

Wotton & Kearney Insurance News

ICA Reform Package

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On 12 February 2007 the Federal Government released the long anticipated draft reform package to amend the **Insurance Contracts Act 1984 (Cth) (ICA)**. The documents released for public comment include the draft bill, regulations, explanatory materials and a draft regulation impact statement. Written comments on these documents are invited by 23 March 2007.

The release of the draft bill follows the comprehensive review of the ICA undertaken by a Review Panel comprised of Mr Alan Cameron A.M., former Chairman of the Australian Securities & Investments Commission, and Ms Nancy Milne. The Review Panel received comments from many stakeholders including regulatory bodies, industry bodies, insurers, brokers, consumer representatives and insurance law firms. The Review Panel subsequently made recommendations regarding amendments required to update the ICA, respond to market development, clarify provisions to address judicial interpretation and reconcile anomalies in the operation of the ICA. The draft bill is intended to give effect to many of the Review Panel's recommendations.

The key proposed changes include:

- The ICA will be extended to apply to contracts with foreign insurers where the contract provides cover for Australian insureds or Australian risks.
- Breach of an insurer's duty of utmost good faith will constitute a breach of the ICA and ASIC will have power to take remedial action against an insurer. This principle will also be extended to cover provisions implied or imposed by the ICA.
- ASIC will have power to intervene in any proceedings arising under the ICA.
- The current objective/subjective test attaching to an insured's duty of disclosure will be clarified so that the objective test is amplified with reference to the nature and extent of cover provided, the class of persons for whom the cover is usually provided, and the circumstances in which the contract was entered into.
- The disclosure requirements for "eligible contracts" will be extended to include renewals, variations and reinstatements, and will require insurers to ask specific questions and preclude insurers from relying on "catch all" questions.
- Insurers will be required to inform the insured of the duty of disclosure, and that the duty applies until the proposed contract is entered into - that is central to addressing the concept of "ongoing disclosure" when there is a significant delay between the presentation of the proposal information and policy inception.

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- The notification requirement for non-standard provisions will be changed from the requirement that insurers “*clearly inform*” insureds to a requirement that insurers present the information in a “*clear, concise and effective manner*”.
- The historically problematic Section 54 will now not apply to claims made and notified policies. The anomalies in relation to “late notification” arising out of a long line of Australian cases in respect of the operation of Section 54, and the complementary operation of Section 40(3), is now to be cured by enhancing Section 40(3) to allow an insured or third party beneficiary to notify facts which might give rise to a claim within 28 days after the policy expires. Insurers will now have prescriptive time periods within which to notify an insured about the expiry of the policy and the implications of not notifying circumstances within 28 days after expiry.
- Courts will be provided with power to modify action taken by an insurer in cases of fraudulent non-disclosure or misrepresentation where the Court considers the result is harsh and unfair for the insured. (This is a potential minefield of judicial intervention).
- The rights of third party beneficiaries will be extended to include, among other things, the right to request policy documents and an increased ability to proceed against an insurer directly.
- Subrogation will also apply to third party beneficiaries.
- Insurers’ remedies relating to life insurance contracts, where the insured either misrepresented or did not disclose relevant matters, will be clarified. For example, certain remedies will be limited in some instances and contracts providing more than one type of cover will be “unbundled”.
- An allowance will be made for electronic communication of notices.

The proposed changes to the ICA are extensive and some may require systemic changes for insurers. The changes are to be implemented over a transition period providing time for insurers to adjust to the changes.

The amendments relating to ASIC powers, the introduction of additional criteria to the objective test and the duty of disclosure will apply to insurance contracts after commencement of the Amended ICA. It is anticipated that the remaining changes will be implemented following a transition period of between 6 months and 2 years. The changes will apply to all contracts “entered into” after commencement of the relevant provision and will apply to renewals, variations, extensions and reinstatements.

For more information contact Kiley Hodges

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