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Dear Mr Sutcliffe

## **INSURANCE CONTRACTS AMENDMENT ACT 2013 – CHANGES TO THE DUTY OF DISCLOSURE**

The Insurance Council of Australia (the Insurance Council) would like to bring to your attention a technical issue that has arisen due to the impending changes to the duty of disclosure provisions brought about by the *Insurance Contracts Amendment Act 2013*. We are aware that a member has already made a submission to Treasury in relation to this matter. The Insurance Council concurs with the analysis and recommendation in that submission.

### **Current duty of disclosure for eligible contracts**

Currently, for eligible contracts of insurance, the duty of disclosure under s21A of the *Insurance Contracts Act 1984* (the Act) applies to new business, but s21 applies to renewals, variations, reinstatements and extensions.

Eligible contracts are one of two types under regulation 2B:

- Contracts that are wholly within a class of contract in relation to which Division 1 of Part V of the Act applies, i.e. motor, home building, home contents, sickness and accident, consumer credit or travel insurance (prescribed contracts); and
- A policy not fitting within these specified classes but for which an insurer opts-into the s21A duty. Such a policy will be an eligible contract of insurance where an insurer has given the insured an oral or written notice informing the insured of the general nature and effect of s21A, even though it is not within the prescribed classes.

For example, a contract that is wholly liability insurance or professional indemnity insurance will be an eligible contract of insurance if the insured has been given a notice informing them of the general nature and effect of s21A prior to them entering into their policy.

It is the second type of eligible contract that this submission relates to.

Currently there is no opt-out ability for insurers that have opted-into s21A. This was not problematic under the current law as on renewal of those contracts, the duty under s21

applied. This is the same duty as for non-eligible contracts. Accordingly, there was no need to have an opt-out mechanism for such contracts.

### **New duty of disclosure from 28 December 2015**

After 28 December 2015, the regime changes and:

- for new eligible contracts s21A applies;
- for non-eligible contracts and variations, extensions and replacements of eligible contracts s21 applies; and
- for renewals of eligible contracts s21B applies.

The s21B requirement is a significant change to the existing model and will under the law apply automatically to any renewal of a policy that the insurer had opted-in for.

As a result, any contract that was eligible at the time of new business will be caught by s21B. There is no mechanism to opt-out of the eligible contract requirements for policies that are not prescribed. This means that after the end of the transition period, s21B will always apply to the opted-in contract.

Section 21B introduces onerous new requirements for eligible contracts which require the insurer to either contact the insured to ask questions relevant to its decision whether to renew the policy and on what terms, or to have the insured confirm previous disclosure they had made under their previous duties.

Given the insurer has opted into an arrangement based on the old legislation for a policy type the Government does not consider to be in need of the relevant protections, we submit there is no policy basis for the mandatory extension of the new s21B requirements to non-prescribed contracts.

Insurers who have opted-into the eligible contract requirements prior to the start of the new requirements on 28 December 2015 are left with the following options:

- amend procedures to meet the s21B requirements – for many this will not be practicable because of the cost or systems restrictions. For example, at renewal, insurers may wish to ask additional questions for these types of policies than asked at new business and to comply with s21B would have to actually contact the insured and ask the questions because they may not have a record of previous disclosure made in this regard;
- waive the duty of disclosure on renewal which puts them at significant risk; or
- not offer renewal and enter into a new contract on new terms without any opt-in – this is a pointless and costly exercise for insurers and customers and increases the risk of insureds becoming uninsured. Insurers will also have to manage pre opt-in contracts and post non-opt-in contracts in different ways which will be extremely inefficient.

The intention in relation to the opting-in concept was that it should only catch insurers that agreed to the model for non-prescribed contracts. Given the changes to the model that they opted-into, it would be unfair not to provide an opt-out to insurers under these circumstances.

The effect of doing so will put the insurer and insured in the position they thought would be the case for the next renewal prior to 28 December 2015.

### Proposed solution

The Insurance Council submits that an ability to opt-out be specifically included in the regulations where the insurer opted-in prior to the commencement date under the non-prescribed contract model and issues, prior to 28 December 2015, a renewal notice advising the insured that their duty on renewal will be that under s21.

In order to facilitate the ability of an insurer to opt-out of the eligible contract requirements for such non-prescribed contracts, we submit that a new regulation 42(3) be added to the following effect:

“(3) Where a contract of insurance is not a contract that is wholly within a class of contracts in relation to which Division 1 of Part V of the Act applies, but is an eligible contract of insurance as a result of an act of the insurer occurring prior to 28 December 2014 which resulted in the operation of regulation 2B(2)(iii), the contract will not be an eligible contract of insurance for any subsequent renewal of that contract, if prior to the next renewal of that contract occurring before 28 December 2015 the insurer complies with subsection 22(1)(a) of the Act as if the contract were not an eligible contract of insurance.”

The practical effect of this would be to give insurers who have opted-into the eligible contract arrangements before 28 December 2014 the opportunity to opt-out prior to the next renewal before the commencement date of 28 December 2015.

Insurers offering new business from 28 December 2014 will need to ensure the PDSs are amended so they do not opt-into s21A from that time.

If you have any questions or comments in relation to our submission please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: 02 9253 5121 or email: [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au).

Yours sincerely



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