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Dear Ms Calder

**Consultation Draft: Insurance Contracts Amendment Regulation 2012 (No. ), including  
Explanatory Statement and Key Facts Sheet (KFS) examples**

The Insurance Council of Australia (Insurance Council) is pleased to provide comments on the Insurance Contracts Amendment Regulation 2012 (No.) (proposed Regulation), setting out the requirements for the provision, structure, format and content of Home Contents and Home Building insurance KFSs.

In the short timeframe provided for public comment, the Insurance Council appreciated the consultative approach taken by Treasury including the discussion on 22 August 2012 with our members. This submission builds on this discussion and previous contributions including our submissions to *Reforming Flood Insurance: Clearing the Waters* Consultation Paper (16 May 2011), the *Insurance Contracts Act Amendment Bill* (18 January 2012) and the KFS Discussion Paper (30 March 2012).

**Attachment 1** details our concerns and recommends changes to the proposed Regulation to address a range of issues including:

- The importance of the KFS as a guide only and the need to avoid confusion and disputation;
- Industry difficulty in selecting a 'main' exclusion/condition and how to substantiate a choice having regard to the reasonable person test set out in the Explanatory Statement;
- The need for flexibility where the 'risk' terminology required on the KFS is not the same terminology used in a Product Disclosure Statement (PDS);
- An effective safe harbour provision for insurers for their choices, while allowing for effective recourse against an insurer for intentional or gross contravention, such as where there is a clear inconsistency between the KFS and PDS;
- The need to take into account situations where a consumer does not provide adequate information to receive a KFS, or satisfactory information for the insurer to rely on to demonstrate it has provided a KFS; and
- Removal of the obligation for a KFS for bundled contracts as it is overly costly and may only confuse a relevant purchaser.

**Attachment 2** provides an example of an alternative KFS model based on comments in Attachment 1.

We would welcome the opportunity to discuss the detail of our submission, including the wording of a reasonable safe harbour provision and the range of changes to the KFS suggested in Attachment 2.

We trust this submission will be of assistance to Treasury in finalising its proposed Regulation. Should you require any further information, please contact the Insurance Council's General Manager Policy – Regulation, Mr Anning on [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au) or (02) 9253 5121.

Yours sincerely



Robert Whelan  
Executive Director & CEO

**1. Requirement to choose main exclusion or condition may inadvertently create disputation**

An insurer must select an example of a 'main' condition/exclusion to be included in Step 2 of the KFS. The Explanatory Statement requires the relevant example to be *what a reasonable person would consider to be a main condition/exclusion*. The insurer is to give regard to, among other things, a consumer's understanding of the issues surrounding the risk to which the example is being provided. Furthermore, the footnote proposed for the table under Step 2 states "these examples are considered to be the main conditions/exclusions to which most consumers would generally consider to be the main conditions/exclusions."

It is not a simple exercise for insurers to decide a 'main' condition/exclusion for a KFS. Section 33C of the Insurance Contracts Act requires the insurer to provide the KFS in the manner prescribed by the Regulations, so the insurer will have the evidentiary burden of proving that it has met the content and provision requirements. It is foreseeable the use of the word 'main' in relation to an example exclusion/condition may expose insurers to inadvertent disputation with customers who mistakenly believe that there are no other important exclusions they need to be aware of, potentially leading to an increase in the matters to be considered by the Financial Ombudsman Service (FOS). The word 'main' is problematic because it is:

- a subjective concept dependent on individual circumstances and likely to shift between events and individuals. For example, an individual who does not have retaining walls or pools on their premises may not attach significant weight to exclusions/conditions dealing with these structures.
- important to recognise that industry considers each term, condition and exclusion that determines the nature and scope of cover to be relevant whereas it is understandable a consumer may consider the exclusion or condition which may adversely affect a particular claims outcome<sup>1</sup> to be the main example which should be outlined on a KFS.
- unclear how insurers would prove why they have chosen one condition or exclusion over another and, to meet the evidentiary onus, insurers predict they would need to undertake substantial assessment/research of consumer attitudes across Australia, which would be impractical and very costly for the volume of products our members offer.
- not ideal to look to claims or internal dispute resolution experience to determine conditions/exclusions given that consumers may not lodge a dispute where they recognise a matter is not covered by the policy. Additionally, referring to previous disputes would not necessarily be relevant to the majority of consumers who will have different interests in a policy.

It is not clear that where exclusions or conditions are listed in the KFS table, they should only relate to the specific risk listed and not be general exclusions or conditions that relate to all covers. It is important to only list exclusions or conditions that relate to the specific risk. This is because if general exclusions or conditions are listed next to specific risks consumers may erroneously believe that the general exclusion/condition only apply to the specific risk when in fact it applies to all covers. This possible misunderstanding could be critical at claims time.

*The Insurance Council submits:*

- *To emphasise the point that the KFS only outlines some exclusions/conditions/limitations, the word 'main' should be deleted and*
- *The footnote below the table in Step 2 under the table should be deleted or alternatively amended to read: "This KFS is a guide only. The examples provided are only some of the*

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<sup>1</sup> The Insurance Council notes that only a very small percentage of consumer claims are denied, with 98% of all claims accepted (Financial Ombudsman Service, Insurance Code of Practice Review 2010-11).

*many specific conditions /exclusions/limitations that may apply to the cover listed. You must read your PDS and policy documentation for all conditions/exclusions/limitations that apply under this policy.”*

The Insurance Council has also suggested some wording changes to the example KFS in Attachment 2 ‘Cover for Valuables, Collections and items away from the insured address’ to improve clarity around the concept of portable items.

See Attachment 2 for full details.

## **2. As the KFS is only a guide, the Regulation must provide a reasonable safe harbour provision**

The proposed Regulation requires an insurer to make a risky value judgement without sufficient safeguards for insurers’ choices against allegations of misleading and deceptive conduct, having regard to the obvious limitations of the KFS’s length and space.

While the KFS will clarify that other conditions and exclusions apply, the limited space available means that the insurer is unlikely to be able to disclose more than one or two conditions/exclusions (whether or not characterised as ‘main’) for each type of risk. Also if the space in column 3 of the table under Step 2 is used to explain other matters (see below) there will be even less space. Consequently, the KFS:

- has the potential to be perceived as misleading as consumers are unlikely to be aware of all relevant conditions and exclusions (including general policy exclusions and conditions) unless they also read the policy documentation; and
- not facilitate exact comparison as insurers are likely to choose different examples for insertion in their KFSs and the KFS does not seek to illustrate additional features or benefits.

*Given the above, the Insurance Council submits insurers should not be liable for choices of information they include in the KFS unless the insurer has intentionally misled or deceived the consumer or they have been grossly negligent. For example, an insurer states it covers flood when it does not. Insurers should also not be liable as a result of a consumer being misled by a compliant KFS. The Insurance Council is keen to discuss the wording of a safe harbour provision with Treasury.*

Furthermore, it is submitted information in the KFS should not be able to:

- be implied as terms into the insurance contract (particularly as the KFS is not itself an insurance contract) or;
- give rise to actions for breach of statutory duty.

## **3. ‘Partial’ cover**

The concept of ‘partial’ proposed in Step 2 of the KFS is ambiguous and the Insurance Council is concerned it has the potential to cause inadvertent disputation with future customers and an increased incidence of complaints to FOS. Partial could mean a variety of things such as:

- monetary limit (either because the customer will be underinsured or because cover for a particular risk is only offered up to a particular sum);
- certain items are covered (cover loss or damage caused by storm and flood but not if the loss or damage is to retaining walls);
- certain exclusions or conditions apply;
- cover only applies for a limited period (eg up to 12 months alternative accommodation).

The ‘risk’ covered may not dictate the monetary limit. This is particularly the case with contents policies where limits may apply on cover for certain items (e.g. jewellery) regardless of the ‘risk’

covered and optional cover may be available to increase cover for such items. It would be difficult to explain this given the limited space offered by a KFS.

*The Insurance Council therefore submits the proposed Regulation should delete the requirement for the KFS to contain the word 'partial'. Instead, the heading for the condition/exclusion column could be amended to include the concept of monetary limits by inserting the word 'limitations' as suggested in the discussion above:*

*"Some examples of specific conditions/exclusions/limitations that apply to the cover (see PDS and policy documentation for full details)." The proposed Regulation should make it clear that the selection of 'yes' means substantially covered in relation to a risk/cover even though there may be conditions/exclusions/limitations disclosed in column 3 of Step 2.*

**4. Describing the risks differently to the way they are described in the PDS may be confusing to a consumer and result in increased costs for insurers**

The Explanatory Statement provides that the KFS "will reduce consumer confusion regarding what is and is not included in insurance contracts and provide consumers with a mechanism to easily compare the key aspects of insurance contracts." However, describing the 'risks' differently in Step 2 of the KFS to the way they are described in the PDS may be confusing because the customer will not be able to cross reference easily to the PDS.

*Rather than require insurers to apply to ASIC for individual relief where an insurer does not use the precise terminology prescribed in its PDS, it is submitted the Regulation should provide for flexibility to allow a brief explanation in column 3 of the table under Step 2 where the risk is described differently in a PDS or under a different 'risk' heading so that the consumer is able to understand how the risk relates to the cover outlined in PDS.*

For example, if appropriate:

- where an insurer does not have the heading "Actions of the sea" but covers certain actions of the seas under another 'risk' heading such as 'tsunami following an earthquake' an insurer could state: "only covered- tsunami that happens as a result of an earthquake -see 'Earthquake' in the PDS".
- where an insurer does not have the heading "Accidental breakage" an insurer could state: "Covered breaks in certain items see 'Broken glass' in the PDS".

Failure to allow some flexibility in the proposed Regulation for differing terminology may result in insurers having to seek ASIC relief or change their PDSs to ensure comparability with the terminology of the KFS and avoid customer confusion as well as compliance issues. This could be a significant cost. However, we are concerned whether there will be sufficient room in column 3 of the table to cover off all the matters referred to in this submission where we have indicated the column could be used.

The Insurance Council also notes that two *risks* in the Home Building KFS table ("removal of debris" and "alternative accommodation") are not properly to be considered as risks, rather they are covers offered as a consequence of a risk occurring. *The Insurance Council submits for clarity the heading should be amended at the top of the column to add the word 'cover' next to "risk" [ ie risk/cover] and remove the heading "Covered?" from the second column.*

**5. Extension to other product types a significant cost imposed without demonstrated benefit**

In addition to home buildings and home contents insurance contracts, the proposed Regulation requires a KFS in relation to bundled contracts which contain a home and/or building component.

The Insurance Council understands that the home/building insurance components of bundled contracts are unlikely to prompt purchases in this category and the requirement for a KFS covering limited parts of the policy may be confusing for the customer as well as significantly costly for industry.

*Taking into account the likely significant cost and training impost that would be placed on industry from the requirement to provide a KFS in relation to the building and/or contents insurance components of bundled contracts, the Insurance Council submits that the KFS requirement in 4A(2)(c) should be deleted in full.*

#### **6. Delivery and electronic communication**

The proposed Regulation states “The insurer must provide the Key Facts Sheet as soon as reasonably practicable, but not later than 14 days, after the consumer first requests information about the contract” (4C(3)), subject to specified exceptions (4C(7)). The current proposal to provide the KFS as soon as reasonably practicable when a consumer indicates they are looking, to any extent, at a particular policy will mean that for every contact a KFS may be required. This is considerably more expensive than providing the KFS when a PDS is required as sought consistently by industry to:

- keep compliance costs to a minimum and
- enable the consumer to effectively cross reference from the KFS to the PDS.

While the proposed Regulation provides for electronic communication of the KFS, which will have cost savings, it does not provide for electronic communication in a technology neutral way (as provided for in other Acts such as the Privacy and Corporations Acts). While we support the option to use email, we submit the proposed Regulation must provide for delivery by technological neutral means, including email.

The proposed Regulations do not recognise circumstances where a consumer may be reluctant or may refuse to provide sufficient information to the insurer to prove any of the following:

- That a KFS was provided (e.g. a customer requests information at an insurer’s branch about a home policy, they are provided a KFS but they refuse to provide any personal details);
- That a KFS was not provided because the customer indicated they did not want one in accordance with the exception in the proposed Regulation (e.g. a customer was offered a KFS when requesting information about a home policy indicated they did not want a KFS but refuses to provide any details so this refusal can be recorded in the insurer’s records).

*The Insurance Council submits an insurer should not be subject to potentially committing an offence because an individual refuses to provide any or sufficient information that will enable the insurer to prove it in fact provided the KFS to the individual or indeed that it did not provide a KFS because the individual indicates they do not want one.*

In considering the practicalities of the requirements around providing a KFS, Treasury should also take into account legislative privacy obligations relating to the collection, such as:

- the need to provide a privacy statement;
- National Privacy Principle 8 relating to an individual’s option to not identify themselves when entering transactions with an organisation;
- the significant administrative burden on industry to keep information about individuals who are not (yet) a customer, with the same information being required to be kept (possibly about the same individual) across multiple insurers (given customers may shop around).

An alternative would be for the proposed Regulation to make it clear that it is open to an insurer to prove a KFS was provided by way of evidence other than that a particular customer was provided with the KFS. For example, evidence as to an insurer’s usual practice of providing a KFS when required by the Regulations and evidence as to training of relevant staff in relation to when a KFS is required to be given.

Further, if there is not to be alignment of the giving of the KFS to the current PDS requirements (as advocated by the Insurance Council) to lessen the burden on insurers, it would also be appropriate for the Regulation to provide a form of oral disclosure such as verbally referring a customer to a website to view the KFS where an individual is seeking a quote or making a general inquiry.

**7. Broker exception must be clear and the KFS must be able to be given by agents/distributors of the insurer**

The proposed Regulations do not make it clear as to whether a KFS will be required to be given where the insured engages a broker. Further, it is not clear how or if the principles outlined in section 71 of the Insurance Contracts Act are intended to apply to the KFS. Section 71 is built around the concept of an insurance contract, but the KFS is built around the concept of a request for information.

It is considered unnecessary to provide a KFS where an insured has engaged a broker and where provision of a KFS directly to a consumer may breach the contract between the broker and insurer.

*Further it is submitted that a KFS must be able to be given by an agent/distributor of the insurer and amount to compliance with the requirement to give a KFS.*

**8. Details of insurer and distributor**

The KFS does not provide for the brand or logo of an insurer's distributor to be provided. In order to reflect the various distribution methods used by industry, it is submitted the KFS should enable the distributor's logo to be inserted on the front page.

The name and AFSL of the issuer/underwriter of the product could then be included at the bottom of the second page. For example "This insurance is issued by ABC Insurance. AFSL (insert licence number)."

There is also a need to clarify in the proposed Regulation at *Step 4, If you want more information about this policy*, that the details of the insurer's agent/distributor may be provided where appropriate instead of the insurer's specific details.

**9. Types of insurance cover offered by insurer**

The Insurance Council re-iterates its previous submissions that the 'types' of insurance listed in Step 4 are not policy types but rather features of a policy type. In light of this, we submit:

- The heading under Step 4 "Types of Insurance cover offered by insurers" be changed to "Maximum level of cover for your [home/contents- insert as applicable]"
- The heading for Step 2 "Check the type of cover and risks covered" be replaced with "Check the maximum level of cover and risks covered".
- Under this heading the words "Under this policy [insert policy type]" should be replaced with "Maximum level of cover [insert details] (see Step 3 for an explanation)."

In addition, we submit the information presently under the heading "Types of insurance cover" in Step 4 would be more appropriately placed under Step 3 being information more in line with "Other things to consider" rather than part of "Seek[ing] more information".

It would also be appropriate to start each line under the heading with the short form description:

"Insurers offer different maximum levels of cover in the event of the loss or destruction of your contents including:

Sum insured - where you set the maximum level of cover and your payout is limited to that amount

Sum insured plus margin - where you set the maximum level of cover and the insurer may provide you with some agreed extra cover above that amount"

An insurer could then insert the short form description (eg "sum insured") next to "Maximum level of cover" in Step 2.

See Attachment 2 for details of all the above suggested changes.

There may also be situations where the insurer offers different maximum levels of cover as options (e.g. sum insured plus margin as an option). The proposed Regulation must clarify that the insurer could state “You can choose sum insured or sum insured plus margin.”

The proposed Regulation should also clarify what is intended by ‘sum insured plus margin’. For example, does margin mean a safety net in monetary percentage terms or does it include cover provided in addition to the sum insured, for example, mortgage discharge and temporary accommodation costs?

Finally, next to the requirement to list ‘policy type’, it is proposed that the insurer advise whether any amounts claimed include or exclude GST. As not all persons will have GST status and an ABN, to avoid unnecessary confusion, it is preferred that the references to GST are removed from the KFS.

#### **10. Step 3 Other things to consider**

The first heading “Limits” and the last heading “Limits and Exclusions in this policy” appear to be repeating information. It is suggested “Limits and Exclusions in this policy” could be moved to the top and change the heading to just “Limits and Exclusions” so the paragraph reads:

“Apart from the exclusions outlined in Step 2 above this policy contains other conditions and exclusions and limitations and terms that may limit or exclude cover. For more detail, please read the Product Disclosure Statement and other relevant policy documentation.”

See proposed [example at Attachment 2](#).

#### **11. Step 4 Seek more information**

The reference in the Home Building KFS to *contents* in paragraph 3 is an error. Also, as noted above, this step should allow an insurer to insert details of a representative where appropriate for more information on the policy.

#### **12. Date of the KFS**

The Explanatory Statement provides that the date of the KFS is “the date of the printing of the key facts sheet”. It is submitted that to avoid confusion as to the currency of a KFS (particularly where the KFS appears on the insurer’s website), the date of the KFS should be the date of its preparation (consistent with the requirement for dating a product disclosure statement under the Corporations Act 2001 (Cth)).

#### **13. Requirement to keep a copy of each KFS on the insurer’s website**

The proposed Regulation should be amended as it may be unclear which is the current KFS and which are historic KFS if all KFSs are required to remain on the website. Proposed Regulation 4C(6) should be amended to provide for a copy of each *current* Key Facts Sheet on the website, in a format that may be downloaded by members of the public.

#### **14. Where the consumer has already received a KFS**

Proposed Regulation 4C(7)(a) and (b) provide exceptions from the requirement to provide a KFS where the consumer has already received a KFS provided “the contract has not changed since then, other than any change to the date of the Key Facts Sheet”. It is considered that the exceptions should apply when there has been no change to the KFS, not when there has been no change to the contract, as each enquiry is likely to relate to a different contract (e.g. a further enquiry may be for a policy with a different commencement date or for a different property). It is submitted the proposed Regulation should be amended to state where the Key Facts Sheet has not changed, rather than referring to ‘the contract’.

#### **15. Font size**

Members have identified that the proposed Regulation at 4B(2)(c)(iv) requires all other wording, including sub-headings and footnotes to be in size 10 font, which is likely to be problematic for the look and spacing of the KFS.

**16. Commencement**

The proposed Regulation state that the Regulation will commence “2 years after the day on which it is registered”. However, the Explanatory Statement states the Regulation will commence “the day they are registered” and this must be amended.

**17. Significant cost imposts**

On the basis of the comments provided in this attachment, the proposed Regulation as currently drafted places a significant cost impost on insurers and therefore members advise that any costings previously provided are seriously under estimated and out of date.

# KEYFACTS ABOUT THIS HOME CONTENTS POLICY

Policy Name [insert policy specific information]

As at: [insert date of KFS preparation]

[Insert Insurance provider/distributor's logo]

THIS IS NOT AN INSURANCE CONTRACT

## STEP 1 Understanding the fact sheet

This Key Facts Sheet (KFS) sets out **some** risks covered and not covered by this policy and other information you should consider. It does not provide a complete statement of the cover offered, exclusions, conditions or limitations that apply under the policy. For full terms and conditions of your cover, you should carefully read the Product Disclosure Statement (**PDS**) and all relevant policy documentation for more details.

## STEP 2 Check the maximum level of cover and the risks covered

Maximum level of cover: [insert policy type.] See Step 3 for an explanation.

Cover/Risk		Some examples of specific conditions, exclusions, or limits that apply to the cover (see PDS and policy documentation for full details)*
Fire and Explosion	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Flood	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Storm	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Accidental breakage	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Earthquake	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Lightning	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Theft and Burglary	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Actions of the sea	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Malicious Damage	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Impacts	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Escape of liquid	Yes/No Optional	[insert policy specific condition/exclusion/limit]

Cover for valuables, collections and portable items (eg jewellery and watches)

High value items and collections	Yes/No Optional	[insert policy specific condition/exclusion/limit]
Portable items away from the insured address	Yes/No Optional	[insert policy specific condition/exclusion/limit]

\* This KFS is a guide only. The examples provided are only some of the many specific conditions /exclusions/limitations that may apply to the cover listed. You must read your PDS and policy documentation for all conditions /exclusions/limitations that apply to the cover under this policy.



## STEP 3 Other things to consider

### Limits and Exclusions

Apart from the conditions, exclusions and limits outlined in Step 2 above this policy contains other conditions, exclusions and limits that may limit or exclude cover.

For more detail, please read the PDS and other relevant policy documentation

### Excesses

Excesses [apply/do not apply] to this policy. You may be able to increase these excesses to lower your premium. For more detail, please read the PDS and other relevant policy documentation.

### Legal liability

This policy covers your legal liability when you are found to be legally responsible for damage or personal injury to a third party or their property. It is limited to [insert policy specific information]. You should read the PDS carefully to determine the extent of this cover.

### Cooling off period

If you decide you don't want this policy within [insert policy specific information] days of it being issued and you haven't made a claim, you can cancel it and receive a refund.

### Maximum level of cover for your contents

Insurers offer different maximum levels of cover in the event of the loss or destruction of your contents including:

- Sum insured - where you set the maximum level of cover and your payout is limited to that amount.
- Sum insured plus margin - where you set the maximum level of cover and the insurer may provide you with some agreed extra cover above that amount.

Failure to adequately insure your home may result in underinsurance.

## STEP 4 Seek more information

You should consider which type of cover is best for you.

Failure to adequately insure your contents for its replacement value may result in underinsurance.

If you want more information on this policy contact us on [insert specific details of insurer or insurance representative.]

For more information on choosing insurance and to better understand insurance visit the Australian Government website: [www.moneysmart.gov.au](http://www.moneysmart.gov.au)

Insurance issued by [insert underwriter's name]

AFSL No. [insert underwriter's licensee number]