CHANGES MADE BY THE INSURANCE CONTRACTS AMENDEMENT ACT 2013

SUMMARY OF KEY ISSUES

© NIBA College 2013

OVERVIEW

The Act makes some of the most significant amendments to the *Insurance Contracts Act 1984 (Cth)* since its original inception in 1986.

This paper summarises the most significant *general insurance* changes. It also sets out the likely impact on us when we act:

- as insurance broker for clients; or
- as agent for insurers. You need to consider whether the change is something you will have responsibility for under your agreement with the insurer.

DUTY OF UTMOST GOOD FAITH

What has changed?

This duty in section 13 has been amended to apply to contacts entered into or renewed for **28 June 2013** so:

- If an insurer breaches the duty they now (in addition to being exposed to an insured for damages) breach the Act. This allows ASIC to bring a representative action and/or take action under the *Corporations Act 2001 (Cth)* for the breach.
- The protection afforded and obligations imposed by it will be extended to apply to third party beneficiaries (i.e., persons specified as covered under the policy who are not contracting insureds) for time of contract entry.

This to consider

When acting for a third party beneficiary, you need to be aware of their new rights and obligations under the duty. These are the same as those that currently apply to the insured (except for the third party beneficiary the new rights and obligations under the Act only apply from entry into the policy). The risk to the insurer from new ASIC powers will be useful in negotiating any disputed claim.

If acting for an insurer you need to check the processes for complying with the duty also cover claims by third party beneficiaries. We expect this would generally be done in practice anyway.

ELECTRONIC COMMUNICATIONS

What has changed?

Insurers will now be able to issue notices/information/documents/statements they must provide to the insured under the Act (e.g. s22 duty of disclosure notice, cancellation notice, renewal notice) by electronic means (previously this was arguable) from **28 December 2012** or an earlier time if permitted by the Government.

All of the notice/information/document/statement obligations (other than the renewal notice obligation) do not apply to any insurer where we are acting for the client.

© NIBA College 2013

Things to consider

We should identify with insurers not currently us sending electronic renewal notices whether they intend to do so and ensure we are happy with any such proposal from a practical perspective (e.g. how could the proposal adversely affect our existing systems on this regard?).

When acting for an insurer, we should to see if this change can be used to reduce costs and improve efficiency etc.

DUTY OF DISCLOSURE AND NOTICE OBLIGATIONS UNDER SECTIONS 22 AND 40(2)

What has changed?

These are a number of changes which apply to contracts entered into or renewed from **28 December 2015.** From our perspective, the most important are:

- When an *"eligible contract"* [1]*is first entered into* insurers can only ask specific questions of the insured in the application process. If they ask a non-specific question they waive the duty in respect of that question. Currently they can also ask the insured to disclose matters they could not reasonably make the subject of a specific question.
- On *renewal of the eligible contract:*
  - The insurer can no longer rely on the current broad duty under section 21 and must instead ask specific questions and/or provide a copy of any matters disclosed previously it wants the insured to notify changes of. If an insured provides no response regarding these past disclosed matters before renewal, they are deemed to have disclosed no change.
  - If the insurer does not do the above or asks a non-specific question they waive the duty in relation to their relevant failure.
  - A past breach of the duty by the insured can still be relied on by the insurer if the insurer failed to comply with the above requirements on renewal.
- Section 21 will still apply for a variation, reinstatement and replacement of an eligible contract and do all non-eligible contracts (e.g. professional indemnity insurance)
- The duty of disclosure notice obligation on the insurer under section 22 has changed. The insurer still has to provide notice of the duty before or at the time the contract is entered into (this is not applicable where we act for the client) but:
  - The form of notice will change for eligible contracts to take the above into account – new versions are to yet to be provided by Government.
  - The notice will now tell the insured that the duty applies until the policy is entered into (which the current notice doesn't do but is actually how the duty currently works)
  - If an insurer's acceptance/counter offer is made more than 2 months after the insured's most recent disclosure under the duty, then the insurer's

[1] An eligible contract is a policy which is new business and wholly in one of the following prescribed classes of contracts in the Act (see regulations 5-25) – Motor Vehicle Insurance, Home Buildings Insurance, Home Contents Insurance, Sickness & Accident Insurance, Consumer Credit Insurance – this also applies to life policies; and Travel Insurance. An insurer can opt into the duty for a contract that would not otherwise be an eligible contract.

© NIBA College 2013

acceptance/counter offer must remind the insured that the duty applies until the proposed policy or other contract is entered into. If not, the insurer can't rely on any non-disclosure after that last disclosure.

- Currently if a section 22 duty disclosure notice of ss40(2) deemed claim liability policy notice is given before original entry into, renewal, extension or reinstatement of the policy (not applicable where we act for the insured), the insurer does not need to give the notice again unless there is a variation involved in a renewal, extension or reinstatement of the policy. The Act now also requires the notices to be given again for a variation that will provide a kind of insurance cover that was not provided by the contract immediately before the variation.

Things to consider

Where we act for the client we need to be aware of the new obligations on the insurer in relation to eligible contracts (including the impact of any breach by the insurer on relation to any disputed claim) and the more limited obligations on the insured.

These are in effect to only answer the specific questions asked and confirm any past disclosure information provided by the insurer on renewal for confirmation (or if accurate not respond).

The main risks for us remain the same:

- If we don't obtain confirmation from the client of the answers submitted by us for them to insurer, they can argue we did not disclose what they asked us to.
- If we don't tell the insured that they duty continues until the contract is entered into and changed occurs, between the time of submitting the application and entry into the contract which is not disclosed, we may be exposed if the insurer rejects the claim.

Where we act for the insurer, we should consider what amendments may need to be made to existing documentation and sales and claim procedures to take the changes to the duty into account. New procedures may also be required regarding the section 22 and ss40(2) notice requirements for variations (if not already given in such cases) and the claims process regarding the amendments.

THIRD PARTY BENEFICIARIES

What has changed?

For contracts entered into or renewed for **28 June 2014:**

- An insurer is defending an action brought by a third party beneficiary, can raise defences relating to the conduct to the insured which occurred either before or after the policy was entered into (e.g. non-disclosure by the insured). Previously this was open to some argument.
- Section 41 will apply to third party beneficiaries as well as the insured. This section essentially gives the insured (and in the future the third party beneficiary) under a liability policy the right to request that the insurer notify whether they admit policy applies to the

© NIBA College 2013

claim, and if so whether they will conduct for insured the defence. A failure to do so prevents reliance on such matters by insurer. .

Things to consider

We need to ensure that if we don't want an insured's conduct to affect the rights of a third party beneficiary making a claim, we seek to amend the policy to prevent the insurer from doing so.

In relation to section 41:

- When acting for a third part beneficiary we may need to make sure they are aware of this right (we may need to update our standard notices to advise of this right); and
- If we act for the insurer we may need to check that liability policy documentation isn't inconsistent with the change and amend claims procedures where appropriate.

SUBROGATION (S67)

What has change?

The current default subrogation rules are to be replaced by new and more detailed default rules. They can still be varied in the terms of the policy and by any agreement made after the relevant loss and occurred.

The rules have been extended to apply to third party beneficiaries as well as contracting insureds.

In short, the default rules give the person undertaking recovery the right to more than they were previously able to recover (e.g. administrative and legal costs incurred in connection with recover and interest). These are new rules setting out how joint recoveries are to be managed.

Things to consider

When acting for the client, we should consider:

- Whether we and the client are satisfied with the default rules or need to n3egotiate new rules;
- If the insurer' policy seeks to vary the default rules to our client's disadvantage.

If we act for the insurer, we need to determine whether the default rules are acceptable or not.

© NIBA College 2013