INSURANCE COUNCIL OF AUSTRALIA

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Dear Ms Calder

INSURANCE CONTRACTS AMENDMENT BILL 2010

The Insurance Council of Australia (Insurance Council) appreciated the opportunity to participate in the Roundtable held on 17 February 2012 and is pleased to be able to provide further comment on the Insurance Contracts(IC) Amendment Bill 2010. We appreciate the extra time granted to respond.

As you may be aware, the Insurance Council met consumer representatives David Coorey (NSW Legal Aid) and John Berrill (Maurice Blackburn) on 29 February to discuss the provisions contained in the 2010 Bill and other recommendations from the Cameron/Milne review. There have subsequently been further discussions between the parties and as a result, there is now agreement in relation to many aspects of the 2010 Bill. A table reflecting these discussions was sent to you separately on Friday, 23 March.

This submission reflects the views of the Insurance Council only and will comment on two specific aspects of the Bill.

Electronic Communication

Of the Cameron/Milne recommendations which remain outstanding, the need to establish clearly that notices required under the IC Act can be provided electronically is particularly important to both consumers and insurers.

It was our understanding that the consumer representatives preferred the provisions contained in the 2007 Bill and draft Regulations. In order to facilitate the discussions on electronic communications with the consumer representatives, the Insurance Council provided them with a document showing how the key aspects of the 2007 Bill and Regulations were already satisfied under the Electronic Transactions Act, the Corporations Act and ASIC Regulatory Guidance. A copy of this document is included at **Attachment A** for your information.

Transition Period for Duty of Disclosure

In relation to the transition period for the duty of disclosure provisions, we would like to make the following points:

- 18 months is insufficient time to enable the general insurance industry to make the necessary changes to PDSs and other documents;

- 30 months would be an appropriate transition period. However, a period of 24 months would be acceptable where relief is provided in the Regulations.

The 2010 Bill states that "Schedule 4 will commence the day after the end of a period of 18 months beginning on the day this Act receives the Royal Assent". We interpret this to mean the intention of the Government was to provide industry with 18 months to make the necessary systems changes.

The Explanatory Memorandum to the Insurance Contracts Amendment Bill 2010 specifically notes that the amendments take effect 18 months after the date of Royal Assent and that "t*his delay in commencement is to allow insurers an opportunity to amend their business practices in response to the new rules regarding the operation of the duty of disclosure and notification of that duty."* At paragraph 2.46, it also states the commencement of the new duty of disclosure requirements in Schedule 4 of the Bill is delayed by 18 months in order to allow insurers "*time to implement the necessary changes to their systems and documents as required*". We welcome this recognition that significant changes to both systems and documents are required and that insurers will require time to make such changes.

However, the new duty of disclosure provisions, set out in Schedule 4, will take effect the day after the end of the 18 month period which begins on the day the Act receives the Royal Assent. Insurance contracts issued 6 months after the date of Royal Assent will therefore fall due for renewal after the 18 month transition period and the new duty of disclosure changes will apply on renewal of these contracts.

Product Disclosure Statements (PDSs) and most schedules, proposals and quotations include a form of words relating to the duty of disclosure that applies on renewal. Where this documentation is provided to customers during the 12 months prior to the end of the transition period, the form of words relating to the duty of disclosure on renewal would become misleading and in breach the PDS requirements of the Corporations Act and the IC Act.

Therefore, the current PDS/policy documents issued by insurers will need to be changed to reflect the new disclosure duty within 6 months after Royal Assent in order to comply. In effect, the proposed 18 month transition period actually only gives insurers 6 months to make the necessary changes. Furthermore, some general insurers send out renewal notices weeks before the actual renewal. For these insurers, the transition period is effectively less than 6 months.

The Insurance Council believes this is an unintended consequence as it clearly contrary to the stated intention of the transition period and there are no real benefits to be gained by consumers under the circumstances.

Insurers need to have systems in place to ensure that renewal notices sent for policies due for renewal after the end of the transition period meet the new s21B requirements. The time for developing such systems changes and the time for testing them should not be underestimated. In addition, many insurers have a number of different systems to update, some of which are those of partners/distributors.

We note that the following two transition options had been raised by Treasury at the meeting between yourself and Ms Vroombout and the Insurance Council's John Anning and Pia Brunner on 8 February and also at the Roundtable on 17 February:

1. Insurers to put both the current and new duty of disclosure requirements in a PDS, so in effect it would state that up until X date (the date the amendments come into effect), the insured's duty of disclosure is the current requirement and after X date, the duty of disclosure reflects the new legislative requirements.

   From our understanding of what Treasury were proposing, this would still mean that insurers have less than 6 months to incorporate the suggested statement into their PDSs and therefore fails to resolve the transition period problem. There is also significant potential for consumer confusion.

2. Insurers issue a supplementary PDS

   We do not support this option. It would be costly for insurers to create and send supplementary PDSs and in any event, being provided with a second separate document is likely to confuse consumers.

We therefore seek an amendment to the Bill to extend the transition period in relation to Schedule 4 from 18 to 30 months from Royal Assent. A period of 30 months would require insurers to make the necessary changes to systems and documents within 18 months, in line with the original intent. Insurance contracts issued after 18 months from Royal Assent would then fall due for renewal after the (30 month) transition period and documents issued in relation to these policies would comply with the new disclosure duty requirements.

In the alternative, a transition period of 24 months would be acceptable where relief is provided (in the Regulations) from the need to update such documents issued pre transition period. It must be clear from the terms of the relief that such documents will not be considered deceptive or misleading. Insurers would ensure the renewal notice sent for renewals to be entered into after the transition period would then update the customer of the new duty post the transition period. It is crucial that such relief is clearly articulated in the Regulations in order to provide certainty to insurers.

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.

Yours sincerely

Robert Whelan
Executive Director & CEO

Consumer Protection	Requirement under the Electronic Transactions Act 1999	Requirement under the Corporations Act and ASIC Regulatory Guide 221	General Comment
A notice must only be sent electronically after the insured gives consent to receive a notice electronically.	Where information (a notice) can be sent in writing to an insured, consent from the insured is required to send it electronically. Consent includes consent that can be reasonably inferred from the conduct of the insured. (see section 5, 9(1)(d) and 9(2)(d) of the ETA)	Explicit consent from the insured is effectively required to provide FSGs, SOA and PDSs electronically. This is because for these documents to be sent electronically the insured **must nominate** the address (including an electronic address) to which the document can be sent. (see section 940C(1)(a)(ii), 940C(1)(a)(iii), 1015C(1)(a)(ii) and 1015C(1)(a)(iii) of the Corporations Act and Regulation 7.9.02A in the Corporations Regulations 2001 relation to PDSs) ASIC RG 221 clarifies that when a provider wishes to deliver a disclosure under a provision enabling disclosures to be sent to an electronic address 'nominated' by the client, they will need to ensure the client has expressly agreed to receive the disclosure in this way. (see ASIC RG221.28 to RG221.31) ASIC RG also sets out good practice in relation to consent, stating: • clients should be able to change their mind about receiving disclosures online at any time and at no cost • when a disclosure is sent to a clients electronic address, the message should include a clear statement to the effect that the client may use an electronic address set out in the message to send an unsubscribe message to the provider (see page 13 Point 6 of ASIC RG 221)	The ETA already requires consent before notices or information can be sent electronically. We submit adequate consumer protection already exists.
The address (whether electronic or not) must be nominated in writing. If no address is nominated, the postal address of the insured last known to the insurer is to be used. (see section 77(1A) of the 2007 Bill)	No relevant provisions.	No relevant provisions.	This requirement goes beyond the current requirements. Presently the insured can nominate an address over the phone. From a practical point of view, insureds would not want to have to write every time they changed their address. This may result in delays to the insured in terms of information and notices being sent to them. Further many insurers call record which provides evidence in the event of a dispute.
The address (whether electronic or not) can be changed or cancelled by the insured giving notice in	No relevant provisions.	No relevant provisions.	See comments above. Further, ASIC considers good practice should be that where a disclosure is sent to an electronic address, there should be a clear statement on the message that the insured can use an

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writing (section 77(1B) of the 2007 Bill)			electronic address nominated by the insurer and set out in the email to “unsubscribe”. (see page 13 Point 6 of ASIC RG 221)
Without affecting the operation of the ETA, a notice or other document that is to be given by electronic communication must, as far as practicable, be presented in a way that will allow the person to whom it is given to keep a copy of it so that the person can have ready access to it in the future. (see section 77(1C) of the 2007 Bill)	At the time the notice was given to the insured, it must have been reasonable to expect that the information (notice) would be readily accessible so as to be useable for subsequent reference. (see section 9(1)(a) and 9(2)(a) of the ETA)	ASIC RG 221 states good practice in this area includes: • The disclosure (document) should be easy to read and , if applicable, retrieve from the insurer’s website • Insureds should also be able to clearly identify the disclosure (document); • The insurer should use reasonable efforts to ensure that the insured received the disclosure (document) by delivering the disclosure (document) to the electronic address nominated by the insured, or sending a notice (paper or electronic) indicating that the disclosure (document) is available on line and how it can be accessed. • If the insurer becomes aware the insured has not received the disclosure (document) they should take reasonable steps to make the disclosure (document) available by other means. • The insured should be able to keep a copy of the disclosure (document) so that they can access the disclosure (document) in the future (note: this is required by law in relation to PDSs). (see pages 11 to 13 ASIC RG221)	We submit that adequate protection is provided under the ETA and ASIC RG221.
The regulations may make provision for or in relation to: (a) the electronic retention of notices or other documents that have been given by electronic communication under this Act; and (b) electronic access to those notices or other documents by the person to whom they were given. (see section 77(1D) of the 2007 Bill)	See above. Furthermore, if the law requires the insurer to: • record information in writing, • retain a written document, or • retain an electronic communication the insurer can meet those requirements if it records/retains these in a electronic form subject to the following protections: a) in all cases – it was reasonable to expect at the time of recording/retaining the information that it would be readily accessible so be useable in the future b) in the case of a written document and electronic communication- the method of generating/retaining the electronic form of the document/retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the document/electronic communication c) in the case of a electronic communication- information is retained in electronic form by the insurer sufficient to enable identification of the following: • the origin and destination of the electronic communication	See above. Furthermore by way of good practice ASIC consider the provider must retain a copy of all versions of the disclosure (document) and use technology, where possible, to maintain records of when each version was available for at least 7 years or as required by law (see page 12 point 5 ASIC RG221).	We submit that adequate protection is provided under the ETA and ASIC RG221.

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	• the time when the electronic communication was sent and received and at the time of commencement of the retention of this information it was reasonable to expect this information would be readily accessible so be used in the future (See section 12 of ETA)		
The regulations may provide that a specified notice or other document that is by this Act required or permitted to be given must be given in hard copy form. (see 2007 Bill section 77(1E))	No relevant provisions.	No relevant provisions.	The ICA questions whether this is necessary. When a consumer has elected to receive notices electronically, it is unclear why it would be preferable to send certain documents in hard copy form. If a consumer prefers electronic communication, they would be unlikely to give a hard copy document greater attention.
A document or notice delivered electronically must not incorporate any image, message, advertisement or other feature that distracts, or is reasonably likely to distract, the recipient or otherwise reduces or interferes, or is reasonably likely to reduce or interfere, with the recipient's ability to understand the notice or document. (see Reg 34(1)(a) of the 2007 Draft Regulations)	No relevant provisions.	Under the Corporations Act, a PDS must be clear, concise and effective. ASIC RG168 dealing with PDSs states : *"(i)f product issuers want to include extraneous material in a PDS, they should consider the overriding requirement that the information in the PDS must be worded and presented in a clear, concise and effective manner.. to diminish…risks, we expect product issuers will consider methods to ensure that extraneous material in a PDS is: (a) clearly distinguishable from other information; and (b) no more prominent than other information*." (see ASIC RG 168.76 to 168.77) Furthermore, ASIC RG 221 states good practice in this area includes: • The disclosure (document) should be easy to read' • Insureds should also be able to clearly identify the disclosure (document); (see pages 11 to 13 ASIC RG221)	This goes to the issue of whether the notice requirement itself under the IC Act had been complied with. For example, if the notice under the IC Act required the insurer to "clearly inform" then placing it with information that distracts from the notice may mean the test of clearly inform is not met. Furthermore this issue is not exclusive to electronically communication. Even notices sent through the post could potentially include information that distracts from the notice. Furthermore, section 72 of the 2010 Bill provides for regulations, if necessary, to be made in relation to the; • content and legibility of the notice; and • the material than may accompany the notice.
The notice or other document must be presented in a way that clearly identifies the information that is part of the notice or document (see Reg 34(1)(b) of the 2007 Draft Regulations)	No relevant provisions.	See above	See above. We submit that adequate protection is provided under the ETA and ASIC RG221.
A document or notice must be presented in a way that would reasonably be expected to enable the	See above.	See above.	We submit that adequate protection is provided under the Bill. It s unlikely an electronic document that cannot be scrolled through would be considered effective disclosure. It should also be noted that hard copy notices cannot be scrolled

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recipient to readily be able to scroll through the whole of the notice or document. (See Reg 34(1)(c) of the 2007 Draft Regulations)			through.
A document or notice must show a full address (not a post office box) and a telephone number at which the insurer may be contacted. (See Reg 34(2) of the 2007 Draft Regulations)	No relevant provisions.	No relevant provisions.	We question why a consumer who has agreed to receive electronic communication would need a full address. It is likely that the insured has received an address and telephone number in the PDS and Policy booklet.
Time of Dispatch	Unless otherwise agreed between the insurer and the insured, the time of dispatch of the electronic communication is: (a) the time when the electronic communication leaves an information system under the control of the insured or of the party who sent it on behalf of the insured; or (b) if the electronic communication has not left an information system under the control of the insured or of the party who sent it on behalf of the insured--the time when the electronic communication is received by the insured. (see section 14 of the ETA)	No relevant provisions.	We submit that adequate protection already exists.
Time of Receipt	Unless otherwise agreed between the insurer and insured this is: a) where the electronic address is designated by the insured, the time when the electronic communication (notice) becomes capable of being retrieved by the insured at an electronic address designated by the insured b) where sent to another electronic address of the insured, the time when both: a) the electronic communication (notice) becomes capable of being retrieved by the insured, and b) the insured becomes aware that the electronic communication (notice) has been sent to that address. It is assumed an electronic communication is capable of being retrieved when it reached the insured's electronic address. (Section 14A of ETA)	No relevant provisions.	We submit that adequate protection already exists.
Place of Dispatch and Receipt	Unless otherwise agreed between the insurer and insured: Dispatch is taken to be at the insurer's place of business	No relevant provisions.	We submit that adequate protection already exists.

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	Receipt is taken to be in the case of a natural person that person's habitual residence. (There are separate rules for place of receipt by businesses to cover various scenarios) (Section 14B of ETA)		
Legal requirement to retain information (documents)	If the law requires the insurer to record information in writing, retain a written document or retain an electronic communication, the insurer can meet those requirements if it records/retains these in a electronic form subject to the following protections: a) in all cases – it was reasonable to expect at the time of recording/retaining the information that it would be readily accessible so be useable in the future b) in the case of a written document and electronic communication- the method of generating/retaining the electronic form of the document/retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the document/electronic communication c) in the case of a electronic communication- information is retained in electronic form by the insurer sufficient to enable identification of the following: • the origin and destination of the electronic communication • the time when the electronic communication was sent and received and at the time of commencement of the retention of this information it was reasonable to expect this information would be readily accessible so be used in the future. (see section 12 of ETA)	By way of good practice ASIC consider the provider must retain a copy of all versions of the disclosure (document) and use technology, where possible, to maintain records of when each version was available for at least 7 years or as required by law (page 12 point 5 ASIC RG221).	We submit that adequate protection already exists.
The electronic communication must have been sent with authority of the purported originator	Unless otherwise agreed between the insurer and insured, the purported originator is only bound by the communication if it was sent by them or with their authority. So if the insured sends the electronic communication, the insured is only bound by it if sent by them or with their authority and vice versa where the insurer is the sender. (see section 15 of the ETA)	No relevant provisions	We submit that adequate protection already exists.
Error in electronic communication in relation to the formation of the contract or performance of the contract	If a natural person makes an input error in an electronic communication exchanged with an automated message system of another party and that system does not provide the person an opportunity to correct the error, the natural person can withdraw the portion of the electronic communication in which the error was made if: • they notify of the error as soon as possible; and • they have not used or received any material benefit or	No relevant provisions.	We submit that adequate protection already exists.

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	value from the other party (see section 15A of ETA)		