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INSURANCE CONTRACTS ACT CHANGES

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Introduction

- 1 The *Insurance Contracts Act 1984* (Cth) (**the Act** or **ICA**) came into force on 1 January 1986. In 2013, almost three decades later, to give effect to substantial changes to the law, the Australian Parliament enacted the *Insurance Contracts Amendment Act 2013* (**Amendment Act**). Most of the changes effected by the Amendment Act are now in force. The balance will come into operation on 28 December 2015 to give insurers an opportunity to change their business practices regarding new rules about the duty of disclosure and notification of that duty: *Explanatory Memorandum to the Insurance Contracts Amendment Bill 2013*, p5.
- 2 According to the Minister's second reading speech (House of Representatives, *Hansard*, 14 March 2013, 2107-2108) the then Bill included measures that will:
 - 2.1 Remove impediments to the use of electronic communication for statutory notices and documents;
 - 2.2 Make the duty of disclosure easier for consumers to understand and comply with, especially at renewal of household/domestic insurance contracts;
 - 2.3 Make the remedies in respect of life insurance contracts more flexible and suited to modern life insurance products;

- 2.4 Clarify the rights and obligations of persons named in contracts as having the benefit of cover, but who are not parties themselves; and
- 2.5 Clarify what types of contracts are exempt from its operation.

Review history

- 3 In September 2003 the then Australian Government appointed Mr Alan Cameron AM (former chairman of the Australian Securities and Investments Commission (**ASIC**)), and Ms Nancy Milne (a partner of the law firm Clayton Utz) to undertake a review of the *Insurance Contracts Act*. The review panel reported to the Government in 2003 on s54 of the Act. The following year it reported on the balance of the Act.
- 4 After consultations with interested groups the *Insurance Contracts Amendment Bill 2010* was prepared and introduced into the House of Representatives in March 2010. The Bill passed the House of Representatives but had not been passed through the Senate before it lapsed as a result of the Federal election in 2010.
- 5 The Bill was reintroduced and passed in 2013. The 2013 Bill was described in the Second Reading Speech as having “some additional refinements” after further consultation had occurred with “key stakeholders”.
- 6 No change was proposed to s54. No change has been made to s54.

Structure of Amendment Act

- 7 The Amendment Act comprises Schedules 1 to 7 that deal with the following subject matters:
 - 7.1 Schedule 1:
 - 7.1.1 Part 1 – Duty of utmost good faith;
 - 7.1.2 Part 2 – Bundled workers’ compensation contracts;
 - 7.1.3 Part 3 – Bundled contracts generally;
 - 7.2 Schedule 2 – Electronic communication;

- 7.3 Schedule 3 – Powers of ASIC;
 - 7.4 Schedule 4 – Disclosure and misrepresentations:
 - 7.4.1 Part 1 – Insureds’ duty of disclosure;
 - 7.4.2 Part 2 – Eligible contracts of insurance;
 - 7.4.3 Part 3 – Insurers’ duty to inform of duty of disclosure;
 - 7.4.4 Part 4 – Non-disclosures by life insureds;
 - 7.5 Schedule 5 – Remedies of insurers: Life insurance contracts
 - 7.5.1 Part 1 – Unbundling of contracts;
 - 7.5.2 Part 2 – Remedies for non-disclosure and misrepresentation;
 - 7.5.3 Part 3 – Remedy for misstatement of date of birth;
 - 7.5.4 Part 4 – Cancellation of contracts;
 - 7.6 Schedule 6 – Third parties:
 - 7.6.1 Part 1 – Requests by third party beneficiaries to insurers for information;
 - 7.6.2 Part 2 – Insurers’ defences in actions by third party beneficiaries;
 - 7.6.3 Part 3 – Rights and obligations of third party beneficiaries under life insurance contracts;
 - 7.6.4 Part 4 – Rights of third parties to recover against insurers;
 - 7.6.5 Part 5 – Representative actions by ASIC on behalf of third party beneficiaries;
 - 7.6.6 Part 6 – Non-disclosure or misrepresentation by members of group life insurance schemes;
 - 7.7 Schedule 7 – Subrogation.
- 8 Most of the amendments came into force on 28 June 2013, when the Amendment Act received Royal Assent, or six months later on 28 December 2013. A comparatively small number will come into operation on 28 December 2015. They relate to the duties of disclosure under domestic insurance and life insurance contracts.

Schedule 1 – Part 1 – Duty of utmost good faith

- 9 A number of changes have been made to rights and obligations of a third party beneficiary who is not a party to the contract of insurance. The term “third party beneficiary” has been defined: ICA s11(1). It is a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.
- 10 The contractual obligation of utmost good faith, implied by s13 into a contract of insurance, has been extended so that it is owed to a third party beneficiary under the contract.
- 11 Failure to comply with the duty of utmost good faith will now be a breach of the Act.
- 12 Where an insurer does not comply with the duty of utmost good faith in the handling or settlement of a claim or potential claim under the contract ASIC may exercise powers under the *Corporations Act 2001* that deal with variation, suspension and cancellation of an Australian Financial Services licence or banning persons from providing financial services.
- 13 These changes apply to a contract of insurance that was entered into or renewed after 28 June 2013 and to certain variations of contracts of life insurance that are not in the nature of an automatic variation.

Schedule 1 – Part 2 – Bundled workers’ compensation contracts

- 14 The Act does not apply to a number of identified classes of insurance. Marine insurance is the clearest example. Motor vehicle injury insurance and insurance against liability to pay statutory workers’ compensation are other examples.
- 15 The classes of insurance to which the Act does not apply have been extended to include contracts entered into for the purposes of a law that relates to workers’ compensation and to provide cover for an employer’s common law liability to pay damages for employment

related personal injury: ICA s9(1)(f). The change overcomes the effect of the decision of the High Court in *Moltoni Corporation Pty Ltd v QBE Insurance* [2001] HCA 73; (2001) 205 CLR 149. Previously, until common law cover was made compulsory in 2011, in Western Australia the ICA did not apply to cover for workers' compensation liability but applied to the common law cover. Now it will not apply to either form of cover.

16 This amendment applies to contracts of insurance entered into or renewed after 28 June 2013.

Schedule 1 – Part 3 – Bundled contracts generally

17 Where a contract (or proposed contract) includes a number of types of insurance, one or more of which would not be covered by the Act if contained in a separate contract of insurance, for the purpose of determining whether the Act applies to the relevant cover each is to be treated as if it was the subject of a separate contract (or proposed contract).

18 For example, one contract might provide cover for liability to employees (workers' compensation cover) and also cover for liability to third parties. The contract will be governed by the Act to the extent that it provides general liability cover.

19 The amendment applies to contracts of insurance entered into or renewed, or certain variations to contracts of life insurance, after 28 June 2013.

Schedule 2 – Electronic communication

20 A provision has been inserted for the manner of service of a document required or permitted under the Act to be given in writing: ICA s72A.

21 A note has been added to the effect that the *Electronic Transactions Act 1999* will apply to permit electronic communication of notices or documents required to be given in writing.

22 These changes took effect on 28 December 2013.

Schedule 3 – Powers of ASIC

23 ASIC has been given a statutory right to intervene in any proceeding relating to matters arising under the ICA and under Part 3 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*: ICA s11F.

24 ASIC has this power for a proceeding commenced after 28 June 2013.

Schedule 4 – Part 1 – Insureds’ duty of disclosure

25 Non-exclusive factors have been inserted that are relevant to determining what a reasonable person could be expected to know to be a matter relevant to the decision of the insurer whether to accept the risk, and if so, on what terms: ICA s21(1)(b).

26 The factors include:

26.1 The nature and extent of the insurance cover to be provided under the relevant contract of insurance;

26.2 The class of persons who would ordinarily be expected to apply for insurance cover of that kind.

27 This change has been delayed and will come into effect on 28 December 2015.

Schedule 4 – Part 2 – Division 1 – Eligible contracts of insurance – Disclosure before contract renewed

28 In the case of “eligible contracts of insurance” (motor vehicle, home building, home contents, sickness and accident, consumer credit, or travel insurance) an insurer will waive compliance with the duty of disclosure in relation to renewal unless before renewal:

28.1 The insurer has requested the insured to answer one or more specific questions relevant to its decision whether to accept the risk, and if so, on what terms; or

- 28.2 The insurer has given the insured a copy of any matter previously disclosed and asked the insured to disclose any change or confirm that there has been no change to that matter.
- 29 The insurer will not be entitled to ask a “catch all” question about whether there is any other matter that should be disclosed that is relevant to its decision whether to accept the risk and on what terms.
- 30 There are provisions on what will constitute compliance with the duty of disclosure. However the amendments will not change the effect of any earlier failure to comply with the duty of disclosure: ICA s21B.
- 31 The changes will not apply until 28 December 2015 unless before the renewal the insurer clearly informs the insured in writing of the general nature and effect of ICA s21B.

**Schedule 4 – Part 2 – Division 2 – Eligible contracts of insurance –
Disclosure before contract originally entered into**

- 32 An insurer for an eligible contract will not be able to rely on an alleged breach of the duty of disclosure unless before the contract of insurance was entered into the insurer has requested the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and if so on what terms. The insurer cannot ask a “catch all” question (a request to disclose any other matter that would be covered by the duty in relation to the renewed contract).
- 33 As with renewal provision has been made for what will constitute compliance with the duty when answers are given: ICA s21A.
- 34 These changes will apply to an eligible contract of insurance entered into after 28 December 2015.

Schedule 4 – Part 3 – Insurers’ duty to inform of duty of disclosure

- 35 The insurer’s obligation to give notice to a proposed insured about the nature of the duty of disclosure has been modified to take into account changes to obligations concerning eligible contracts of insurance and life insurance and to add the additional requirement that the notice include that the duty applies until the proposed contract is entered into, and in the case of a contract of life insurance, that the notice is given to a person who is not the insured but would become a life insured.
- 36 Where there is a delay of more than two months between a proposed insured’s disclosure and when the contract of insurance is entered into or a counter offer made by the insurer, the insurer must give the insured a reminder that the duty applies until the contract is entered into.
- 37 If the insurer does not comply with the notice requirements then it may not exercise a right in respect of non-disclosure unless the failure was fraudulent: ICA s22.
- 38 These changes apply to a contract of insurance entered into or renewed, extended, varied or reinstated after 28 December 2015.

Schedule 4 – Part 4 – Non-disclosures by life insureds

- 39 A duty of disclosure has been imposed on a life insured who is not a party to the contract of insurance: ICA s31A.
- 40 The change will apply to contracts of life insurance entered into, or certain contracts varied, after 28 December 2015.

**Schedule 5 – Part 1 – Remedies of insurers: Life insurance contracts –
Unbundling of contracts**

- 41 Changes will permit contracts of life insurance to be treated as if they were two or more separate contracts of life insurance for the purposes of determining an insurer’s rights in

the event of non-disclosure or misrepresentation: ICA s27A. This change will apply to a contract of life insurance entered into before or after 28 June 2013.

Schedule 5 – Part 2 – Remedies of insurers: Life insurance contracts – Remedies for non-disclosure and misrepresentation

- 42 A right has been conferred for an insurer to avoid a contract for innocent non-disclosure or misrepresentation within 3 years after the contract was entered into. The right will only apply where the insurer would not have entered into the contract.
- 43 The insurer may vary the contract, with effect from the time when the contract was entered into, to place itself in the position it would have been in but for the non-disclosure or misrepresentation.
- 44 The new ability to vary the contract of insurance will not apply to contracts of life insurance with a surrender value or that provide cover for the death of a life insured: ICA s29.
- 45 These changes will apply to contracts of life insurance entered into, or certain variations to contracts of life insurance, after 28 June 2014.

Schedule 5 – Part 3 – Remedies of insurers: Life insurance contracts – Remedy for misstatement of date of birth

- 46 The insurer will be entitled to change the expiration date of a life insurance contract where the date has been calculated by reference to the date of birth of the life insured that is not correct: ICA s30(3).
- 47 This change will apply to contracts of life insurance entered into, or certain contracts of life insurance varied, after 28 June 2013.

Schedule 5 – Part 1 – Remedies of insurers: Life insurance contracts – Cancellation of contracts

48 A power has been conferred on an insurer to cancel a contract of life insurance where the insured has made a fraudulent claim under a contract of insurance with the insurer: ICA s59A.

49 There is a general prohibition on cancelling a contract of general insurance whether entered into before or after 28 June 2013. A prohibition has been added on cancelling a contract of life insurance other than in accordance with the ICA or the *Life Insurance Act 1995*.

50 This prohibition applies to a contract of life insurance entered into after 28 June 2013.

Schedule 6 – Part 1 – Requests by third party beneficiaries to insurers for information

51 A third party beneficiary now has a right to require the insurer to inform it whether the insurer admits the contract that applies to a claim and whether it proposes to conduct on behalf of the claimant negotiations and any legal proceedings in respect of the claim: ICA s41.

52 This change applies to a contract of liability insurance entered into or renewed after 28 June 2014.

Schedule 6 – Part 2 – Insurers’ defences in actions by third party beneficiaries

53 A “third party beneficiary” (previously “a person who is not a party to a contract of general insurance, whether by name or otherwise”) is placed in the same position regarding rights and obligations as the insured under the contract of insurance: ICA s48.

54 A defence relating to the conduct of an insured will be available as a defence in an action by the third party beneficiary, whether the conduct occurred before or after the contract was entered into.

55 Similar provisions have been introduced for a third party beneficiary under a contract of life insurance entered into in connection with a retirement savings account: ICA s48AA.

56 These changes apply to contracts of general insurance entered into or renewed, contracts of life insurance entered into, or certain contracts of life insurance varied, after 28 June 2014.

Schedule 6 – Part 3 – Rights and obligations of third party beneficiaries under life insurance contracts

57 A third party beneficiary under a contract of life insurance has a right to recover although not a party to the contract but has in relation to a claim the same obligations to the insurer as if an insured: ICA s48A.

58 These changes apply to contracts of life insurance entered into, or certain contracts of life insurance varied, after 28 June 2014.

Schedule 6 – Part 4 – Rights of third parties to recover against insurers

59 A party with the benefit of a liability judgment may recover an amount equal to an insurer's liability under a contract of liability insurance where the insured or third party beneficiary defendant has died or cannot, after reasonable enquiry, be found: ICA s51.

60 This change applies to contracts of liability insurance entered into or renewed after 28 June 2014.

Schedule 6 – Part 5 – Representative actions by ASIC on behalf of third party beneficiaries

61 ASIC may now bring an action against an insurer, not only behalf of an insured but also on behalf of a third party beneficiary: ICA s55A. The action is where ASIC is satisfied the insured or third party beneficiary has suffered, or is likely to suffer, damage because the terms of the contract or conduct of the insurer breaches the Act.

62 This change applies to a contract of insurance entered into before or after 28 June 2013.

Schedule 6 – Part 6 – Non-disclosure or misrepresentation by members of group life insurance schemes

- 63 The provisions of the Act concerning ambiguous questions in proposals (s23) and certain statements that are not misrepresentations (s26) have been extended to apply to persons who seek to become members of a group life scheme other than a superannuation or retirement scheme: ICA ss23 & 26.
- 64 The provisions of the Act concerning non-disclosure and misrepresentation applied at the time when the proposed life insured under a group life contract became a life insured: ICA s32.
- 65 These changes apply to a contract of insurance entered into, or certain contracts of life insurance varied, after 28 June 2014.

Schedule 7 – Subrogation

- 66 The provisions of the Act concerning subrogation apply to a third party beneficiary as if that party was an insured: ICA s64.
- 67 A new regime has been established for the allocation as between insurer and insured or third party of the proceeds of a recovery action: ICA s67.
- 68 The allocation varies according to whether the recovery right was exercised by the insurer or the insured or third party.
- 69 These provisions came into effect on 28 December 2013 and applied to contracts of insurance that were entered into or renewed after that date.