



## Insurance Contracts Act Amendment Bill 2010

### Executive Summary

The *Insurance Contracts Act Amendment Bill 2010 (the Bill)* was tabled by the Minister for Financial Services, Superannuation and Corporate Law on 17 March 2010.

The Bill proposes amendments to the *Insurance Contracts Act 1984 (Cwth) (the Act)*.

### Summary of Proposed Amendments

The Bill proposes changes to the Act in the following areas:

- use of electronic communication for statutory notices and documents;
- the duty of utmost good faith as a breach of the Act;
- duty of disclosure;
- remedies in respect of life insurance contracts;
- rights and obligations of 'third party beneficiaries'; and
- the types of contracts exempt from its operation.

### Key Changes – A Comparison

The following changes should be of particular interest to insurers:

- Duty of utmost good faith;
- Insured's duty of disclosure;
- Insurer's duty to inform;
- New rights to third party beneficiaries.

### Duty of Utmost Good Faith

Under the Act, a breach of the duty of utmost good faith amounted to a breach of an implied term of the insurance contract.

The Bill proposes to make a breach of the duty of utmost good faith a breach of the Act, however, the position that it arises firstly as a breach of an implied term remains intact and therefore the duty remains contractual in nature (which becomes relevant if ever a damages case is successful for a breach of good faith).

Essentially the proposed amendment broadens the corporate regulator's (**ASIC**) 'watchdog' powers in respect of the duty. The amendment has the effect of providing ASIC with an extra avenue to exercise its 'public interest' powers under s55A of the Act to commence or take over an action against an insurer on behalf of the insured in the event of a breach of s 13.

The amendment is unlikely to have any material impact on the relationship between an insurer and an insured.

However, the proposed amendments to insert a new s 13(3) and (4) affect the rights of third parties. The courts have held that the duty of good faith does not arise between an insurer and a third party (*CGU Workers Compensation v García* (2007) NSWCA 193.). This is because the doctrine of privity of contract has the effect of preventing a third party who may be a beneficiary of a contract of insurance from the benefit of a duty of utmost good faith, because they are not a party to the contract. The proposed amendment will have the effect of extending the duty to third party beneficiaries after the contract is entered into.

Other proposed amendments have also expanded the rights of third parties, discussed below.

## **Insured's Duty of Disclosure**

The proposed amendment to s21 of the Act is relatively modest in effect.

The proposed amendment seeks to refine the objective element of the duty of disclosure currently in the Act (“*an insured has a duty to disclose every matter that is known to an insured that a reasonable person in the circumstances could be expected to know is relevant*”).

The bill seeks to add to that definition so that the object element will continue “*having regard to factors including, but not limited to, the nature and extent of the insurance cover to be provided under the relevant contract of insurance.*”

This amendment appears to be a codification of the issue noted by Brooking J in *Twenty-first Maylux Pty Ltd v Mercantile Mutual Insurance (Aust) Ltd* (1990) VR 919 who considered that extrinsic factors such as the type of policy in issue were the relevant factors to take into account.

## **Third Party Beneficiaries**

### ***Insurer's Election***

Section 41 of the Act allows an insured who has made a claim on their liability insurance policy to require the insurer to inform them whether the insurer admits whether the policy responds to the claim and if so, whether the insurer proposes to conduct negotiations or any legal proceedings on behalf of the insured in respect of the claim.

The proposed amendment expands this to give third party beneficiaries the same rights to request an insurer for information. The proposed amendment does not affect the exposure of an insurer to a claim but does, however, provide recourse to a claimant to put pressure on an insurer where an insurer has reserved indemnity in respect of a claim.

### ***Insurers' Defences***

Section 48 provides a right of recovery from an insurer to a third party notwithstanding that they are not a party to the contract.

The proposed amendment leaves this position unchanged but the amended subsection (3) clarifies that an insurer, in defence of an action by a third party, should be entitled to raise defences relating to the conduct of an insured and that relates to the conduct of the insured even if the conduct occurred before the contract was entered into.

The effect of the proposed amendment is a welcome clarification for insurers that a third party beneficiary should be in no better position than that of an insured.

## ***Direct Recourse***

Section 51 of the Act gives a right to third parties to recover directly against an insurer in circumstances where the insured under a contract of liability insurance is liable in damages to the third party.

The proposed amendment expands section 51 to include a third party beneficiary who has died or cannot be located. The proposed amendment expands both the exposure and scope for recovery for insurers in respect of recovery actions, particularly in respect of health insurers.

This amendment will have a fairly significant impact on practice and procedure, saving claimants from having to avail themselves of the current options in 601AG of the *Corporations Act* and s 6 of the *Law Reform (Misc Provisions) Act 1946*.

## ***Insurer's duty to inform***

Section 22 of the Act requires insurers to inform insureds about the duty of disclosure before the contract is entered into.

The proposed amendment includes a new provision requiring the insurer to inform the insured of the general nature and effect of the duty of disclosure. Provisions are also included to the effect that if an insurer accepts a proposed insurance contract or makes a counter-offer more than two months after the proposed insured's most recent disclosure, the insurer must remind the insured that the duty of disclosure applies.

Brokers and insurers should take note of this proposed amendment.

### **For more information please contact:**

**Jonathan Newby, Principal**  
**Direct Line: (02) 9265 3257**  
**Email: [jonathan.newby@mct-syd.com.au](mailto:jonathan.newby@mct-syd.com.au)**

### **Authors:**

Jonathan Newby  
Principal

Jon Cheung  
Solicitor

**[www.mccabeterrell.com.au](http://www.mccabeterrell.com.au)**

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The McCabe Terrill HBM Legal Group -  
An association of independent firms  
practising in Sydney, Melbourne  
and Brisbane

**McCabe Terrill Lawyers**  
Level 14, 130 Elizabeth Street  
Sydney NSW 2000 Australia  
T +61 2 9261 1211  
F +61 2 9261 2336

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