

**COMMENTS ON THE
EXPOSURE DRAFT (8/3/2004) – INSURANCE CONTRACTS AMENDMENT BILL
2004
BY
VERO INSURANCE LIMITED**

1 Introduction

Vero Insurance Limited (formerly Royal & Sun Alliance Insurance Australia Limited) (ABN 48 005 297 807) (“**Vero**”) is a large general insurer. Vero issues claims made contracts of liability insurance, including Professional Indemnity, Directors and Officers Liability, Employment Practices Liability, Superannuation Liability, Association Liability and Crime Insurance. We estimate that Vero is the third largest Australian insurer in the Professional Indemnity market and Vero has the largest market share in the Superannuation Liability market. Accordingly, the proposed amendments to sections 40 and 54 of the *Insurance Contracts Act 1984* (Cth) (“**the Act**”) contained in the *Exposure Draft of the Insurance Contracts Amendment Bill 2004* (Cth) (“**the Bill**”) will impact on the business of Vero.

2 Comments of the Insurance Council of Australia

Vero has had the benefit of reading and commenting on draft comments on the Bill prepared by the Insurance Council of Australia Limited (“**ICA**”). Apart from the comments made in Part 3 of this Paper, Vero agrees and endorses the ICA’s comments. In particular, we reiterate that:

- The Bill does not address the concerns consistently raised by insurers in relation to late notification of claims, since it only deals with late notification of facts and circumstances which may give rise to a claim.
- The timing requirements set out in section 40(2A) of the Bill will effectively mean that 2 notices will need to be sent to insureds, one in relation to renewal (which is usually sent about 6 weeks prior to expiry) and the second explaining the effect of section 40(3) (which is required to be sent out between 30 and 7 days before expiry). Vero agrees with ICA’s submission that a notice explaining the effect of section 40(3) need only be given at the time the policy is entered into, utilising current industry practices and procedures.
- Proposed sub-sections 40(2A) and (2B) place impractical, expensive and difficult burdens on an insurer, as it requires the insurer to firstly ascertain whether the insurance broker has given the necessary notice under section 40(2A). Given the

positive step which it is contemplated insurers must take to comply with section 40(2B)(b), it seems that an insurer would only be excused from sending a notice explaining the effect of section 40(3) if the broker had advised the insurer that the notice had in fact been given within the period. If the insurer does not receive such advice from the broker, the insurer would arguably be required to implement processes to ensure a notice explaining the effect of section 40(3) is sent directly to insureds. This does not reflect the commercial reality that most contact with insureds in relation to professional indemnity business is via the broker. We also envisage that the considerable costs associated with implementing procedures to enable compliance with this requirement will ultimately need to be factored into premiums. Further, proposed section 40(2B) is inconsistent with the policy objective behind section 71 of the Act. In light of the above, we submit that this obligation should be deleted and section 71(1) should apply in relation to giving notices explaining the effect of section 40(3).

- A breach of section 40(2A) should not constitute a criminal offence.

3 Section 40(3)

Vero submits that the 45 day extended reporting period contained in proposed section 40(3) of the Bill should be deleted in its entirety. To allow an insured an additional period of time after expiry of the contract to report facts which may give rise to a claim of which the insured was aware prior to expiry of the contract has three negative consequences.

Firstly, there is no incentive for insureds to be diligent and implement good management practices to ensure that they are capturing information in relation to facts and circumstances in a timely manner so that they can respond with appropriate risk control measures.

Secondly, before renewal or before entering into an insurance contract with a new insurer, the insured's duty of disclosure requires it to disclose any matters relevant to the insurer's decision whether to accept the risk. While notification of facts and circumstances will be covered under the previous contract of insurance if notified within 45 days after expiry, the notification of these same facts and circumstances can arguably be relevant to the new insurer or the insurer offering renewal and that insurer's decision whether to accept the risk and, if so, on what terms. This, in turn, means the insured would be required to disclose these facts before entering into the new contract. Thus, the odd result could arise that if the insured is aware of facts which may give rise to a claim, it is likely that it would

have a duty to disclose this under the new contract before the contract starts but it is not required to disclose these facts under the old contract for up to 45 days after expiry. This clearly creates ambiguity and the result is that the insured owes inconsistent duties to insurers in terms of notification and disclosure.

Thirdly, the uncertainty relating to unknown claims at the end of a policy period makes the provisioning for unknown claims more difficult. This could, in turn, affect the pricing of policies. Given that an objective of the reforms in relation to sections 40 and 54 of the Act is to promote the availability and affordability of professional indemnity insurance, this proposed amendment together with the costs associated with proposed section 40(2B), could lead to an opposite result.

As a member of the ICA, Vero had previously agreed to accept an extended reporting period, but did so only on the basis that the reforms would prevent both late notification of facts and circumstances that might give rise to a claim and late notification of claims. As stated earlier in this paper, no reforms have been forthcoming relating to late notification of claims. Accordingly, we submit that there should be no extended reporting period contained in the Bill.

Dated: 16 April 2004