



Investment & Financial Services Association Ltd

ACN 080 744 163

19 February 2007

Insurance Contracts Act Review
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: icareview@treasury.gov.au

Dear Sir

Draft Insurance Contracts Bill - Cancellation of life policies and section 29(4)

The Investment and Financial Services Association welcomes the opportunity to review the draft reform package announced today by Parliamentary Secretary to the Treasurer, Chris Pearce MP, which will give effect to most recommendations of the review of the *Insurance Contracts Act 1984* (the Act).

IFSA represents the life insurance industry and the retail and wholesale superannuation & funds management industries. IFSA has over 140 members, including APRA regulated product issuers as well as related Australian Financial Services Licensees who are responsible for investing over \$950 billion, on behalf of more than nine million Australians.

As outlined to Treasury officers following the release of the Review, there are two weaknesses the life insurance industry has identified that should be corrected before the *Reform Package* is tabled in Parliament. These matters are outlined in the annexure to this letter.

IFSA members are now working on the remaining parts of the *Reform Package*, and a subsequent submission will be provided by 23 March 2007.

IFSA acknowledges the cooperative approach that Treasury has taken in the total review process.

Please feel free to contact either myself or David Micó on 02 9299 3022 should you wish to discuss any of the matters contained in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R Gilbert', is positioned to the left of a vertical red line.

Richard Gilbert
Chief Executive Officer

ANNEXURE TO LETTER DATED 12 FEBRUARY 2007

Draft Insurance Contracts Bill - Cancellation of life policies and section 29(4)

Cancellation of life policies

At paragraph 7.55 of the Review Panel's report it was stated with respect to cancellations of contracts under s60:

“There is no section 60 equivalent for contracts of life insurance. Therefore, there is no provision in the IC Act that allows a life insurer to cancel a policy for any reason. Many life insurers have proceeded on the basis that they are entitled, under some circumstances, to cancel a contract under the common law.

...it is understood that life insurers can currently rely on the common law and specific cancellation clauses in their policies to provide a similar outcome to that of section 60 of the IC Act. The Review Panel notes that the industry is concerned that these common law rights have yet to be tested by the High Court, however, the review panel questions the need to clarify in statute that which is already available to the life insurance industry (our emphasis)”.

Subsequent to the review panel's findings, in *Walton v The Colonial Mutual Life Assurance Society Limited*¹, his Honour Justice Einstein held that a life insurer did not have a right under the common law to cancel a contract of life insurance in circumstances where a fraudulent claim had been made upon it (see paragraphs 49 to 52 of the judgment).

The views of Justice Einstein have been endorsed in subsequent decisions² and have been adopted by the Financial Industry Complaints Service as the correct view of the law. The FICS Panel regularly quotes the Walton case as authority for its view that a life insurer does not have a right at common law to cancel a policy.

It is self evident from *Walton* and the reaction to this decision that the review panel's comments about life insurers having an entitlement to cancel contracts under the common law are no longer valid. Further, the panel clearly agreed that there is no logical reason why life insurers should be denied the same right to cancel a policy which is provided to general insurers.

It follows that an amendment to the IC Act is called for to restore to life insurers the right to cancel a policy which previously was thought to exist at common law.

IFSA submits that s60 should be expanded to include life contracts. Any conflict that this may cause with s210 of the *Life Act* (as noted by the Panel at paragraph 7.54) can be dealt with by a minor amendment to s60 (d) providing that any cancellation, in respect of non payment of premiums, is subject to s210 of the *Life Act*.

¹ [2004] NSWSC 616 19 July 2004

² See for example the comments of Graham DCJ in *Langenbaker v AC&L* unreported NSW District Court, 1 December 2005

ANNEXURE TO LETTER DATED 12 FEBRUARY 2007
Draft Insurance Contracts Bill - Cancellation of life policies and section 29(4)

S29 (4) “notice in writing given to the insured”

Section 29(4) provides that an insurer may vary the insured amount, when a non-disclosure or misrepresentation has occurred, by giving the insured “notice in writing“.

The IC Act does not define “insured”. On one view, “insured” does not include the insured’s legal personal representative. Such an interpretation would prevent the insurer from utilising s29 (4) in circumstances where the insured is dead (which often occurs) on the basis that the requisite notice cannot be given to a dead person.

Section 29(4) is the only Section in the Act which requires service on the insured of a notice subsequent to the formation of a contract.

In order to give this section its desired effect, the words *or “the insured’s legal personal representative”* should be inserted after the word insured in the third line of s29 (4).