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By email: ward.sutcliffe@treasury.gov.au

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Dear Mr Sutcliffe

**EXPOSURE DRAFT INSURANCE CONTRACTS AMENDMENT
REGULATION 2014 (NO. 1)**

The Insurance Council of Australia (Insurance Council) appreciates the opportunity to comment on the exposure draft of the *Insurance Contracts Amendment Regulation 2014 (No. 1)* (the draft regulations). We are grateful for the extension of time granted in making this submission.

The Insurance Council and its members are supportive of the draft regulations, which amend the prescribed duty of disclosure notices to give effect to the changes introduced by the *Insurance Contracts Amendment Act 2013* (the Amendment Act). As you will be aware, the Insurance Council had strongly encouraged the Government to enact the changes to clarify the duty of disclosure for consumers while also ensuring that insurers have reliable information to assess and price risk. We encourage the Government to give effect to the draft regulations as soon as practicable, given the certainty this provides industry that they will comply with the new rules.

We would like to take the opportunity to suggest some enhancements to the proposed duty of disclosure notices contained in the draft regulations.

Reasonable person in the circumstances test

We note that the prescribed form of wording in the proposed duty of disclosure notices does not include the two non-exclusive factors (inserted by the Amendment Act) to be taken into regard when determining whether a matter known to the insured is one that a reasonable person in the circumstances could be expected to know to be relevant. If insurers use the prescribed form of wording, they are protected from the requirement to disclose these factors in their section 22 notices. However, we note that insurers may not use the exact prescribed form of wording. Consequently, protection from possible legal challenge because of non-disclosure of the two factors would not be available.

The Insurance Council submits that Treasury should address this risk, however minimal, by specifying in the Explanatory Statement to the draft regulations that the two factors need not be disclosed in section 22 notices. This will help to avoid unnecessary disputes.

Use of existing or amended prescribed wording

Draft regulation 42 states that an insurer may continue to use the current prescribed form of wording or the new version for any contract entered into before 28 December 2015. This gives insurers that now use the current prescribed form of wording additional time to update their section 22 notices next year.

However, as noted previously, few if any insurers use the exact prescribed form of wording. To address this, we suggest that Treasury make a change to the regulation so that insurers can continue to use their existing duty of disclosure notices up until 28 December 2015, provided that at the time they prepared their existing notice it was compliant with section 22 of the *Insurance Contracts Act 1984* (the Insurance Contracts Act).

Eligible contracts of insurance

There is a further issue for eligible contracts of insurance that arises from draft regulation 42. Existing eligible contract notices, whether prescribed or otherwise, state that the client's renewal duty is under section 21.

Where this existing notice is given to customers who enter into a policy or renew from 28 December 2014, the notice will not accurately advise the client of their duty of disclosure at the time of renewal from or after 28 December 2015. This is because the obligations under section 21B are different than the section 21 obligations set out in the existing notice. As such, there is a risk that insurers using an old notice would be in technical breach of the misleading or deceptive provisions of the ASIC or Corporations Act. While we expect that ASIC would be unlikely to take action on these breaches, provided the updated duty is advised prior to the renewal after 28 December 2015, certainty on this point would be welcome.

The regulation could be amended to confirm that the issue of an old notice in the prescribed form or otherwise, will comply with section 22 and not be misleading or deceptive provided that on the next renewal which occurs on or after 28 December 2015 the insured is advised before or at that time of the relevant new obligation.

All contracts of insurance

The same issue does not seem to arise with respect to non eligible contracts of insurance where section 21 applies in all cases and where an eligible contract is entered into where there is a variation, extension or reinstatement.

Non eligible contract notices in their current form should not be misleading as the only changes to section 21 relate to:

- *Telling the customer the duty applies up until entry.* Not including this in the notice can reasonably be argued not to be misleading on the basis that the statement that it applies up until the next notification trigger can be provided prior to that time and nothing requires the duty of disclosure notice information to be in one form. Provided all the information is advised prior to the next trigger there should be no issue.
- *The non exclusive factors when considering what a reasonable person in the circumstances could be expected to know.* We do not believe there is an expectation for notices to be amended to reflect these two factors, as they are not included in the proposed prescribed form of wording.

However, the same amendments to the regulations, referred to above in relation to eligible contract notices, would provide certainty in this respect.

Proposed content of notices

Our suggested amendments to the proposed duty of disclosure notices are marked up in the **Attachment**.

Most of our suggested amendments seek to make the content more consumer-friendly and concise.

We note that, pertaining to circumstances where a client fails to meet their duty of disclosure due to innocent non-disclosure, an insurer has the right to reduce their liability under a contract and then cancel the contract. We suggest that the wording under the sub-headings “non-disclosure” should be amended accordingly.

In relation to the references to specific questions “...that are relevant to our decision whether to accept the risk of insurance, and if so, on what terms”, a member has suggested that the removal of the words in the quotation mark will make the notices more concise and consumer-friendly. We have not marked-up this suggestion in the Attachment, as not all members are of the view that such a change is required. However, we thought it was a view worth noting.

We suggest that the reference to “course of business” in Part 1 of Schedule 1 should read “course of our business as an insurer” to better reflect subsection 21 (2) (c) of the Insurance Contracts Act.

We note that consumers may be confused by the references to “applies until the contract is entered into” where it also applies in relation to renewals and other specified circumstances in the Insurance Contracts Act. Whilst technically accurate, it may be more “consumer friendly” to use a clearer form of words to avoid the need to check the Act for what else constitutes entry.

In relation to the reminder notices contained in Schedule 1B, we note that the references to “...this contract of insurance” suggests that there is a contract in place at the time the reminder notice is issued, which is not the case. We suggest that references to contract within this context should be removed accordingly.

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

SUGGESTED CHANGES TO PRESCRIBED DUTY OF DISCLOSURE NOTICES

Schedule 1—Writing to inform of duty of disclosure

Note: See subregulation 3(1).

Part 1—Contracts of general insurance, other than eligible contracts

Your duty of disclosure

Before you enter into ~~an eligible~~[this](#) contract of general insurance with us, you have a duty, under the *Insurance Contracts Act 1984*, to disclose to us every matter that you know, or could reasonably be expected to know, is relevant to our decision whether to accept the risk of the insurance and, if so, on what terms.

~~This duty of disclosure applies until the contract is entered into.~~

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

[This duty of disclosure applies until the contract is entered into \(or renewed, extended, varied or reinstated as applicable\).](#)

Your duty however does not require disclosure of [any](#) matter:

- that diminishes the risk to be undertaken by us; or
- that is of common knowledge; or
- that we know or, in the ordinary course of [our](#) business [as an insurer](#), ought to know; or
- as to which compliance with your duty is waived by us.

Non-disclosure

If you fail to comply with your duty of disclosure, we may be entitled to reduce our liability under the contract in respect of a claim ~~or may~~, cancel the contract, [or both](#).

If your non-disclosure is fraudulent, we may also have the option of avoiding the contract from its beginning.

Part 3—Eligible contracts of insurance – [New business](#)

Your duty of disclosure

Before you enter into ~~an eligible~~[this](#) contract of [general](#) insurance with us, you have a duty of disclosure under the *Insurance Contracts Act 1984* [that applies until the contract is entered into](#).

~~If we ask you~~[When answering our](#) specific questions that are relevant to our decision whether to accept the risk of the insurance and, if so, on what terms, you must [be honest and](#) disclose to us anything that you know and that a reasonable person in the circumstances would include in answer to the questions.

[It is important that you understand you are answering our questions in this way for yourself and anyone else whom you want to be covered by the contract.](#)

~~This duty of disclosure applies until the contract is entered into.~~

Non-disclosure

If you fail to comply with your duty of disclosure, we may be entitled to reduce our liability under the contract in respect of a claim ~~or may~~, cancel the contract, ~~or both~~.

If your non-disclosure is fraudulent, we may also have the option of avoiding the contract from its beginning.

Part 4—Renewal of eligible contracts of insurance

Your duty of disclosure

Before you renew this contract of insurance with us, you have a duty of disclosure under the *Insurance Contracts Act 1984* that applies until the contract is renewed.

If we ask you specific questions that are relevant to our decision whether to accept the risk of the insurance and, if so, on what terms, you must be honest and disclose to us anything that you know and that a reasonable person in the circumstances would include in answer to the questions.

It is important that you understand you are answering our questions in this way for yourself and anyone else whom you want to be covered by the contract.

~~Also, w~~We may give you a copy or restatement of any matter you have previously told us and ask you to tell us about any change to the matter or to tell us if there is no change to the matter. If we do this, you must disclose to us any change to the matter or inform us that there is no change to the matter.

If you do not disclose to us a change to a matter you have previously disclosed, you will be taken to have informed us that there is no change to the matter.

~~This duty of disclosure applies until the contract is renewed.~~

Non-disclosure

If you fail to comply with your duty of disclosure, we may be entitled to reduce our liability under the contract in respect of a claim ~~or may~~, cancel the contract, ~~or both~~.

If your non-disclosure is fraudulent, we may also have the option of avoiding the contract from its beginning.

Schedule 1B—Writing to remind of duty of disclosure

Note: See regulation 3A.

Part 1—Contracts of general insurance

Reminder—your duty of disclosure

You have previously been given a notice informing you of your duty of disclosure in relation to this contract of general insurance.

This is a duty to disclose to us every matter that you know, or could reasonably be expected to know, is relevant to our decision whether to accept the risk of the insurance and, if so, on what terms.

This duty of disclosure ~~continues applies~~ until the contract is entered into (or renewed, extended, varied or reinstated as applicable).

If your non-disclosure is fraudulent, we may also have the option of avoiding the contract from its beginning.

Part 3—Eligible contracts of insurance

Reminder—your duty of disclosure

You have previously been given a notice informing you of your duty of disclosure in relation to ~~an eligible this contract of~~ insurance.

This is a duty to disclose to us, in response to our questions, every matter that you know, and that a reasonable person in the circumstances would include in answer to the questions.

This duty of disclosure ~~continues applies~~ until the contract is entered into.

Schedule 2—Words to inform of duty of disclosure for eligible contracts of insurance

Note: See subregulation 3(2).

~~Before you enter into an eligible contract of insurance with us, y~~You have a duty of disclosure under the Insurance Contracts Act 1984 to us that applies until this insurance policy is entered into, renewed, extended, varied or reinstated as applicable.

~~We may ask you specific questions that are relevant to our decision whether to accept the risk of the insurance and, if so, on what terms. If we do~~When answering our questions, you must tell us anything that you know and that a reasonable person in the circumstances would include in their answer. It is important that you understand you are answering the questions for yourself and anyone else to whom the question applies.

~~This duty applies until the contract is entered into.~~

~~We may reduce or refuse to pay a claim and cancel the policy, if you have not answered our questions in this way.~~

~~If you fail to comply, we may be entitled to reduce our liability under the contract in respect of a claim or we may cancel the contract.~~

~~If your non-disclosure is fraudulent, we may also have the option of avoiding the contract from its beginning.~~
