



Investment & Financial Services Association Ltd

ABN 82 080 744 163

23 March 2007

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

By email: [icareview@treasury.gov.au](mailto:icareview@treasury.gov.au)

Dear Sir,

**Draft Insurance Contracts Act 1984 Reform Package**

The Investment and Financial Services Association in its initial submission of 19 February 2007 acknowledged and welcomed the opportunity to review the draft reform package for the Insurance Contracts Act 1984. That initial submission addressed:

- Cancellation of life policies; and
- Subsection 29(4) – ‘Notice in writing given to the insured’.

In this submission, our comments and recommendations are provided in the attached Appendix, and focuses on the following matters:

***Insurance Contracts Amendment Bill 2007***

- Schedule 2 - Electronic communications
- Schedule 4 - Disclosure and misrepresentation
- Schedule 7 – Remedies of insurer: life insurance contracts
- Miscellaneous - Cancellation of contracts of life insurance that do not have a surrender value, agency and insured’s legal personal representative

***Insurance Contracts Amendment Regulations 2007***

- Schedule 2 – Electronic communications
- Schedule 3 - Notice of duty of disclosure

***Insurance Contracts Amendment Bill 2007 Regulation Impact Statement***

- Paragraph 3.48 – Code of Practice for life insurers.

We would also welcome a meeting to work through our proposals which go beyond those recommended in the Review Report.

A further submission will be provided to Treasury next week and will address the questions asked in the reform package.

Please contact either myself or David Micó on 02 9299 3022, if you wish to discuss the contents of this submission or arrange a meeting.

Yours sincerely

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

**Richard Gilbert**  
Chief Executive Officer

**Annexure : Insurance Contracts Act Reform Package**

**Exposure Draft**

**Insurance Contracts Amendment Bill 2007**

**A Bill for an Act to amend the *Insurance Contracts Act 1984***

**Schedule 2 – Electronic communication**

**Items 2 and 3 – Proposed subsections 77(1) and (1A)**

IFSA supports electronic communication – in particular, email – as a permissible means for insurers to give notices to insureds under the Act. However, building a systemic capacity to give notices by email will be expensive for insurers and will take time. At present, notices (both under the Act and otherwise) are generally given by post.

The combined effect of draft subsections 77(1) and (1A) is that if an insured who is a natural person only nominates an email address as his or her address for notices, the insurer's *only* options for giving a notice under the Act will be either to give the notice personally (which, except in rare cases, will be impractical) or to give the notice by email. IFSA submits that this would place an unduly onerous burden on insurers who have not yet built the systemic capacity to communicate with their insureds by email.

IFSA proposes that an insurer be *permitted, but not obliged*, to give notices under the Act by email.

Draft subsections 77(1) and (1A) do not provide for service of notices by email on an insured who is a body corporate. IFSA submits that an insurer should be permitted (but not obliged) to give notices under the Act to an insured who is a body corporate by email.

Also, draft subsection 77(1A) only permits an insured to nominate an address *in writing*. IFSA submits that as many insurance products are sold over the phone, an insured should also be able to nominate an address verbally if agreed by the insurer.

IFSA suggests that the means by which the parties may initially nominate an address for notices and subsequently change that address be dealt together with in a single subsection (see the discussion of draft subsection 77(1B) below).

Finally, IFSA notes that it is not clear whether the provisions of section 77 are mandatory. If the provisions of draft subsection 77(1) are intended to be mandatory, IFSA submits that the term "shall" should be used in place of the term "may".

IFSA suggests that a wording along the following lines replace draft subsections 77(1) and (1A):

'77(1) A notice or other document that is by this Act required or permitted to be given to a person shall be given:

- (a) by sending the notice or other document to an electronic address, facsimile number or other address nominated by the person; or
- (b) by sending the notice or other document to a postal address nominated by the person or, if no postal address has been nominated by the person, to the postal address of that person last known to the person giving the notice or other document; or
- (c) if the person is a body corporate – in any way in which documents may be served on the body corporate; or
- (d) if the person is a natural person – personally.'

## Subsection 77(2)

Subsection 77(2) provides that a *notice of cancellation* given by post is deemed to have been received 'at the time at which it would have been delivered in the ordinary course of post unless the insured proves that, through no fault of the insured, the insured did not receive it.'

However, any *other notice under the Act* given by post is subject to the Evidence Act of the particular State or Territory. For example, in the ACT, New South Wales and Tasmania a postal article is deemed to have been received 'on the fourth working day after having been posted', unless the contract provides otherwise: Evidence Acts, section 160. 'Working day' is defined as a day that is not a Saturday or a Sunday, or a public holiday or bank holiday in the place to which the article was addressed.

A postal communication relating to the contract *which is not a notice under the Act* (eg a letter rejecting a claim) will also be subject to the Evidence Act of the particular State or Territory.

IFSA submits that:

- the concept of 'delivery in the ordinary course of post' is problematical because the ordinary time for delivery varies between different places;
- there should be a single, simple rule for all notices under the Act given by post; and
- to achieve the greatest possible uniformity between the rule for notices under the Act given by post and the rule for other postal communications relating to the contract, subsection 77(2) should be re-worded along the lines of section 160 of the uniform Evidence Acts.

IFSA suggests a wording along the following lines, which would cover notices, statements, etc given by post by either party to the contract:

'77(2) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that an article sent by prepaid post addressed to a person at a specified address was received at that address on the fourth working day after having been posted.

(3) Subsection (2) does not apply if it is inconsistent with the terms of the contract of insurance.

(4) In subsection (2):

**article** means a notice, a statement, any other document or any information that, by this Act, is required or permitted to be given to a person.

**working day** means a day that is not:

- (a) a Saturday or a Sunday; or
- (b) a public holiday, bank holiday or statutory holiday in the place to which the article was addressed.'

On this approach, the phrase 'unless evidence sufficient to raise doubt about the presumption is adduced' (which is already used in section 160 of the uniform Evidence Acts) in proposed subsection 77(2) would give insureds protection that is broadly equivalent to the protection given by the phrase 'unless the insured proves that, through no fault of the insured, the insured did not receive it' in the current subsection 77(2).

IFSA notes that Treasury intends to make communications under the IC Act subject to the ET Act, and that s 14 of the ET Act specifies when an 'electronic communication' – which includes an email or facsimile – is deemed to have been received. Therefore, the IC Act does not need to specify when an email or facsimile is deemed to have been received.

### **Item 3 – Proposed new subsection 77(1B)**

Draft subsection 77(1B) provides that a natural person who has nominated an address may, by notice *in writing*, change the nominated address or cancel the nomination. IFSA submits that as insurers commonly receive and process notices of change of address given verbally by insureds to call centres, the proposed requirement that notice of a change of address be given in writing is unduly restrictive.

Also, *cancellation* of an address for notices (as opposed to a *change of address* for notices) should not be permitted as this would allow an insured to cancel a nominated address for notices without providing a new address for notices.

Also, if subsection 77(1) is amended to permit a body corporate to nominate an address, the body corporate should be permitted to change that address.

As mentioned above (see the discussion of draft subsections 77(1) and (1A)), IFSA suggests that the means by which the parties may initially nominate an address for notices and subsequently change that address be dealt together with in a single subsection. (The present draft subsection 77(1A) would be deleted.)

IFSA suggests a wording along the following lines for nominations and changes of nominations of addresses for notices:

'77(1B) For the purposes of subsection (1), a person may only nominate, or change a previous nomination of, an electronic address, facsimile number, postal address or other address:

- (a) by notice in writing; or
- (b) in any other manner agreed by the parties.

## **Schedule 4 – Disclosure and misrepresentations**

### **Item 3 – Proposed change to section 21A**

Draft section 21A removes the right of the insurer, in the case of an 'eligible' contract of insurance, to ask a catch-all question.

With one exception, 'eligible' contracts of insurance are wholly contracts of general insurance. The exception is consumer credit insurance. Consumer credit insurance contracts typically include both a life insurance component (ie cover for death) and a general insurance component (ie cover for disability and involuntary unemployment).

The Panel noted (at paragraph 4.14 of its Report) a submission that 'It is impossible for [life underwriters] to think of and ask all relevant questions' and concluded (at paragraph 4.16) that 'section 21A of the IC Act is not suitable to apply to life insurance'.

In recommending that the insurer's right to ask a catch-all question be removed, the Panel apparently overlooked that consumer credit insurance contracts typically include a life insurance component.

IFSA submits that in the case of a consumer credit insurance contract, the insurer's right to ask a catch-all question should be preserved. Alternatively, consumer credit insurance contracts should be removed from the definition of 'eligible contract of insurance' in regulation 2B.

#### **Schedule 4 – Disclosure and misrepresentations**

##### **Item 5 – Proposed change to section 22**

IFSA supports the principle that an insurer should not have any remedy for an innocent non-disclosure by the insured or a life insured where the insurer has not given that person notice of the duty of disclosure.

The use of the word ‘must’ in section 22 (in both its current form and the proposed form) suggests that the section is obligatory in character – ie the insurer must give notice of the duty of disclosure in every case. However, in many situations the insurer does not require the insured (or the life insured) to comply with their duty of disclosure. Examples are:

- group life superannuation policies where new fund members are given automatic cover;
- policies written on an ‘activation’ basis – ie a policy is issued if the insured simply represents the risk as meeting specified eligibility criteria (commonly set out in the PDS or in an activation form, or in both); and
- policies where the insured is required to answer a set of underwriting questions but is not required to make any further disclosure. As noted in paragraph 4.10 of the Panel Report, AAMI writes all its policies in this way and does not give its clients notice of the duty of disclosure. AAMI has deliberately chosen not to have any remedy for innocent non-disclosure.

IFSA submits that draft section 22 should be re-worded to make it clear that giving notices under the section is optional for insurers – although of course the insurer forfeits its remedies for innocent non-disclosure if the appropriate notice has not been given. IFSA suggests an approach along these lines:

- move draft subsection 22(5) up so that it becomes subsection 22(1), and re-word it as follows:  

‘22(1) An insurer has no rights in respect of a failure to comply with the duty of disclosure unless:

  - (a) the insurer has complied with subsections (2), (3) and (4), as applicable; or
  - (b) that failure was fraudulent.’
- re-number draft subsections 22(1), (2) and (3) as subsections 22(2), (3) and (4) respectively and in those subsections replace the word ‘must’ with ‘shall’ wherever appearing.

#### **Schedule 4 – Disclosure and misrepresentations**

##### **Item 9 – Proposed new section 31A**

The Panel (at paragraph 4.33 of its Report) recommended that a life insured should have a duty to disclose matters that within their knowledge that are relevant to the insurer’s consideration of the risk in a way which complements the independent obligation they currently have not to make misrepresentations, under section 25.

IFSA is concerned that the words of the draft section require a life insured to merely disclose matters “that *the insured* would have been required to disclose”. On a literal interpretation of this, the life insured is not required to disclose any matter which is not known to the insured, because the insured would not have been required to disclose any matter which is not known to the insured. For example, if

the life insured knew that they were suffering from an adverse medical condition but the insured was not aware of that condition, the life insured would not have to disclose it. Of course, this result is not what the Panel intended. It would defeat the Panel's recommendation and would render the amendments of no practical benefit to insurers in that the life insured would have no duty to disclose matters of relevance to the insurer that were solely within their knowledge.

IFSA submits that the draft Bill should create an independent duty of disclosure on the part of the life insured, which mirrors their current obligation under section 25.

IFSA suggests that the proposed section @31A be worded identically with subsection 21(1), but with the words 'an insured' and 'the insured' replaced by 'a life insured' and 'the life insured' wherever appearing. The introductory phrase 'Subject to this Act' would indicate that the new section @31A is to be read subject to the current subsections 21(2) and (3).

'Life insured should be defined in subsection 11(1) as including a proposed life insured (similar to the current definition of 'the insured').

## **Schedule 7 – Remedies of insurer: life insurance contracts**

### **Part 1 – “Unbundling” of contracts**

#### **Items 1 and 2 – Proposed paragraph @27A**

IFSA welcomes the recognition in draft section @27A that a contract of life insurance may provide more than one kind of insurance cover – ie cover under draft section 28A and cover under section 29 as amended. IFSA supports 'unbundling' in this sense. A broadly similar kind of unbundling is presently found in subsection 764A(1A) of the Corporations Act, for the purposes of Chapter 7 of that Act.

It is also common for life insurers to issue a single policy which covers more than one life insured. IFSA also supports 'unbundling' in the sense that where a contract of life insurance covers more than one life insured, a misrepresentation or non-disclosure by one life insured should not affect the rights of the other lives insured. IFSA proposes a new section @27B to cover this kind of unbundling. A broadly similar kind of unbundling is presently found in subsection 764A(1B) of the Corporations Act, for the purposes of Chapter 7 of that Act. For clarification, IFSA refer to two previous submissions; page 3 submission dated 24 December 2003 and page 10 for submission dated 27 February 2004.

IFSA suggests that the structure of the proposed new section 27A should follow the structure of the new proposed subsection 9(1A), and also incorporate by reference the definition of 'contract in life insurance' in the new proposed subsection 29(1A). IFSA suggests a wording for new sections 27A and 27B along these lines:

27A If a contract of life insurance includes:

- (1) provisions that would, if they comprised a single contract, form a contract of life insurance within the meaning of section 29 (the **first group of provisions**); and
- (2) provisions that would, if they comprised a single contract, form a contract of life insurance other than a contract of life insurance within the meaning of section 29 (the **second group of provisions**);

this Division applies as if the first group of provisions and the second group of provisions were each a separate contract.

27B. If a contract of life insurance covers 2 or more lives insured, this Division applies as if each set of provisions in the contract relating to each life insured were each a separate contract.

Draft item 2 in Schedule 7 provides that the new section @27A will only apply to contracts entered into *after* the commencement of the amendment. However, as noted in paragraph 4.107 of the draft Explanatory Memorandum, the present inability to unbundle contracts of life insurance 'can be to the significant disadvantage of an insured and unnecessarily restrict the remedial options of the insurer'.

There is no reason why the new section @27A (and IFSA's proposed new section @27B) should not apply to all contracts of insurance, irrespective of whether the contract was entered into before or after the commencement of the amendment, and IFSA proposes this.

## **Part 2 – Remedies for non-disclosure and misrepresentation**

### **Items 3 and 4 – Proposed paragraph 28A and 29(1)**

IFSA strongly supports the proposed amendment to introduce a distinction between the remedies that apply to 'traditional' life insurance policies and 'non-traditional' ones. Insureds and beneficiaries will benefit from this amendment because where the contract falls under section 28A, the insurer will no longer be entitled to avoid the policy in the event of innocent non-disclosure or misrepresentation, as it is presently entitled to do under section 29.

IFSA submits that 'traditional' life insurance policies have (or will have) a surrender value, while 'non-traditional' policies do not, and that whether or not a policy has (or will have) a surrender value should be the test for whether section 28A or section 29 applies. Contracts of life insurance with no surrender value and contracts of general insurance are all contracts of insurance without any investment component. In other words, they are all purely risk contracts. In paragraph 7.23 of its Report the Panel noted a submission that 'the rationale for the three-year rule [in subsection 29(3), which is the main point of difference between section 29 and section 28] is to protect consumers *where the policy being avoided may have a surrender value.*' In other words, the main purpose of section 29 is to protect insureds who hold a policy with a surrender value.

The test IFSA proposes would be a clear and simple rule, and one which would be easy to follow in practice. (IFSA notes that the distinction between policies with and without a surrender value has been included in the definition of 'life policy' in section 5 of the recently passed Anti-Money Laundering and Counter-Terrorism Financing Act 2006.) On this approach, policies providing death cover (but without a surrender value) would also be excluded from the proposed section 29, and would come under the proposed section 28A.

A clear separation between contracts with and without a surrender value would also have a beneficial flow-on effect in removing the need to give the one insured two distinct disclosure notices as proposed in *Schedule 1, Insurance Contracts Amendment Regulations 2007*.

IFSA suggests that the proposed heading in Item 3 be modified to read:

**'@28A Contracts of life insurance that do not have a surrender value'**

IFSA also suggests that for item 4, proposed subsection (1A) and the Note to section 29 be modified as follows:

'(1A) In this section:  
**contract of life insurance** means a contract of life insurance that has or will have a surrender value.

Note: The heading to section 29 is replaced by the heading "**Contracts of life insurance that have a surrender value**".'

### **Item 6 – Application of new section 28A and the amendments to section 29**

Draft item 6 in Schedule 7 provides that the new section 28A and the amendments to section 29 in Schedule 7, Part 2 will only apply contracts of insurance entered into after those amendments commence. Draft item 11 in subsection 2(1) provides that Schedule 7, Part 2 will commence 12 months after the Act receives the Royal Assent.

However, the new section @28A is linked to the concept of unbundling. Taken together, these 2 amendments will significantly benefit insureds and beneficiaries. As noted in paragraph 4.107 of the draft Explanatory Memorandum, the present inability to unbundle contracts of life insurance 'can be to

the significant disadvantage of an insured and unnecessarily restrict the remedial options of the insurer’.

IFSA has proposed above that new section @27A (and IFSA’s proposed new section @27B) which permits unbundling and which commences on Assent should apply to *all* contracts of insurance, irrespective of whether the contract was entered into before or after the commencement of the amendment. Consistently with that proposal, IFSA also proposes that the new section 28A commence immediately, and apply to all contracts of insurance, irrespective of whether the contract was entered into before or after the amendments commenced.

This approach would also avoid much confusion, wasted time and wasted costs because insurers, insureds, superannuation trustees and their advisers would not have to determine whether a particular claim is subject to the old section 29 or the new section 28A. For example, it would avoid the situation where some members of a superannuation fund come under the old section 29, while other members of the same fund come under the new section 28A. This is a very significant issue because contracts of life insurance typically run for many years.

IFSA suggests that:

- item 6 be re-worded along the following lines:

**‘6. Application of items 3 to 5**

The amendments made by items 3 to 5 apply to a contract of insurance, whether entered into before or after the commencement of this item.’

- item 11 in subsection 2(1) be re-worded to provide that Schedule 7, Part 2 commences when the Act receives the Royal Assent; and
- in draft regulation 2(c), the commencement date for Schedule 3 to the Amendment Regulations (which includes the new forms of ‘Your duty of disclosure’ notice) be changed from ‘on the commencement of Schedule 4 to the Insurance Contracts Amendment Act 2006’ to ‘on the day 12 months after these Regulations are registered.’

On this approach, a life insurer who has given the insured notice of the duty of disclosure in accordance with the present section 22 and the present ‘Your duty of disclosure’ notice in the Regulations will qualify for the new section 28A remedy for innocent non-disclosure, unless the contract is entered into after the new section 22 and the new ‘Your duty of disclosure’ notice in the Amendment Regulations commence – which will be 12 months after the Act receives Royal Assent.

## **Other Matters**

### **Cancellation of contracts of life insurance that do not have a surrender value**

In our submission of 19 February 2007 IFSA submitted that section 60 (which regulates the cancellation of contracts of general insurance) should be expanded to include contracts of life insurance. The following comments are made by way of refinement of that submission.

Cancellation of life policies for non-payment of premiums (called ‘forfeiture’) is regulated by the Life Insurance Act 1995, and previously by the Life Insurance Act 1945. Historically, as the table in paragraph 7.16 of the Panel’s Report shows, the great majority of life policies were whole of life and endowment policies, which had a surrender value. Against this background, there was no need for the IC Act, when it was originally enacted, to regulate the cancellation of contracts of life insurance.

IFSA submits that with the vast increase in the number of contracts of life insurance that do not have a surrender value, there is now a need for the IC Act to regulate the cancellation of such contracts.

In relation to Schedule 7, Part 2 'Remedies for non-disclosure and misrepresentation', IFSA has submitted above that all contracts of life insurance that do not have a surrender value should come under the new section @28A, which will provide the same remedies as section 28 currently provides for contracts of general insurance.

IFSA submits that, in relation to the insurer's rights of cancellation, there should be a corresponding alignment of section @28A contracts with contracts of general insurance. Specifically, IFSA submits that:

- the Life Insurance Act should continue to regulate the cancellation of all contracts of life insurance for non-payment of premiums;
- the IC Act should regulate the cancellation of contracts of life insurance that do not have a surrender value by providing that a life insurer may cancel a section @28A contract on any of the grounds set out in the current subsection 60(1) *other than* non-payment of premiums; and
- it is not necessary for the IC Act to regulate the cancellation of contracts of life insurance that have a surrender value, as this has not been identified as an area of concern.

IFSA suggests that a new section @60A (containing the applicable elements of the current subsection 60(1)) be inserted, and section 63 be amended, along the following lines:

**'@60A Cancellation of contracts of life insurance that do not have a surrender value**

- (1) This section applies to a contract of life insurance other than a contract of life insurance within the meaning of section 29.
- (2) Where, in relation to the contract:
  - (a) a person who is or was at any time the insured failed to comply with the duty of the utmost good faith;
  - (b) the person who was the insured at the time when the contract was entered into failed to comply with the duty of disclosure;
  - (c) the person who was the insured at the time when the contract was entered into made a misrepresentation to the insurer during the negotiations for the contract but before it was entered into;
  - (d) a person who is or was at any time the insured failed to comply with a provision of the contract, *other than* a provision with respect to payment of the premium; or
  - (e) the insured has made a fraudulent claim under the contract or under some other contract of insurance (whether with the insurer concerned or with some other insurer) that provides insurance cover during any part of the period during which the first-mentioned contract provides insurance cover;

the insurer may cancel the contract.'

**'63 Cancellations void**

- (1) Except as provided by this Act, an insurer may not cancel a contract of general insurance, or a contract of life insurance other than a contract of life insurance within the meaning of section 29, and any purported cancellation in contravention of this section is of no effect.

- (2) Subsection (1) does not affect any right of the insurer to cancel a contract of life insurance other than a contract of life insurance within the meaning of section 29 for failure by the insured to comply with a provision of the contract with respect to payment of the premium.’

IFSA submits that all amendments relating to the new category of section @28A contracts, including this one, should commence on Assent and apply to all contracts, irrespective of whether the contract was entered into before or after the commencement of the amendment.

## **Section 71 – Agency**

Section 71 and subsection 58(2) of the Insurance Contracts Act 1984 address some aspects of agency.

Subsection 71(1) provides that where the contract was arranged by an insurance broker acting as agent of the insured (and not acting under a binder), the insurer is generally excused from giving the pre-contractual notices which it is ordinarily required to give to the insured under the Act. Subsection 71(2) permits an insurer to give a notice, statement, document or information under the Act to a person who acted as the agent of the insured in arranging the insurance (but not an insurance intermediary – ie an insurance broker or agent) instead of to the insured directly. Subsection 71(3) provides that an insurance intermediary (other than a broker not acting under a binder) is deemed to be the agent of the insurer, not the insured, in relation to the giving of any notice, etc under the Act. Conversely and by implication, this means that a broker not acting under a binder is to be treated as the agent of the insured.

Subsection 58(2) provides that a notice under that paragraph shall be given to ‘the insured or a person acting as agent for the insured’.

Apart from the situation covered by subsection 58(2), it is not clear whether notices, etc under the Act may be given to a person other than a broker (not acting under a binder) who commences acting as the insured’s agent *after* the contract has been entered into (ie they did not act as the agent of the insured in arranging the insurance). Examples would be a solicitor representing the insured, or a member of the insured’s family representing the insured, who did not arrange the insurance. Examples of notices, etc which may be given after the contract has been entered into are a notice of avoidance of a contract under subsection 28(2) or 29(2), a notice of variation of a contract of life insurance under subsection 29(4), a statement setting out the provisions of the contract under subsection 74(1), a notice of cancellation under subsection 59(1), a statement setting out the insurer’s reasons for cancellation under subsection 75(1), or information given by a liability insurer in response to a notice under subsection 41(2).

In its *Report No 20: Insurance Contracts* the Australian Law Reform Commission said, at paragraph 46:

‘In general, the principles of agency should apply to the giving and receiving of information.’

However, the Commission apparently overlooked the need to include in the Act a general provision about agency after the contract has been entered into. There is no discussion of the topic in the Report.

IFSA submits that section 71 should be expanded to permit an insurer, *after* the contract of insurance has been entered into, to give a notice, statement, document or information under the Act to any person acting as agent for the insured, instead of to the insured directly.

IFSA suggests the insertion of a new subsection 71(4) along the following lines:

- ‘71(4) Where, after a contract of insurance has been entered into, the insurer gives to a person acting as agent for the insured a notice, a statement, any other document or any information that, by this Act, is required or permitted to be given to the insured, the insurer shall be deemed to have given that notice, statement, document or information to the insured.’

## Legal personal representatives of insureds

A related question is whether, in circumstances where the insured has died, a notice may be served on the insured's legal personal representative. Examples are a notice of avoidance of a contract under subsections 28(2) or 29(2), a notice of variation of a contract of life insurance under subsection 29(4), a statement setting out the provisions of the contract under subsection 74(1), a notice of cancellation under subsection 59(1), and a statement setting out the insurer's reasons for cancellation under subsection 75(1).

In our submission of 19 February 2007 IFSA proposed that the words 'or the insured's legal personal representative' be inserted after the word 'insured' in the third line of subsection 29(4).

Having considered the issue further, and recognising that the issue extends beyond subsection 29(4), IFSA now proposes instead that the following sentence be added to the definition of 'insured and insurer' in subsection 11(1):

***'Insured*** also includes the insured's legal personal representative.'

## **Exposure Draft Insurance Contracts Amendment Regulations 2007 (No.)**

### **Schedule 2 – Amendment commencing on commencement of Schedule 2 to the *Insurance Contracts Amendment Act 2006* (regulation 3)**

#### **Item 1 Electronic communications**

Draft subsection 34(2) requires an insurer to include, in any electronic communication, ‘a full address (not a post office box)’ and ‘a telephone number’ at which it can be contacted. The draft Explanatory Statement does not provide any explanation for this requirement. In particular, it does not explain why a *street address* must be provided, nor why a street address must be provided *in addition to* a telephone number.

The IC Act and Regulations do not presently require an insurer to provide any contact details to insureds, and so this proposed requirement is quite new.

Where an insurer prepares a PDS, it must include its ‘name and contact details’: Corporations Act, paragraph 1013D(1)(a). The kind of ‘contact details’ in this context is not prescribed. Similarly, if the insurer is an Australian financial service licensee, the FSGs and Statements of Advice given by it and its authorised representatives must include its ‘name and contact details’: paragraphs 942B(2)(a), 942C(2)(c)(i), 947B(2)(c) and 947C(2)(d)(i). Again, the kind of ‘contact details’ is not prescribed. In all these contexts the insurer has some degree of flexibility in deciding what contact details are most appropriate for the particular financial products and services being provided, and for the particular client group.

The Spam Act 2003 provides that a ‘commercial electronic message’ (as defined in section 6) must include ‘accurate information about how the recipient can readily contact [the sender]’: paragraph 17(1)(b). Again, the kind of contact details in this context is not prescribed.

Not all insurers deal with their insureds by means of a ‘shop front’. An insurer may choose to deal with its insureds just by telephone and post, or through intermediaries.

The inclusion of the insurer’s street address in electronic communications is generally unlikely to materially assist the insured where the insurer’s contact details have already been provided (eg in a PDS or policy wording) or the telephone number of the individual who sent the electronic communication has been included in the communication.

IFSA submits that to maintain flexibility in this area, draft subsection 34(2) should be aligned with the provisions of the Corporations Act, noted above, which apply to PDSs, FSGs and Statements of Advice. IFSA suggests a wording along the following lines:

‘34(2) If the electronic communication is given by an insurer, the communication must also show the insurer’s name and contact details.’

### **Schedule 3 – Amendment commencing on commencement of Schedule 4 to the *Insurance Contracts Amendment Act 2006* (regulation 3)**

#### **Item 1 Notice of duty of disclosure – proposed**

IFSA submits that there need to be separate forms of the notice of duty of disclosure for contracts of insurance under sections 28 and 28A. This is because:

- contracts under section 28 are commonly renewed, whereas contracts under section 28A are not; and
- the notice under section 28A should refer to the disclosure obligations of third party lives insured.

The life insurance component of consumer credit insurance is an 'eligible' contract: regulation 21(a). It should therefore come under the form of notice for eligible contracts.

IFSA suggests that regulation 3 be re-worded along the following lines:

**'Notice of duty of disclosure**

- (1) The form of writing that may be used to inform an insured of the matters mentioned in subsection 22 (1) of the Act is:
  - (a) for a contract of general insurance that is not an eligible contract of insurance — the form set out in Part 1 of Schedule 1; and
  - (b) for a contract of life insurance that is not a contract of life insurance within the meaning of section 29 of the Act and not an eligible contract — the form set out in Part 2 of Schedule 1; and
  - (c) for a contract of life insurance within the meaning of section 29 of the Act — the form set out in Part 3 of Schedule 1; and
  - (d) for an eligible contract of insurance — the form set out in Part 4 of Schedule 1.
- (2) The words that may be used to inform an insured orally of the matters mentioned in subsection 22 (1) of the Act for a contract of insurance are set out in Schedule 2.

*Note* Section 69 of the Act provides for the circumstances in which information that is required by other provisions of the Act to be given in writing may be given orally. '

**Item 2 – Schedules 1 and 2**

IFSA makes the following recommendations for the wordings of the heading and/or form of words used in the notices for Parts 1, 2, 3 and 4. The proposed changes recognise the introduction of the new proposed section @28A.

IFSA would propose the following changes to proposed Schedule 1:

Heading Change

**Part 1                      Contracts of general insurance**

Heading Change and Change in Notice Wording

**Part 2                      Contracts of life insurance (other than contracts of life insurance within the meaning of section 29 of the Act) (section 28A)**

**Your duty of disclosure**

Before you enter into a contract of life insurance with an insurer, you have a duty, under the *Insurance Contracts Act 1984*, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of the insurance and, if so, on what terms.

You have the same duty to disclose those matters to the insurer before you extend, vary or reinstate a contract of life insurance.

Your duty, however, does not require disclosure of a matter:

— that diminishes the risk to be undertaken by the insurer; or

- that is of common knowledge; or
- that your insurer knows or, in the ordinary course of its business, ought to know; or
- as to which compliance with your duty is waived by the insurer.

### **Duty of disclosure by life insureds**

If, under the contract, the life of someone else will be insured, that person has the same duty to disclose matters to the insurer as the person who enters into the contract.

The matters that must be disclosed by the other person are the ones explained above under the heading '**Your duty of disclosure**'.

If the other person fails to disclose a matter or makes a misrepresentation, this will be treated as if the person who entered into the contract failed to disclose a matter or made a misrepresentation.

### **When the duty applies**

The duty to disclose a matter applies until the proposed contract is entered into.

### **Non-disclosure**

If there is a failure to comply with the duty of disclosure or a misrepresentation is made (whether by you or by someone else whose life is insured under the contract), the insurer may be entitled to reduce its liability under the contract in relation to the claim and/or may cancel the contract.

If the non-disclosure or misrepresentation is fraudulent, the insurer may also have the option of refusing to pay a claim and treating the contract as never having worked.

Heading Change

## **Part 3                    Contracts of life insurance (within the meaning of section 29 of the Act)**

Heading Change

## **Part 4                    Eligible contracts of insurance**

**Exposure Draft  
Insurance Contracts Amendment Bill 2007 Regulation Impact Statement**

**Paragraph 3.48 – Code of Practice for life insurers**

This paragraph says that life insurers do not have a code of practice.

While it is true that life insurers do not have a code of practice as such, IFSA members are bound by IFSA Standards. These include IFSA Standard No.1.00 “Code of Ethics & Code of Conduct” which sets out the guiding principles by which members are expected to operate. For example, at page 3 this Standard provides that:

‘Members should conduct their activities with the highest degree of integrity and fair dealing, to ensure that ... client and investor interests are paramount in all decisions and transactions ...’

IFSA requests that paragraph 3.48 be amended to include reference to IFSA standards which are binding on IFSA members.