circumstances beyond the acceptance of new business and on renewal. Are there disadvantages to applying section 21A in new circumstances such as where an eligible contract is extended, varied or reinstated?

Is there a need for another oral disclosure notice to be included in the regulations in respect of disclosures to be made by an insurer pursuant to section 21A?

4.65 The second amendment proposed by the Panel goes to the 'catch all' question that insurers may ask under paragraph 21A(4)(b).

4.66 Although the framework in section 21A generally requires insurers to ask specific questions if they wish to rely on the duty of disclosure, the ability to ask a 'catch all' question tends to undermine the

benefits for insureds. This is because, if such a question is asked, the insured will be required to 'second guess' what matters might be relevant to an insurer's decision whether to accept the risk and on what terms.

4.67 An insurer should be in a position to decide what matters are material to their decision to provide eligible types of insurance cover dealt with in section 21A and formulate specific questions accordingly. In the event an insurer is unable to foresee a matter which is relevant to their decision whether to accept the risk of a particular contract, then it may be harsh on an unsophisticated insured to expect them to realise its relevance.

4.68 The Panel considered that the risk of such a situation occurring should fall on the insurer rather than the insured, and recommended that the ability of the insured to ask 'catch all' questions under section 21A should be removed.

4.69 The Panel recommendation is adopted in the revised version of section 21A at Item 3 which amends the options for insurers so that, if they wish to rely on the duty of disclosure in relation to eligible contracts of insurance, they must request the insured answer specific relevant questions (as per current subsection 21A(3)). The ability to ask specific questions accompanied by a 'catch all' question, which is currently in subsection 21A(4), is removed.

4.70 By operation of Item 4 and clause 2, the amendments in Schedule 4 will apply, from 12 months after Royal Assent, to all contracts of insurance entered into after that day.

## Part 3 — Insurer's duty to inform of duty of disclosure

### Notification that the duty exists until contract begins

***(Report recommendations 4.3 and 4.5)***

4.71 The insured has a duty of disclosure until the time at which the relevant contract of insurance is entered into. In normal circumstances this presents no difficulty because the insured provides information to the insurer a short time before the contract begins. However, this is not always the case.

4.72 In some instances, particularly where long term contracts of life insurance are involved, there may be a significant time lag (sometimes months) between the time a prospective insured submits information to an

insurer together with an application, and the time the policy is actually entered into. During this period circumstances may change, or events may occur, that need to be disclosed to the insurer in order for the insured to comply with the duty of disclosure.

4.73 If the insured fails to disclose these circumstances or events before the contract is entered into, then any claim they later make could be at risk due to their failure to comply with the duty of disclosure. The Panel recommended, in order to minimise the possibility of harsh outcomes, that prospective insureds should be reminded that the duty of disclosure extends until the time the relevant policy is actually entered into.

4.74 The current subsection 22(1) of the IC Act requires insurers to notify insureds about the duty of disclosure any time 'before the contract is entered into'. Item 5 of Schedule 4 repeals the former section 22 entirely and substitutes revised subsections 22(2) and 22(3) into the provision while amending the words of other subsections.

4.75 New subsection 22(1) makes it clear that any notification given to the insurer pursuant to the section should explain that the duty of disclosure obligation applies until the time that the proposed contract is entered into.

4.76 Further, Item 5 replaces the current subsection 22(3) with a new subsection which provides that where the insurer's acceptance, or counter-offer, in relation to the proposed contract is made more than two months after the insured's most recent disclosure for the purposes of complying with their duty of disclosure, then along with the acceptance or counter-offer the insurer must also provide a further reminder that the duty of disclosure applies until the proposed (or, in the case of a counter-offer, the other) contract is entered into.

4.77 The addition of this reminder requirement in cases where there is a significant delay between the initial disclosure and the contract commencing, is intended to promote disclosures being made current as at the contract date, so that the insurer is fully informed and there can be an early renegotiation if necessary.

4.78 Item 5 amends subsection 22(2) to allow for the making of regulations that prescribe a form of writing for the reminder requirement in new subsection 22(3), in addition to the initial notification requirement under revised subsection 22(1).

4.79 The current subsection 22(3) precludes an insurer that fails to inform an insured of their duty of disclosure from relying on a breach of that duty by the insured unless the breach is fraudulent. Item 5 has amended the current subsection 22(3) so that it is now subsection 22(5).

4.80 New subsection 22(5) applies such that an insurer who fails to comply with subsections 22(1) and, if applicable, subsections 22(2) or 22(3) will be precluded from exercising a right in respect of any failure by the insured to comply with their duty of disclosure under the contract unless the particular failure is fraudulent. As such, compliance with all applicable requirements under subsection 22 will become a precondition to being able to exercise any rights in respect of failure to comply with the duty of disclosure unless that failure was fraudulent.

## Notification extends to life insureds

***(Report recommendation 4.5)***

4.81 A life insured under a contract of insurance may include persons that are not the insured and, therefore, not subject to duty of disclosure obligations under current law. By amendments in Part 4 of Schedule 4, any non-disclosure by such a life insured will now be imputed to the insured which, in effect, is an extension of the insured's duty of disclosure to the life insured.

4.82 Following a Panel recommendation, Item 5 of Schedule 4 replaces the current subsection 22(2) with a new subsection that requires insurers to inform proposed life insureds that they have a duty of disclosure. The Panel thought this necessary given the increased obligation to disclose that is to be imposed on persons who are to become the life insured under a contract of life insurance.

4.83 Item 5 also revises current subsection 22(3), which has become subsection 22(5), so that an insurer that fails to inform a prospective life insured of their duty of disclosure will be precluded from relying on any breach of that duty by the life insured except where the breach is fraudulent. This is consistent with the current position in respect of insureds.

4.84 However, the above changes do not mean that the additional reminder requirement imposed by new subsection 22(3) will be extended to life insureds unless that life insured is also the contracting insured.

4.85 By operation of Item 8 and clause 2, the amendments in Part 3 of Schedule 4 will apply, from 12 months after Royal Assent, to all contracts of insurance entered into after that day.

### Part 4 — Non-disclosure by life insured

***(Report recommendation 4.4)***

4.86 Contracts of life insurance are often entered by one person to cover the life of another. Although not a contracting party, the person whose life is proposed to be insured (known as the life insured) will usually provide the insurer with information about matters such as their state of health, in order to assist the insurer to make a decision about whether, and on what terms, to issue the policy.

4.87 Section 25 deals with this situation by providing that if, during the negotiations on a life insurance contract, a prospective life insured makes a misrepresentation, the IC Act takes effect as if the misrepresentation has been made by the contracting insured.

4.88 The existing wording of section 25 only extends to misrepresentations and the Panel recommended that non-disclosure by a prospective life insured should be treated in a similar way. That is because non-disclosure can be similar in final result, in terms of potential detrimental impact on an insurer's decision, to an actual misrepresentation.

4.89 Accordingly, Item 9 inserts a new section 31A into the IC Act, which is similar in its effect to section 25 except it covers non-disclosure rather than misrepresentations.

4.90 By operation of Item 10 and clause 2, the amendments in Part 4 of Schedule 4 will apply, from 12 months after Royal Assent, to all contracts of insurance entered into at least one year after the day.

## Schedule 5 — Non-standard provisions

***(Report recommendation 5.1)***

4.91 The IC Act currently includes provisions in sections 35 and 37 to the effect that, unless an insurer 'clearly informs' prospective insureds about particular matters in the contract of insurance before it is entered

into, the insurer may not be able to rely on what the contractual terms provide.

4.92 The Panel noted that, despite the current requirement to 'clearly inform' prospective insureds, and judicial interpretations of its meaning, there was still a perception that insurers did not always disclose to prospective insureds non standard and unusual policy terms in an effective and meaningful manner.

4.93 The Panel proposed that the 'clearly inform' requirements in sections 35 and 37 should be changed to 'clear, concise and effective', which mirrors the disclosure standard under the product disclosure statement (PDS) requirements of the Corporations Act 2001. The Panel noted that the addition of the 'concise' requirement would simplify disclosure documents and enhance useability of disclosures.

4.94 There is no intention, by changing the requirement, to restrict the type of document that disclosures in accordance with section 35 and 37 may be contained in. There is also no intention to change the consequence for insurers of failing to meet the requirement.

4.95 Insurers that fail to disclose the existence of a non-standard or unusual term in a clear, concise and effective manner will be treated as not having given the disclosure, which will prevent them from later relying on that term to deny a claim. This is the effect of the revised subsections 35(2) and 37(2).

4.96 Schedule 5 contains a series of amendments to give effect to the Panel recommendation that the current obligation to 'clearly inform' in sections 35 and 37 be changed to an obligation to disclose in a 'clear, concise and effective manner'.

**Request for comment**

Panel Recommendation 5.3 was that sections 35 and 37 of the IC Act should be amended to make it clear that the PDS may be used as the vehicle to disclose non-standard and unusual policy terms.

Many insurers already use a PDS for the purpose — the IC Act does not prevent this occurring. Further, recent changes to the Corporations Regulations (Regulation 7.9.15E) will require general insurers to disclose non-standard or unusual policy terms in the PDS from 20 June 2007.

Accordingly, adopting Panel Recommendation 5.3 to amend sections 35 and 37 appears to be unnecessary and it is proposed that this recommendation will not be proceeded with.

Further, could an amendment be made to the Corporations Regulations to require life insurers to disclose non standard or unusual policy terms in the PDS so that the treatment of life insurers is consistent with the treatment of general insurers from 20 June 2007.

Comments are sought on the appropriateness of this suggestion.

4.97 By operation of Item 6 and clause 2, the amendments in Schedule 5 will apply to all contracts of insurance entered into at least two years from Royal Assent. The delay in commencement will allow insurers time to consider and, where necessary, adjust their disclosure documents to take account of the new presentation requirements.

**Request for comment**

Is the proposed two year transition period necessary in light of the forthcoming comparable requirements in Corporations Regulation 7.9.15E?



## Schedule 6 — Remedies of the parties

***(Report recommendation 6.1)***

4.98 The duty of utmost good faith is a significant element of any contract of insurance. By section 13 of the IC Act, all parties to a contract of insurance must act towards the other party, in respect of any matter arising under the contract, with the utmost good faith.

4.99 Further, under section 14, if reliance on a provision of a contract of insurance would present a breach of the duty of utmost good faith then such reliance will not be allowed.

4.100 In determining whether reliance by an insurer on a provision of a contract will present a breach of the duty of utmost good faith, the court must have regard to whether the insured was notified about the provision in question.

4.101 The Panel recommended the duty of utmost good faith principle should prevail over not only express terms of the contract but also other 'terms' governing the relationship between the parties, including those arising by implication or by operation of the law.

4.102 The amendment in Item 1 of Schedule 6 gives effect to this recommendation by amending the law to provide that a party may not rely on a provision of the IC Act, nor a provision of a contract of insurance, if to do so would present a breach of utmost good faith.

4.103 By operation of Item 2 and clause 2, the amendment in Schedule 6 will apply to all contracts of insurance entered into after Royal Assent.

**Request for comment**

The Panel suggested that any amendment giving effect to this recommendation may be relevant to finding a breach of utmost good faith against an insurer who fails to provide the notification required under subsection 40(2) but then seeks to rely on other provisions of the IC Act to support denial or limitation of its liability under a 'claims made' policy.

Aside from this example, under what other circumstances might reliance by a party on a provision of the Act be a breach of the duty of utmost good faith?

Does allowing a general, equitable principle to override statutory provisions raise any concerns from a certainty perspective?

## Schedule 7 — Remedies of insurer: life insurance contracts

4.104 Schedule 7 amends the way in which the IC Act deals with remedies for life insurers in cases of misrepresentation or non-disclosure

by insureds prior to entry into the contract of life insurance. The amendments, which are designed to make the remedies more flexible and tailored than those that currently apply:

- allow the remedies to be applied to each different element of a bundled life insurance contract as if each element or aspect were a separate policy;

- introduce a distinction between the remedies that apply to 'traditional' life insurance policies (that is, those with a primary purpose of death cover, or a contract of life insurance with a surrender value) and the remedies that apply to other forms of life insurance; and

- expand the range of remedies that are available to a life insurer in cases where the misrepresentation involves a misstatement of birth date.

## Part 1 — 'Unbundling' of contracts

***(Report recommendation 7.1)***

4.105 Contracts of life insurance often 'bundle' different types of protection against more than one type of insurable event resulting from death, sickness or accident in the one contract. An applicant seeking cover for each type of insurable event will be separately considered by an insurer for each type of risk, and different factors will be taken into consideration in the underwriting decisions.

4.106 For example, an applicant may present with a family medical history of a condition that is well recognised as a risk factor in the development of a debilitating disease, but a disease that is unlikely to result in premature death. In those circumstances the insurer is likely to accept a death cover component without a loading or exclusion, but the income protection cover would be offered with a modification to the policy terms or a premium loading, in response to the additional risk caused by the family history of the condition.

4.107 Any misrepresentation or non disclosure that affects one aspect of the insurance cover may not be relevant to the other. However, as currently drafted, the remedies that are available, such as for avoidance or variation of the contract, must be applied to the contract as a whole. This can be to the significant disadvantage of an insured and unnecessarily restrict the remedial options for an insurer.

4.108 Item 1 therefore inserts a new section 27A into the IC Act which will provide that if a contract of life insurance contains two or more kinds of insurance cover, the remedies in Division 3 of Part IV for misrepresentation and non-disclosure apply to each type of cover as if the contract contained only the one kind of cover. Hence, if a contract contains cover in respect of death and cover in respect of total and permanent disability, the remedies for misrepresentation or non-disclosure will apply to each type of cover separately.

4.109 By operation of Item 2 and clause 2, the amendments in Part 1 of Schedule 7 will apply to contracts entered into after Royal Assent.

**Request for comment**

Is the expression in proposed new section 27A 'kinds of insurance cover' suitable terminology to describe clearly the different components of a life insurance policy that are commonly bundled (for example, death/income protection/trauma/total and permanent disability)?

New section 27A is directed at unbundling contracts of life insurance for the purposes of applying insurer remedies. Should the amendment therefore refer explicitly to contracts of life insurance providing death or with a surrender value and other types of contract of life insurance?

## Part 2 — Remedies for non-disclosure and misrepresentation

***(Report recommendations 7.2 and 7.3)***

4.110 The current section 29 of the IC Act lists remedies that may be applied by life insurance providers in cases of misrepresentation and non-disclosure. Whilst suitable for 'traditional' kinds of life insurance policy, the current provision is not well suited to many types of life insurance which are now made available. In many cases, misrepresentation or non-disclosure in respect of non traditional types of life insurance policy would be better dealt with through remedies akin to those available for general insurance policies.

4.111 Item 3 inserts a new section 28A into the IC Act, which provides for remedies the same as those available for general insurance policies under section 28 to apply to life insurance policies, except those covered by an amended section 29.

4.112 Item 4 amends section 29 so that the remedies it contains only apply to 'traditional' contracts of life insurance such as those whose primary purpose is the provision of insurance cover in respect of the death of a life insured or contracts of life insurance that have a surrender value. Surrender value refers to the cash amount payable by the life insurance company to the policy owner in the event a policy is voluntarily terminated before its maturity or the death of the insured person. They are common in traditional 'whole of life' and 'endowment' insurance policies. The *Life Insurance Act 1995* sets the minimum standard for the calculation of a surrender value.

4.113 Item 5 amends the reference to 'a contract' in subsection 29(3) of the IC Act to 'the contract'. This change responds to a concern that, on one interpretation of the current subsection 29(3), the insurer can only avoid a contract for non-disclosure or misrepresentation if they show that they would not have been prepared to enter any contract of life insurance with the insured had the insurer known the true facts.

4.114 The intention of the proposed change is to clarify that the insurer should be able to avoid the contract if they would not have extended cover of the risk proposed on any terms, had the true facts been known. The fact that the insurer may still have been willing to offer cover of a different type of risk had the true facts been known should not mean their right to avoid the particular contract for misrepresentation or non disclosure under subsection 29(3) is lost.

4.115 Subsection 28A(1) avoids this issue by referring to 'the contract' rather than 'a contract'.

4.116 By operation of Item 6 to Schedule 7 and clause 2, the amendments in Part 2 apply to contracts of insurance entered into 12 months after Royal Assent.

**Request for comment**

Could the IC Act provide that remedies such as those found in section 28 of the IC Act apply to all contracts of life insurance?

## Part 3 — Remedy for misstatement of date of birth

4.117 Section 30 of the IC Act contains specific remedies for life insurers in circumstances where the date of birth of one or more life insureds was incorrectly stated at the time the contract was entered into. It covers situations where age was understated or overstated, and allows for

the insurer, when the true date of birth is known, to adjust the sum insured or reduce the premium payable.

4.118 In response to a Panel recommendation, Item 7 of Schedule 7 inserts a new subsection 30(3A) into the IC Act which establishes an additional remedy for an insurer in circumstances addressed by section 30. Under this new option, an insurer may vary the contract by changing its expiration date to a date that would have been based on the correct date of birth. This means that neither the amount insured nor premium payable needs to be modified.

4.119 Item 8 amends subsection 30(4) so that a variation of the contract as permitted under the new subsection 30(3A) is taken to have occurred from the time the contract was entered into. This is in accordance with the rule regarding the existing remedies in subsection 30(2).

4.120 By operation of Item 9 and clause 2, the amendments in Part 3 will apply to all contracts of life insurance entered into after Royal Assent.

**Request for comment**

Section 60 of the Act outlines the circumstances in which an insurer may cancel a contract of general insurance. There is no equivalent for contracts of life insurance. At paragraph 7.55 of its final report, the Panel indicated '...it is also understood that life insurers can currently rely upon the common law and specific cancellation clauses in their policies to provide a similar outcome to that of section 60 of the IC Act'.

Have there been any developments subsequent to the Panel's report that warrant revisiting this issue?

# Schedule 8 — Restrictions on insurers' contractual rights and remedies

**Request for comment**

Panel Recommendation 8.1 was that sections 31 and 56 of the IC Act should be re-drafted so that they can be applied by alternative dispute resolution (ADR) bodies.

Subsequent legal advice has indicated that, except in the case of the Superannuation Complaints Tribunal, this amendment is not necessary because the ADR bodies are not creatures of statute.

In the case of the Superannuation Complaints Tribunal, legal advice has been obtained which indicates that the Tribunal may already exercise powers of the type conferred by sections 31 and 56.

As a consequence it is not proposed to amend the IC Act or Superannuation (Resolution of Complaints) Act 1993 as part of giving effect to recommendations of the Review.

Comments are sought on whether this proposal is appropriate.

## Part 1 — Relief for innocent non-disclosure or misrepresentation

***(Report recommendation 8.2)***

4.121 The IC Act allows an insurer to deny liability for a claim if a person has become an insured on the basis of some fraudulent non-disclosure or misrepresentation (subsection 28(2)). However, under section 31 of the IC Act, a court may provide some relief to an insured if their fraudulent misrepresentation or non-disclosure did not cause the insurer significant prejudice.

4.122 Where the non-disclosure or misrepresentation is not fraudulent, there is no similar power for courts to provide relief even though the consequences of applying subsection 28(3) of the IC Act might be that the liability of the insurer is reduced to nil. As a consequence, the Panel recommended that the power of a court to provide relief to an insured under section 31 should be expanded, in circumstances where the liability of the insurer has been significantly reduced, so as to allow such relief even in cases where the non-disclosure or misrepresentation is innocent.

4.123 Item 1 of Schedule 8 gives effect to this recommendation by expanding section 31 to allow a court, where it would be harsh or unfair not to do so, to disregard:

- avoidance on the ground of fraudulent misrepresentation or non-disclosure; or

- a significant reduction of liability (including a reduction to nil) on the ground of misrepresentation or non-disclosure (whether or not fraudulent).

4.124 If a court disregards insurer avoidance of a contract of insurance or reduction of liability under the expanded section 31, it will have a discretion to allow the insured to recover that part of the amount to which the insured would have been entitled if the contract had not been avoided or the liability reduced, that is just and equitable.

4.125 In most cases, it is expected that a reduction in liability under section 28 or the new section 28A would not lead to an unjust result for insureds. However, expanding section 31 to cover innocent misrepresentation and non-disclosure provides insureds with an avenue for obtaining a just result in exceptional cases where a reduction of liability under sections 28 or 28A is harsh or unfair.

4.126 Items 4, 5 and 6 are consequential amendments to paragraphs 31(3)(a) and 31(3)(b) and subsection 31(4) to recognise that section 31 will extend to non-disclosure and misrepresentation that is not necessarily fraudulent. Items 2, 3 and 6 are consequential changes to recognise the inclusion of new subsection 31(1A).

4.127 By operation of Item 8 and clause 2, the amendments in Part 1 of Schedule 8 will apply to all contracts of insurance that are entered into 12 months after Royal Assent.

**Request for comment**

Are the proposed amendments to subsection 31(4) necessary? Is it relevant to refer to a reduction of liability in the context of subsection 31(4)?

Is the 12 month transitional period for commencement of the amendment in Part 1 of Schedule 8 appropriate?

## Part 2 — Expiration and renewal of contracts

***(Report recommendation 8.3)***

4.128 Current section 58 of the IC Act provides that if an insurer fails to notify an insured that a general insurance contract for which renewal is usual is about to expire, and the insured does not obtain alternative cover before this expiry, there is a statutory contract which arises between the insurer and insured on the same terms as the original contract. This statutory contract expires on the earlier of the expiration of the period covered by the original contract (for example one year), or when the insured obtains formal replacement cover.

4.129 Should a claim be made against such a statutory contract, section 58 provides that the insurer is entitled to a premium. Unless there is total loss, only a part premium is payable and this is calculated pro rata by reference to the period that the statutory contract ran before the claim was made.

4.130 The Panel recommended that if any claim is made under a statutory contract, the full amount of the hypothetical premium should be immediately payable. That is, if a claim is made under a statutory contract then the insurer and insured should be in the same position, as far as premiums are concerned, as if the contract was actually renewed.

4.131 To give effect to this recommendation, Item 9 replaces paragraph 58(4)(b) with a provision requiring the full amount of the premium that would have been payable had the contract been renewed in the usual manner to be paid in the event of a claim. Item 10 repeals subsections 58(5) and (6) which deal with the former pro-rata calculations.

4.132 If, having made a claim and paid the premium, an insured wishes to cancel the statutory contract and/or take out alternative (that is non-statutory) cover with the insurer or an alternative provider, the

statutory contract will be cancelled pursuant to paragraph 58(3)(d). Whether the insured is entitled to a refund of the proportion of premium they have paid should be determined by reference to whether the terms of the initial contract provide for a refund of premium if the contract is cancelled following a claim.

4.133 By operation of Item 13 and clause 2, the amendments in Part 2 of Schedule 8 will apply to all contracts of insurance entered into six months after Royal Assent.

**Request for comment**

Is the six month transitional period for commencement of the amendments in Part 2 of Schedule 8 appropriate?

## Schedule 9 — Third parties

4.134 Third parties may be persons that are specified in a contract of insurance (whether by name or otherwise) as being persons to whom cover provided by the contract extends ('third party beneficiaries') or they may be third parties against whose claims an insured has insurance cover. In Schedule 9 are a series of amendments designed to alter the rights and obligations of such third parties under the IC Act.

### Part 1 — Definition of third party beneficiary

4.135 Item 1 inserts into section 11 a new definition of third party beneficiary for the purposes of the IC Act. Previously, third party beneficiaries for the purposes of contracts of general insurance were described in section 48. Because third party beneficiaries are now referred to in the amended sections 13, 40, 48, 48A, 48A, 51, 54A, 64 and 74, it was thought a definition in the general definitions provision was more appropriate.

### Part 2 — Requests by third parties to insurers for information

***(Report recommendation 10.1)***

4.136 The Panel expressed support for allowing third party beneficiaries access to certain rights and obligations held by an insured under the IC Act. In particular, the Panel recommended that third party

beneficiaries should have access to provisions of the IC Act which allow the insured to provide notice, such as subsection 40(3) or section 74.

4.137 Under section 41 of the IC Act, an insured that has made a claim under a contract of liability insurance may require the insurer to inform them in writing:

- whether the insurer admits that the contract applies to the claim; and
- if the insurer so admits, whether the insurer proposes to conduct, on behalf of the insured, the negotiations and any legal proceedings in respect of the claim made against the insured.

4.138 As the Panel recommended third party beneficiaries should have access to provisions that allow an insured to provide notice, it follows that third party beneficiaries should have rights under section 41. This is the intention of Items 3 to 7 of Part 2 of Schedule 9.

4.139 Similarly, Items 8, 9 and 10 amend section 74 to allow third party beneficiaries the right to request in writing a statement which sets out all the provisions of the relevant contract of insurance. Under the existing section 74 an insured may ask the insurer to give them a statement in writing which explains all provisions of the contract. If an insurer fails to provide such a statement then they are liable for an offence.

4.140 By operation of Item 11 and clause 2, the amendments in Part 1 of Schedule 9 will apply to contracts of insurance entered into 12 months after Royal Assent.

## Part 3 — Insurer's defences in actions by third parties

***(Report recommendation 10.2)***

4.141 Section 48 of the IC Act deals with, amongst other things, the defences available to a general insurer against a claim by a third party beneficiary. Section 48AA makes similar provision regarding contracts of life insurance offered in connection with Retirement Savings Accounts (RSAs).

4.142 Items 12 and 13 of Schedule 9 amend subsections 48(1) and 48(2) so that they use the term 'third party beneficiary', now defined in

section 11 (see Item 1 of Schedule 9), but the substance of the subsections is unchanged. There are similar amendments to subsections 48AA(1) and 48AA(2) in Item 16 and Item 17.

4.143 Section 48AA is worded similarly to section 48 except it deals with the defences a life insurer has against a claim by beneficiaries of a contract of life insurance taken out by an RSA provider. To ensure greater consistency in the wording of sections 48AA and 48, Item 14 amends paragraph 48(2)(a) so that its wording reflects that used in paragraph 48AA(2)(a).

4.144 There has been some doubt as to whether subsection 48(3), and as a consequence subsection 48AA(3), allow for claims by third party beneficiaries to be tainted by the wrongful conduct of an insured. There is also doubt as to whether an insurer may raise pre-contractual conduct, such as a breach of the duty of disclosure, in assessing a claim by a third party beneficiary.

4.145 The policy intent of sections 48 and 48AA is that third party beneficiaries should be in no better position, in terms of their ability to claim, than the insured. Also, it is intended that an insurer should be entitled to raise conduct that occurred pre-contractually.

4.146 To give effect to these intentions, Items 15 and 18 amend subsections 48(3) and 48AA(3) respectively to make it clear that, in defending an action by a third party beneficiary:

- a general insurer may raise defences relating to the conduct of the insured; and
- the conduct that may be raised may have occurred either after the contract was entered into or before (for example, non-disclosure).

4.147 By operation of Item 19 and clause 2, the amendments in Part 3 of Schedule 9 will apply to contracts of insurance entered into 12 months after Royal Assent.

## Part 4 — Rights and obligations of third parties under contracts of life insurance

***(Report recommendation 10.3)***

4.148 Section 48A of the IC Act applies to contracts of life insurance that are effected on the life of one person but expressed to be for the benefit of another person (a third party beneficiary). As part of its review, the Panel recommended a series of amendments be made to section 48A in response to recent developments in the insurance industry and these are dealt with in Item 20.

4.149 Item 20 amends section 48A to:

- introduce the term 'third party beneficiary', as defined under Item 1 of Schedule 9, into subsections 48A(1) and 48A(2) in place of the current reference to 'third party';
- allow for circumstances in which a person whose life is insured under a contract of life insurance may be the third party beneficiary;
- ensure that a third party beneficiary who has a claim over monies payable under the contract of life insurance may bring an action against the insurer in respect of the claim without the intervention of the policyholder;
- ensure that, in relation to such a claim, the third party beneficiary has the same obligations to the insurer as if they were the insured (for example, the obligation to comply with the duty of utmost good faith); and
- ensure that the third party beneficiary is capable of giving a valid discharge to the insurer in relation to the insurer's obligations in respect of the claim.

4.150 By operation of Item 21 and clause 2, the amendments in Part 1 of Schedule 9 will apply to all contracts of life insurance entered into 12 months after Royal Assent.

**Request for comment**

New subsection 48A(2) includes paragraph (a) which provides that a third party beneficiary has a right to recover from the insurer any money that becomes payable under the contact; and paragraph (b) which provides that any money which is recovered under the contract is payable to the third party beneficiary.

Is it necessary to make this distinction or are the contents of paragraph 48A(2)(b) implicit in paragraph 48A(2)(a)?

## Part 5 — Right of third party to recover against insurer

***(Report recommendation 10.4)***

4.151 Section 51 of the IC Act deals with the rights of third parties to recover directly against an insurer in circumstances where the insured under a contract of liability insurance is liable in damages to the third party. The section provides that, where an insured has died or cannot be found, the third party may bring an action against the insurer directly.

4.152 The Panel recommended that section 51 be amended to deal with a further two situations, namely where:

- the insured is alive and can be found but the third party cannot recover any amount owed to them as a judgement has been executed against the insured and returned with a nulla bona endorsement; and
- a third party beneficiary is liable under a contract of insurance but cannot, after reasonable enquiry, be found.

4.153 Amendments under Part 5 of Schedule 9 expand section 51 in response to the Panel recommendation so that it not only covers liability of an insured but also liability of a third party beneficiary (as defined under Item 1 of Schedule 9).

4.154 The amendments (through new subparagraph 51(1)(b)(iii) in Item 22) also expand section 51 to cover the situation raised by the Panel where judgment has been obtained against an insured or third party beneficiary but execution or other process issued on the judgment has been returned unsatisfied.

4.155 It is not expected that this scenario would be very common because in the vast majority of cases, insureds (and third party beneficiaries) facing a claim against them would take advantage of any liability cover that is available to them to meet the liability.

4.156 By operation of Item 25 and clause 2, the amendments in Part 5 of Schedule 9 will apply to all contracts of liability insurance entered into 12 months after Royal Assent.

**Request for comment**

Are there enough examples of third parties being denied recovery to justify making the proposed rule in Item 25 subparagraph 51(1)(b)(iii)?

If so, is there a need for any special rules regarding the defences that an insurer may be allowed to raise, given that in the circumstances envisaged, the insured or third party beneficiary would already have had an opportunity to put defences to a court, but may not necessarily have taken that opportunity?

## Part 6 — Non-disclosure or misrepresentation by member of group life insurance scheme

***(Report recommendations 10.5 and 10.6)***

4.157 Insurers normally only have a remedy for non-disclosures and misrepresentations made by insureds prior to the time the contract was entered into. However, in the case of so-called 'blanket' contracts of life insurance that are taken out by superannuation trustees for the benefit of scheme members, the contract date will often pre-date the joining of the scheme by fund members. As a consequence, an insurer would ordinarily have no remedy for non-disclosure and misrepresentation in relation to members who join after the contract date and receive cover under the relevant contract of life insurance.

4.158 To deal with this situation, section 32 of the IC Act provides that non-disclosures or misrepresentations made in respect of scheme members are treated as though the contract were an individual contract of life insurance that was entered into at the time when the proposed member joined the scheme.

4.159 In some circumstances, individuals will join a superannuation scheme but there will be some delay before life insurance cover they acquire as part of joining that scheme is effected. For example, a new

employee may join a superannuation scheme and superannuation contributions may be made on their behalf, however before the insurer provides life insurance cover that employee must undergo a medical examination and/or answer questions about their health.

4.160 In those circumstances, section 32 would still deny the insurer a remedy if non disclosure or misrepresentation occurred during the interim period, because the contract is taken to be entered into when the member joined the scheme.

4.161 Replacement subsection 32(2) in Item 33 remedies this difficulty by providing that, where there is a delay from the time of joining the scheme until the time that cover is actually effected, the relevant contract of life insurance is taken to commence at the time the proposed life insured became a life insured under the scheme; in other words, at the time the life insurance cover under the scheme took effect in relation to the member concerned.

4.162 There are, in addition to blanket contracts of life insurance taken out in connection with a superannuation scheme, other circumstances in which life insurance is taken out for a group of people, many of whom may become eligible for cover after the contract date. Those other contracts also present a difficulty with the availability of insurer remedies for non-disclosure and misrepresentation. To deal with these other types of group life contract, unrelated to superannuation, Items 26 32 of Schedule 9 remove the defined term 'blanket superannuation contract' and replace it with a new term 'group life contract', which is defined as a contract of life insurance that is maintained for the purpose of a superannuation, retirement or other group life scheme. The wider definition is intended to cover the range of group contracts of life insurance that may offer cover to members some time after the contract is entered into.

4.163 The amendments have been designed to apply so that, in so far as the rules already apply to blanket superannuation contracts, they will continue to apply whether the blanket superannuation contract was entered into prior to, or subsequent to, the commencement of the amendment (see Item 35). However, by Item 36 of Schedule 9, the extension to other types of group contracts of life insurance will only apply to contracts entered into after commencement which, by operation of clause 2, occurs 12 months after Royal Assent.

## Schedule 10 — Subrogation

***(Report recommendations 11.1 and 11.2)***

4.164 In the case of indemnity insurance, unless excluded by the terms of the contract, there is a right for an insurer to act in the name of the insured to pursue any claims the insured may have against third parties that have contributed to a loss. So if, for example, an insurer pays a claim to an insured arising from a motor vehicle collision, the insurer may pursue, in the name of the insured, actions against the person that caused the collision.

4.165 The amount recovered from the third party is often not equal to the amount the insurer has paid to the insured in respect of the loss. The costs of the action, and any difference between the amount of the loss and the amount insured, must also be considered when deciding to whom any recovered monies should be paid.

4.166 Section 67 of the IC Act provides rules for how monies recovered from a third party by an insurer under a right of subrogation should be divided between the insurer and the insured. The Panel listed a number of criticisms of section 67 in its review.

4.167 To address some of the difficulties experienced with the existing section 67, Item 2 of Schedule 9 introduces a replacement section 67 containing rules that are intended to provide for the division of any proceeds from a subrogated action. This provision is based on the following principles:

- Firstly, the party taking the recovery action should be entitled to reimbursement for the administrative and legal costs of that action from any monies recovered. If both parties contribute, they are both reimbursed, or share the reimbursement pro rata if there is insufficient recovered money to reimburse both in full.

- Secondly, once any administrative or legal costs of the action have been met, there are three possibilities for distribution of remaining sums depending on who has funded the recovery action.

    (a) If the insurer funds the recovery action pursuant to its rights of subrogation, it is entitled to an amount equal to the amount that it has paid to the insured under the

contract of insurance. The insured is then entitled to any further amount necessary for it to ultimately recover from the insurer under the contract of insurance or the third party in the recovery action, or both in combination, the full amount of its loss (not just the measure of indemnity under the policy). This entitlement does not diminish the insured's right to receive payment under the policy in a prompt manner according with the terms of the contract and the insurer's obligation to pay promptly, subject to any contrary agreement between the parties.

(b) If the insured funds the recovery action, the order in the preceding paragraph is reversed. The insured is entitled to retain an amount so that the total that it receives from the recovery action and under the policy is equal to its total loss. The insurer is entitled at this point to an amount equal to the amount that it has paid to the insured under the insurance contract.

(c) If the action is funded jointly by both the insurer and insured, they are both entitled to the same amounts as referred to in (a) and (b) above, pro rata if there are insufficient funds to reimburse them in full.

- Thirdly, any excess that remains after the administrative and legal costs are paid and both the insured's and insurer's loss covered is to be distributed to both parties in the same proportions as they contributed to the administrative and legal costs of the recovery action. Through this process, the party (or parties) that bore most of the cost and risk of the recovery action should receive the benefit of the windfall. Most commonly this would be the insurer — but the insurer only gets the benefit after the insured has received full recovery for all its losses, because the insured would have been entitled to these losses as damages from the third party, whether or not there was any insurance in place.

- Finally, any separate or identifiable component in respect of interest should be divided fairly between the parties, having regard to the amounts that each has recovered and the periods of time for which each party lost the use of their funds.

4.168 The Panel had also recommended, for the purposes of the new section 67, that third party beneficiaries should be treated as insureds and this is the effect of Item 1 of Schedule 10. Accordingly, the same principles of subrogation apply whether the person being indemnified is the insured party or a third party beneficiary to whom the indemnity cover extends.

4.169 New subsection 67(7) provides that the rights of the insurer and insured (or third party beneficiary) under section 67 may be modified by the terms of the relevant insurance contract or any agreement that is made between the insurer and the insured after the loss has occurred. This latter requirement captures the terms of existing subsection 67(3) of the Act.

4.170 By operation of Item 3 and clause 2, the amendments in Schedule 10 will apply to contracts of insurance entered into six months after Royal Assent.

## Schedule 11 — Claims made and claims made and notified policies

4.171 A 'claims made and notified' insurance policy covers an insured if a claim of liability is made against them during the policy period and the insured notifies their insurer of that claim also during the policy period.

4.172 'Claims made and notified' policies may contain a provision which states that if an insured notifies their insurer of facts that might give rise to a claim during the policy period, the insurer is obligated to cover the insured for any claim that eventually arises from the notified facts — even if the claim is actually made outside of the policy period. These so-called 'deeming provisions' in a policy are contractual terms that achieve a similar outcome to subsection 40(3) of the IC Act.

4.173 The current subsection 40(3) of the IC Act stipulates that, for liability insurance, insurers are required to provide cover if an insured notifies them of facts that might give rise to a claim during the period of cover as soon as was reasonably practicable after the insured became aware of those facts, even if the claim is ultimately made after the period of cover provided by the contract.

4.174 Section 54 of the IC Act currently provides relief for an insured who fails to comply with a contractual requirement of an insurance policy,

if the non compliance did not cause or contribute to the loss. In such instances, an insurer cannot rely on the non compliance to avoid liability.

4.175 However, if the non compliance did contribute to the loss, section 54 allows insurers to reduce their liability to the extent that their interests were adversely affected. This is referred to as the 'prejudice test'.

4.176 The effect of judicial interpretation of subsection 54(1) has been to excuse holders of 'claims made and notified' policies from the need to:

- notify their insurer of a claim during the policy period; and
- if the policy has a 'deeming provision', notify their insurer of facts that might give rise to a claim during the policy period.

4.177 Although such late notifications do not comply with the contractual terms of a policy, the courts' interpretation of subsection 54(1) protection has ensured that an insurer cannot refuse to cover the eventual claim.

4.178 Item 1 of Schedule 11 amends subsection 40(1) to introduce a new, more comprehensive definition of 'claims made and notified' insurance.

4.179 Item 2 amends subsection 40(3) and introduces an extended reporting period of 28 days for 'claims made and notified' insurance policies. Currently, insureds must notify the insurer of facts that might give rise to a claim during the policy period to ensure coverage if a claim later eventuates. Item 2 gives an insured an additional 28 days after their policy expires in which to notify the insurer of facts that might give rise to a claim, however such facts may only be notified if they occur during the policy period.

4.180 Item 2 also introduces a new disclosure regime in subsection 40(4) so that at least 14 days before a 'claims made and notified' policy expires or comes up for renewal, insurers must inform the insured, or any person that is acting as agent for the insured, about the consequences of failing to notify facts that might give rise to a claim.

**Request for comment**

What impact, if any, would the extended reporting period of 28 days have on an insured's duty of disclosure as part of renewal of the relevant contract or entry into a new contract of liability insurance shortly after cover provided by the old contract expires?

The last exposure draft of amendments to section 54 and related provisions included a proposed subsection 40(2). That subsection required insurers to issue insureds with a notice of their right to notify of facts or circumstances in a period beginning 30 days before the cover expires and ending 14 days before the cover expires.

That requirement has been omitted from the current draft following comments from industry at the need to provide two notices to comply with this requirement.

Please provide comments if you think that the 30 day cap in which to provide a notice from the last exposure draft should be reinstated.

4.181 If an insurer cancels the insurance policy, an insured may still notify the insurer of facts that might give rise to a claim, provided this is within 28 days after the cancellation. Because of the extended reporting period, an insured would still have approximately 14 days after they received their notice to make a notification of facts to their insurer.

4.182 Item 4 introduces a new section 54A. New section 54A allows an insurer to refuse to cover a claim if that claim eventuated from facts that the insured knew about during the policy period but which they did not notify to the insurer during that policy period or the extended reporting period. Item 3 makes a consequential amendment to subsection 54(1).

4.183 By operation of Item 5 and clause 2, Schedule 11 would apply to all contracts of liability insurance entered into 28 days after Royal Assent. As disclosures are required at the end of the policy period, it would generally be 12 months after commencement before an insurer would be required to comply with the new disclosure requirements.

**Request for comment**

Have there been any changes in the market for claims made and notified policies, or industry developments, that would render the proposed amendments inappropriate or outdated? If so, what are these changes?