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Dear Mr Kelly

FACILITATING ELECTRONIC DISCLOSURE IN THE INSURANCE SECTOR

The Insurance Council of Australia (the **Insurance Council**) would like to engage with The Treasury on financial services law reform to enable mandated disclosures to be made by insurers electronically. Technological advances provide the opportunity to consider innovative, and potentially better, ways of making financial product disclosures. However, requirements in the *Insurance Contracts Act 1984* (the **IC Act**) are constraining widespread adoption of electronic and innovative forms of digital disclosure in the insurance industry. In particular, due to the requirement to “give” relevant information and notices, hard copy disclosure remains the default method of disclosure.

As you will be aware, the Insurance Council has taken a leadership role in enhancing the effectiveness of disclosure to ensure that consumers are able to make informed decisions regarding their insurance needs. In 2015, the Insurance Council established an independent Effective Disclosure Taskforce, which made 16 recommendations to enhance the role of disclosure in consumer decision-making. The Taskforce recognised the potential for more targeted and engaging disclosure to be facilitated through digital innovation. Within this context, the Taskforce recommended that the Insurance Council should engage with the Government on law reform to enable electronic communication as the default method of providing insurance product disclosure.

Recognising the benefits to consumers of electronic disclosure, in July 2015, ASIC issued revised guidance and issued relief to remove barriers to electronic disclosure in the *Corporations Act 2001* (the **Corporations Act**). One of the key changes made by ASIC was to enable a product issuer to provide a disclosure document electronically without the need to seek a client’s consent. ASIC has also implemented relief to allow disclosure using any digital method to be made by notifying the client that the disclosure is available.

Unfortunately, insurers cannot rely on the relief and guidance provided by ASIC as it is confined to requirements under the Corporations Act. The disclosure requirements for insurance are not only set out in the Corporations Act, but also the IC Act. We understand that it was not ASIC’s intent to limit the scope of the proposals in relation to insurers; rather,

ASIC is not similarly empowered to provide relief under the IC Act as it is under the Corporations Act. Nevertheless, there is no compelling policy reason for there to be a different regulatory approach to electronic disclosure for insurers relative to other providers of financial services.

In our attached submission, the Insurance Council sets out the required law reform to enable insurers to take advantage of ASIC's 2015 guidance and relief, consistent with other financial services product disclosure requirements. We recommend changes to the IC Act so that the disclosure obligations under the IC Act are consistent with the disclosure obligations for PDSs under the Corporations Act.

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 (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO

FACILITATING ELECTRONIC DISCLOSURE IN THE INSURANCE SECTOR: ISSUES AND PROPOSED LAW REFORM

1. Introduction and Overview

Technological advances provide the opportunity to consider innovative, and potentially better, ways of making financial product disclosures. However, requirements in the *Insurance Contracts Act 1984* (the **IC Act**) are constraining widespread adoption of electronic and innovative forms of digital disclosure in the general insurance industry¹.

In recent years, the Government and the Australian Securities and Investments Commission (**ASIC**) have recognised the potential for electronic disclosure to better meet consumer needs. Since 2010, there have been a number of changes to the disclosure regime to facilitate the provision of documents electronically. The 2013 amendments² to the IC Act, together with ASIC Class Order 10/1219, have largely removed the legal impediments to the delivery of disclosure electronically. However, due to the requirement to “give” relevant information and notices, hard copy disclosure remains the default method of disclosure.

While ASIC implemented substantial measures in July 2015 to facilitate electronic disclosure³, the regulatory relief provided was confined to the *Corporations Act 2001* (the **Corporations Act**) as ASIC does not have similar powers to provide relief under the IC Act. This has resulted in regulatory inconsistency between the Corporations Act and IC Act as it relates to disclosure.

In its Consultation Paper (**CP**) 224 on facilitating electronic disclosure, ASIC noted that electronic disclosure has the potential to enable the presentation of information in ways that are more engaging and informative for consumers. Electronic disclosure also has the additional benefit of enabling delivery of information to consumers in faster and more convenient ways. ASIC estimated that the measures it implemented in 2015 to facilitate electronic disclosure represents a cost saving of \$9,205,602 for consumers; factoring in the reduced time needed for opting in to digital disclosure and reduced costs of storage⁴.

The Insurance Council’s Effective Disclosure Taskforce considered that while the Product Disclosure Statement (**PDS**) is comprehensive in its coverage, there is potential for more strategic engagement with consumers about select information when purchasing a product. Electronic forms of disclosure have the potential to enable insurers to better target information that is relevant to a consumer at specific points of the product life cycle.

¹ Substantially the same issues also arise in relation to electronic disclosure for the life insurance industry in Australia. However, as this paper has been prepared by the Insurance Council of Australia, any issues specific to the life insurance industry have not been addressed.

² Insurance Contracts Amendment Act 2013.

³ Revised Regulatory Guide 221 *Facilitating digital financial services disclosures*; ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647; and ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649.

⁴ ASIC (July 2015), *Facilitating digital financial services disclosures*, Regulation Impact Statement.

There will also be significant cost savings for the industry by removing legislative barriers to electronic disclosure. ASIC noted that legislative barriers to electronic disclosure create market inefficiency, in the form of additional transaction costs for providers⁵. As the legislative settings favour printed disclosure formats and posted delivery, this creates unnecessary printing and mailing costs for insurers. The recent changes, effective from January 2016, made by Australia Post to increase the cost of postage and lengthen the time of delivery further illustrate the inefficiencies of the current legislative barriers to electronic disclosure.

We propose amendments to the IC Act to facilitate electronic disclosure of information and notices (Notices) under the IC Act, so that the disclosure obligations under the IC Act are consistent with the disclosure obligations for PDSs under the Corporations Act. In addition, we propose amendments to the IC Act to give ASIC power to provide relief in relation to the IC Act's disclosure obligations, similar to ASIC's power of relief in relation to disclosure obligations under the Corporations Act. This would enable ASIC to grant relief to better facilitate the practical issues with respect to disclosure including, but not limited to, relief identical to that granted under the Corporations Act if required.

The reform proposed will be consistent with the Government's red-tape reduction and digital economy policies. The reform will also be an opportunity for the Government to demonstrate its commitment to the Financial System Inquiry (FSI) recommendations that it has accepted; including to remove regulatory impediments to innovative product disclosure (recommendation 23), and to amend priority areas of regulation to be technology neutral (recommendation 39).

Our submission sets out the current disclosure obligations for insurers; the legislative barriers to electronic disclosure; and our recommended reform of the IC Act.

2. Current Disclosure Requirements and ASIC Relief

Currently, the requirements in three sets of legislation must be met in order for general insurers to be compliant with their disclosure obligations:

- i) the Corporations Act;
- ii) the IC Act; and
- iii) *Electronic Transactions Act 1999* (the **ET Act**).

Chapter 7 of the Corporations Act sets out a tailored disclosure regime for general insurance; it differs from that of other financial products by allowing the policy terms and conditions to be combined with the PDS and removes the need to disclose information required of other products.

Under the Corporations Act, modified by *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647*, a PDS:

- (a) must be given in one of the following ways:

⁵ ASIC (July 2015), *Facilitating digital financial services disclosures*, Regulation Impact Statement.

- (i) given to the client, or the client's agent, personally (section 1015C(1)(a)(i) of the Corporations Act); or
 - (ii) sent to the client, or the client's agent, at an address (including an electronic address) or fax number nominated by the client or the client's agent (section 1015C(1)(a)(ii) of the Corporations Act); or
 - (iii) otherwise made available to the client, or the client's agent, in a manner agreed between the client, or the client's agent, and the providing entity, and which allows the providing entity to be satisfied, on reasonable grounds, that the client or their agent (as relevant) has received it (section 1015C(4) of the Corporations Act and regulation 7.9.02A); or
 - (iv) made available to the client, or the client's agent, by a "nominated electronic means"⁶ (section 1015C(4) of the Corporations Act and ASIC Legislative Instrument 15-647); and
- (b) may be in printed or electronic form (section 1015C(1)(b) of the Corporations Act). If a PDS is given in electronic form, it 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 (regulation 7.9.02B(1)).

Importantly, option (a)(iv) above was made possible by ASIC in July 2015 following consultation on measures to facilitate electronic disclosure. This method of disclosure enables a PDS to be "made available" on a website or other electronic facility, provided clients are notified (e.g. via a link or a referral to a web address or app) that the disclosure is available. As part of these measures, ASIC also clarified in Regulatory Guide (RG) 221 *Facilitating digital financial services disclosures* that if a financial services provider has an email address for a client, they do not need further consent to use that address to deliver disclosures electronically.

However, the tailored disclosure regime for general insurance also requires PDSs to include disclosures mandated under sections 35 and 37 of the IC Act (i.e. disclosure of non-standard and unusual terms). In practice, general insurance PDSs also include other important disclosures required under the IC Act; the full range of Notices required under the IC Act is set out in the Annex. While section 72A of the IC Act enables electronic communications to be made, such communications must be made in accordance with the ET Act.

These disclosures fall outside of permissible disclosure conduct as expressed in RG 221 and Legislative Instrument 15-647. Although ASIC administers the IC Act, it does not have the power under that Act to grant relief to better facilitate electronic disclosure, as it does under the Corporations Act.

3. Barriers to Electronic Disclosure

For disclosures mandated by the IC Act (where electronic disclosures must be made in accordance with the ET Act), there remain a number of barriers to electronic disclosure:

⁶ Section 5(1) of ASIC Legislative Instrument 15-647 sets out the criteria that must be satisfied for "a document, information, statement or notification" to validly be made available by a "nominated electronic means".

- i) the need to obtain client consent – what constitutes consent to provide documents electronically under the ET Act is unclear and has practical difficulties;
- ii) the option to make a PDS available on websites or other electronic facility may not be available to insurers – IC Act Notices must actually be given to a person, not just “made available”; and
- iii) the additional requirements imposed by the IC Act that the insurer “clearly inform” the insured in writing for some Notices – this creates uncertainty about whether the provision of a PDS by post, email or other electronic means would meet this requirement in the absence of express provisions to that effect.

Each of these issues are outlined in more detail below.

3.1. Consent to Receive Electronic Disclosure

As a result of amendments to the *Electronic Transactions Regulations 2000*, which came into effect on 28 December 2013, Notices under the IC Act can be sent to a person by email in accordance with the ET Act. However, section 9(2)(d) of the ET Act requires that “the person to whom the information is required to be given consents to the information being given by way of electronic communication”.

The ET Act defines “consent” to include “consent that can reasonably be inferred from the conduct of the person concerned”. Whilst this definition of consent is not exhaustive, it would seem to revert to a dictionary definition at a minimum. By way of example, the Butterworth’s Concise Australian Legal Dictionary defines “consent” as “affirmative acceptance, not merely a standing by and absence of objection.”

Insurers cannot rely on ASIC guidance that express consent is not required if an email address has been provided; at least for disclosure of Notices in PDSs that pertain to IC Act requirements. In practice, insurers would not be able to rely on ASIC guidance for the provision of the whole PDS.

ASIC has helpfully indicated to the Insurance Council its intention to administer the obligations to provide information under the IC Act in a way consistent with the principles in RG 221. Nevertheless, the industry requires legislative certainty to ensure that court and external dispute resolution outcomes are consistent with ASIC’s intent.

3.2. The Provision of PDSs on Websites or other Electronic Facilities

The IC Act requires prescribed Notices to be given in writing and when read in conjunction with the ET Act, arguably requires Notices under the IC Act to actually be given “in writing” where reasonably practicable, not just made available.

Sections 9(1) and (2) of the ET Act relevantly provide that information that must or may be given “in writing” may be given:

... by means of an electronic communication where ...

- (a) *... at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference... [and]*

(d) ... *the person to whom the information is permitted to be given consents to the information being given by way of electronic communication.*

Arguably, a hyperlink to a website or equivalent site that sets out the Notice under the IC Act, which is continually maintained, meets the requirements of sections 9(1)(a) and 9(2)(a).

However, there is uncertainty with this approach given the definition of “electronic communication” in section 5 of the ET Act, particularly when read in conjunction with section 14A(1) of that Act:

- (a) section 5 relevantly defines “electronic communication” to mean “**a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy**” [our emphasis]; and
- (b) section 14A(1) relevantly provides that “*the time of receipt of [an] electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at **an electronic address designated by the addressee***” [our emphasis].

In a recent decision of the Queensland Supreme Court (*Conveyor & General Engineering Pty Ltd v. Basetec Services Pty Ltd & Anor* [2014] QSC 30)⁷, Justice McMurdo considered almost identical provisions in the *Electronic Transactions (Queensland) Act 2001* (Qld) in relation to the use of a Dropbox link, which operates in a similar way to a website link. Justice McMurdo concluded that the material within the Dropbox was not part of an “electronic communication” (as defined) and it could not be said that the Dropbox was “an electronic address designated by the addressee”. In particular, he noted at para [28]:

...the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated “by guided or unguided electromagnetic energy.” Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website.

The issue outlined above potentially applies to all Notices under the IC Act, which are required to be “**given** in writing” (i.e. all Notices under the IC Act, with the exception of the Key Facts Sheet (**KFS**)). A similar issue arises in relation to the KFS, as section 33C(1) of the IC Act requires a KFS to be “provided”, and there is no provision to simply make a KFS available, whether by electronic means or otherwise.

In addition, the plain meaning of “given” in the Macquarie dictionary includes “to deliver freely; bestow; hand over”. It is arguable that this means that delivery of the required information only occurs once the consumer clicks the hyperlink and accesses the relevant information.

We understand that ASIC would not have concerns about insurers relying on RG 221 and Legislative Instrument 15-147 if it were possible under the IC Act, so that an insurer can simply make IC Act Notices available by electronic means.

⁷ Available at http://www.queenslandreports.com.au/docs/db_keydecisions/QSC14-030.pdf

However, we believe that under the current legislation it is likely that based on its guidance the Financial Ombudsman Service (**FOS**) could take a restrictive interpretation of the IC Act. The Courts could also take this view. There is a real risk that a client who receives the hyperlink could successfully argue that they were not given the IC Act Notice in writing; for example, because they were not able to access the data or files attached to an email or through a hyperlink (due to data corruption, system failure or software issues). As a consequence, an insurer may not be able to rely on the remedies for non-disclosure or misrepresentation, or on non-standard or unusual policy terms. This could have significant, adverse implications for the administration of policies and the payment of claims.

Presently there is no FOS guidance to reduce the risk of this interpretation for insurers. The removal of uncertainty by way of legislative clarity would facilitate electronic disclosure.

3.3. *Additional IC Act “Clearly Inform” Requirements*

The IC Act imposes an additional requirement that the insurer “clearly inform” the insured in writing in relation to some Notices under the IC Act. There is some uncertainty about whether the provision of these Notices by email or other electronic means, would meet this requirement, in the absence of express provisions to that effect. The relevant sections are:

- (a) section 21B – information about the duty of disclosure before renewing an eligible contract of insurance, which only applied during the “transition period”, which ended on 28 December 2015;
- (b) section 22 – information about the duty of disclosure before entering into a contract of insurance;
- (c) section 35 - information about provisions of a prescribed contract that differ from the standard cover provisions, *“whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise”*;
- (d) section 37 - information about unusual provisions, *“whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise”*;
- (e) section 37C – information about whether a prescribed contract covers flood;
- (f) section 39 - information about provisions of instalment contracts of general insurance that limit the liability of the insurer due to non-payment of premium;
- (g) section 40 - information about notification provisions under contracts of liability insurance;
- (h) section 44 - information about average provisions under contracts of general insurance;
- (i) section 49 - information that insurance cover under a contract of general insurance does not extend to third party interests;
- (j) section 62 - information about cancellation of instalment contracts of general insurance; and
- (k) section 68 - information about contracts affecting rights of subrogation.

Currently, except in relation to sections 35 and 37, whether the provision of a PDS or policy wording containing these provisions would meet the requirement that the insurer “clearly inform” the insured in writing will depend on the circumstances on a case by case basis, including the design, format and wording of the PDS or policy wording, and how information in the PDS or policy wording is otherwise brought to the insured’s attention.

4. Proposed Amendments to the IC Act

Because some of the issues are specific to insurance, the simplest and most efficient solution to the above issues may be for the Federal Government to amend the IC Act so that:

- i) the disclosure obligations under the IC Act and Regulations are consistent with the disclosure obligations for PDSs under the Corporations Act, as modified by ASIC Legislative Instrument 15-647;
- ii) compliance with the new requirements would, where applicable to the relevant Notice, satisfy the obligation to clearly inform the customer about the content of the relevant Notice; and
- iii) ASIC has power to provide relief in relation to the IC Act disclosure obligations to provide practical facilitation of electronic disclosure, including, but not limited to relief the same or similar to that in relation to disclosure obligations under the Corporations Act. This would enable ASIC to grant relief in relation to the need to seek express client consent for sending a PDS to a client by email.

In relation to (i) above, the amendments to the IC Act and Regulations should be consistent with the disclosure obligations under the Corporations Act except to the extent that other changes are required for issues specific to insurance, e.g. matters relating to what constitutes clearly informing customers of the content of the relevant Notice.

In relation to (iii) above, addressing the consent issue by way of ASIC relief in the IC Act is the simplest option. However, we note that separate relief instruments operating under the Corporations Act and IC Act creates the risk of inconsistency over time, and potentially different rules for the same customer purchasing different products from a diversified financial services provider. We would welcome further consideration of an alternative approach that would permit consent to be given to a customer which would thereafter apply to all products offered by that financial services provider. Regardless of this specific issue, our recommendation is that ASIC should be empowered to provide relief in relation to the IC Act disclosure obligations, which would provide ASIC with flexibility in facilitating innovative product disclosure.

ANNEXURE: NOTICES UNDER THE INSURANCE CONTRACTS ACT

The *Insurance Contracts Act 1984* states that an insurer shall or may provide the following information, notices and statements “in writing”, including in respect of contracts of general insurance and contracts of life insurance. Relevant provisions are shown in **bold** text.

1. Information about the duty of disclosure before renewing an eligible contract of insurance

Section 21B relevantly provides:

- (1) *This section applies in relation to the renewal of an eligible contract of insurance after the commencement of this section (regardless of when the contract was originally entered into).*
- (2) *However, this section does not apply in relation to the renewal of an eligible contract of insurance during the transition period [ie the period from 28 June 2013 to 28 December 2015] unless, before the contract is renewed, the insurer has **clearly informed the insured in writing** of the general nature and effect of this section...*

Note: Before the contract is renewed, the insurer must also clearly inform the insured in writing of the general nature and effect of the duty of disclosure (see section 22).

2. Information about the duty of disclosure before entering into a contract of insurance

Section 22 relevantly provides:

- (1) *The insurer must, before a contract of insurance is entered into, **clearly inform the insured in writing**:*
 - (a) *of the general nature and effect of the duty of disclosure; and*
 - (b) *if section 21A or 21B applies to the contract—of the general nature and effect of that section; and*
 - (c) *if the contract is a contract of life insurance—of the effect of section 31A; and*
 - (d) *that the duty of disclosure applies until the proposed contract is entered into.*
- (2) *If the proposed contract is a contract of life insurance, the insurer must also, before the contract is entered into, **clearly inform, in writing, any person (other than the insured) who, under the contract, would become a life insured** of the matters referred to in subsection (1)...*

3. Notices varying a contract of life insurance for non-disclosure or misrepresentation

Section 29 provides:

- (1) *This section applies where the person who became the insured under a contract of life insurance upon the contract being entered into:*
 - (a) *failed to comply with the duty of disclosure; or*

(b) made a misrepresentation to the insurer before the contract was entered into;
but does not apply where:

- (c) the insurer would have entered into the contract even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into; or
- (d) the failure or misrepresentation was in respect of the date of birth of one or more of the life insureds.

Note: If subsection 27A(1), (3) or (4) applies to the contract of life insurance, different remedies may be available to the insurer in respect of each separate contract of life insurance that is taken to exist by virtue of the relevant subsection.

Insurer may avoid contract

- (2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.
- (3) If the failure was not fraudulent or the misrepresentation was not made fraudulently, the insurer may, within 3 years after the contract was entered into, avoid the contract.

Insurer may vary contract

- (4) If the insurer has not avoided the contract, whether under subsection (2) or (3) or otherwise, the insurer may, **by notice in writing given to the insured**, vary the contract by substituting for the sum insured (including any bonuses) a sum that is not less than the sum ascertained in accordance with the formula

$$\frac{SP}{Q}$$

where:

S is the number of dollars that is equal to the sum insured (including any bonuses).

P is the number of dollars that is equal to the premium that has, or to the sum of the premiums that have, become payable under the contract; and

Q is the number of dollars that is equal to the premium, or to the sum of the premiums, that the insurer would have been likely to have charged if the duty of disclosure had been complied with or the misrepresentation had not been made.

Note: This subsection applies differently in relation to a contract with a surrender value, or a contract that provides insurance cover in respect of the death of a life insured (see subsection (10)).

- (5) In the application of subsection (4) in relation to a contract that provides for periodic payments, **the sum insured** means each such payment (including any bonuses).
- (6) If the insurer has not avoided the contract or has not varied the contract under subsection (4), the insurer may, **by notice in writing given to the insured**, vary the contract in such a way as to place the insurer in the position (subject to subsection (7)) in which the insurer would have been if the duty of disclosure had been complied with or the misrepresentation had not been made.

Note: This subsection does not apply in relation to a contract with a surrender value, or a contract that provides insurance cover in respect of the death of a life insured (see subsection (10)).

- (7) *The position of the insurer under a contract (the **relevant contract**) that is varied under subsection (6) must not be inconsistent with the position in which other reasonable and prudent insurers would have been if:*
- (a) *they had entered into similar contracts of life insurance to the relevant contract; and*
 - (b) *there had been no failure to comply with the duty of disclosure, and no misrepresentation, by the insureds under the similar contracts before they were entered into.*
- (8) *For the purposes of subsection (7), a contract of life insurance (the **similar contract**) is similar to another contract of life insurance (the **relevant contract**) if:*
- (a) *the similar contract provides insurance cover that is the same as, or similar to, the kind of insurance cover provided by the relevant contract; and*
 - (b) *the similar contract was entered into at, or close to, the time the relevant contract was entered into.*

Date of effect of variation of contract

- (9) *A variation of a contract under subsection (4) or (6) has effect from the time when the contract was entered into.*

Exception for contracts with a surrender value or that provide cover on death

- (10) *If the contract is a contract with a surrender value, or a contract that provides insurance cover in respect of the death of a life insured:*
- (a) *the insurer may vary the contract under subsection (4) before the expiration of 3 years after the contract was entered into, but not after that period; and*
 - (b) *subsections (6), (7) and (8) do not apply in relation to the contract.*

4. Key Facts Sheet for prescribed contracts

Section 33C relevantly provides:

- (1) *An insurer must **provide** a Key Facts Sheet for a prescribed contract, or a potential prescribed contract, in the circumstances, and in the manner, prescribed by the regulations...*

Regulation 4C then relevantly provides:

- (3) *The insurer **may provide** the Key Facts Sheet **by electronic means at the consumer's request.***

5. Information about provisions of a prescribed contract that differ from the standard cover provisions

Section 35 provides:

- (1) *Where:*
- (a) *a claim is made under a prescribed contract; and*

(b) the event the happening of which gave rise to the claim is a prescribed event in relation to the contract;

the insurer may not refuse to pay an amount equal to the minimum amount in relation to the claim by reason only that the effect of the contract, but for this subsection, would be that the event the happening of which gave rise to the claim was an event in respect of which:

(c) the amount of the insurance cover provided by the contract was less than the minimum amount; or

(d) insurance cover was not provided by the contract.

*(2) Subsection (1) does not have effect where the insurer proves that, before the contract was entered into, the insurer **clearly informed the insured in writing (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise)** or the insured knew, or a reasonable person in the circumstances could be expected to have known:*

(a) where the effect of the contract, but for subsection (1), would be that the liability of the insurer in respect of a claim arising upon the happening of the event would be less than the minimum amount—what the extent of the insurer’s liability under the contract in respect of such a claim would be; or

(b) where the effect of the contract, but for subsection (1), would be that the insurer would be under no liability in respect of such a claim—that the contract would not provide insurance cover in respect of the happening of that event.

(3) Regulations made for the purposes of this section take effect at the expiration of 60 days after the day on which they are notified in the Gazette.

(4) Where regulations made for the purposes of this section are amended after the day on which a particular contract of insurance is entered into, the amendments shall be disregarded in relation to the application of subsection (1) to that contract.

6. Information about unusual provisions

Section 37 provides:

*An insurer may not rely on a provision included in a contract of insurance (not being a prescribed contract) of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer **clearly informed the insured in writing** of the effect of the provision (**whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise**).*

7. Information about whether a prescribed contract covers flood

Section 37C provides:

*Before entering into a prescribed contract, the insurer must **clearly inform the insured in writing** whether the contract provides insurance cover in respect of loss or damage caused by, or resulting from, flood as defined by the regulations.*

8. Information about provisions of instalment contracts of general insurance that limit the liability of the insurer due to non-payment of premium

Section 39 provides:

Where a provision included in an instalment contract of general insurance has the effect of limiting the liability of the insurer by reference to non-payment of an instalment of the premium, the insurer may not refuse to pay a claim, in whole or in part, by reason only of the operation of that provision unless:

- (a) at least one instalment of the premium has remained unpaid for a period of at least 14 days; and*
- (b) before the contract was entered into, the insurer **clearly informed the insured, in writing**, of the effect of the provision.*

9. Information about notification provisions under contracts of liability insurance

Section 40 provides:

- (1) This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract.*
- (2) The insurer shall, before the contract is entered into:*
 - (a) **clearly inform the insured in writing** of the effect of subsection (3); and*
 - (b) if the contract does not provide insurance cover in relation to events that occurred before the contract was entered into, **clearly inform the insured in writing** that the contract does not provide such cover.*

Penalty: 300 penalty units.

- (3) Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.*

10. Information under contracts of liability insurance as to the insurer's liability and conduct of legal proceedings

Section 41 provides:

- (1) This section applies in relation to a contract of liability insurance if it would constitute a breach of the contract if, without the consent of the insurer, the insured or any third party beneficiary were:*
 - (a) to settle or compromise a claim against the insured or third party beneficiary; or*
 - (b) to make an admission or payment in respect of such a claim.*

- (2) *If the insured or any third party beneficiary (the **claimant**) under the contract has made a claim under the contract, the claimant may at any time, by notice in writing given to the insurer, require **the insurer to inform the claimant in writing**:*
- (a) *whether the insurer admits that the contract applies to the claim; and*
 - (b) *if the insurer so admits—whether the insurer proposes to conduct, on behalf of the claimant, the negotiations and any legal proceedings in respect of the claim made against the claimant.*
- (3) *If the insurer does not, within a reasonable time after being given a notice under subsection (2), inform the claimant:*
- (a) *that the insurer admits that the contract of liability insurance applies to the claim; and*
 - (b) *that the insurer proposes to conduct, on behalf of the claimant, the negotiations and any legal proceedings in respect of the claim made against the claimant;*
- then:*
- (c) *the insurer may not refuse payment of the claim; and*
 - (d) *the amount payable in respect of the claim is not reduced;*
- by reason only that the claimant breached the contract as mentioned in subsection (1).*

11. Information about average provisions under contracts of general insurance

Section 44 relevantly provides:

- (1) *An insurer may not rely on an average provision included in a contract of general insurance unless, before the contract was entered into, the insurer **clearly informed the insured in writing** of the nature and effect of the provision including whether the provision is based on indemnity or on replacement value of the property that is the subject-matter of the contract.*

12. Information that insurance cover under a contract of general insurance does not extend to third party interests

Section 49 relevantly provides:

- (1) *This section applies where:*
- (a) *a loss occurs in respect of property that is the subject-matter of a contract of general insurance; and*
 - (b) *the insured and some other person each have an interest in the property;*
- but does not apply where:*
- (c) *the contract of insurance does not provide insurance cover in respect of an interest in the property that is not the insured's interest; and*
 - (d) *before the contract was entered into, the insurer **clearly informed the insured in writing** that the insurance cover provided by the contract would not extend to such an interest...*

13. Notices about the imminent expiration of renewable insurance cover

Section 58 relevantly provides:

- (1) In this section, **renewable insurance cover** means insurance cover that:
 - (a) is provided for a particular period of time; and
 - (b) is of a kind that it is usual to renew or for the renewal of which it is usual to negotiate.
- (2) Not later than 14 days before the day on which renewable insurance cover provided under a contract of general insurance (in this section called the **original contract**) expires, the insurer shall **give to the insured or a person acting as agent for the insured a notice in writing** informing the person to whom the notice is given of the day on which and the time at which the cover will expire and whether the insurer is prepared to negotiate to renew or extend the cover...

14. Notices about the proposed cancellation of a contract of insurance

Section 59 relevantly provides:

- (1) An insurer who wishes to exercise a right to cancel a contract of insurance shall **give notice in writing** of the proposed cancellation to the insured.

15. Information about cancellation of instalment contracts of general insurance

Section 62 provides:

- (1) An instalment contract of general insurance may include provisions inconsistent with section 59 with respect to the cancellation of the contract for non-payment of an instalment of the premium.
- (2) An insurer may not rely on such a provision unless:
 - (a) at least one instalment of the premium has remained unpaid, at the time when the contract is sought to be cancelled, for a period of at least one month; and
 - (b) before the contract was entered into, the insurer **clearly informed the insured in writing** of the effect of the provision.

16. Information about contracts affecting rights of subrogation

Section 68 provides:

- (1) Where a contract of general insurance includes a provision that has the effect of excluding or limiting the insurer's liability in respect of a loss by reason that the insured is a party to an agreement that excludes or limits a right of the insured to recover damages from a person other than the insurer in respect of the loss, the insurer may not rely on the provision unless the insurer **clearly informed the insured in writing**, before the contract of insurance was entered into, of the effect of the provision.
- (2) The duty of disclosure does not require the insured to disclose the existence of a contract that so limits the insured's rights.

17. Statements setting out all the provisions of a contract

Section 74 provides:

- (1) *Where the insured under a contract of insurance so requests in writing given to the insurer, the insurer shall give to the insured **a statement in writing** that sets out all the provisions of the contract.*

Penalty: 300 penalty units.

- (2) *An insurer need not comply with the requirements of subsection (1) if the insurer has already given to the insured such a statement, whether as required by this Act or otherwise.*

Note: A defendant bears an evidential burden in relation to the matters in subsection (2), see subsection 13.3(3) of the Criminal Code.

18. Statements setting out the insurer's reasons for not offering or cancelling a contract of insurance

Section 75 relevantly provides:

- (1) *Where an insurer:*

- (a) *does not accept an offer to enter into a contract of insurance;*
- (b) *Cancels a contract of insurance;*
- (c) *indicates to the insured that the insurer does not propose to renew the insurance cover provided under a contract of insurance; or*
- (d) *by reason of some special risk relating to the insured or to the subject-matter of the contract, offers insurance cover to the insured on terms that are less advantageous to the insured than the terms that the insurer would otherwise offer;*

*the insurer shall, if the insured so requests in writing given to the insurer, **give** to the insured **a statement in writing** setting out the insurer's reasons for not accepting the offer, for cancelling the contract, for not renewing the insurance cover or for offering insurance cover on less advantageous terms, as the case may be.*

Penalty: 300 penalty units...

- (5) *Where an insurer:*

- (a) *does not accept an offer to enter into a contract of life insurance;*
- (b) *Cancels such a contract;*
- (c) *indicates to the insured that the insurer does not propose to renew the insurance cover provided under such a contract; or*
- (d) *by reason of some special risk relating to the life insured, offers life insurance cover to the insured on terms that are less advantageous to the insured than the terms that the insurer would otherwise offer;*

*the insurer shall, if the life insured so requests in writing given to the insurer, give to the life insured **a statement in writing** setting out the insurer's reasons for not accepting the offer, for cancelling the contract, for not renewing the insurance cover or for offering life insurance cover on less advantageous terms, as the case may be, being reasons that relate to the state of health of the life insured.*

Penalty: 300 penalty units.