




# The Insurance Contracts Act – An Overview of Recent Changes and Implications for Insurers, Insureds and Brokers

**Presented by Julia Brabant and Uma Kotecha**  
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## KEY CHANGES

The Insurance Contracts Amendment Act has seven schedules containing provisions. The major amendments to the Insurance Contracts Act 1984 relate to:

1. Removing impediments to the use of electronic communication for statutory notices and documents;
2. Providing new powers to the Australian Securities and Investments Commission to take action to address breaches of the duty of utmost good faith by insurers, including in respect of claims handling; and
3. Simplifying the duty of disclosure to improve consumers' comprehension and capacity to comply with the disclosure provisions.

Other key changes introduced are:

4. There is a general theme of "unbundling" of insurance contracts so that the ICA applies to separate components of insurance contracts as if they were stand-alone contracts,
5. Third parties have greater rights and responsibilities;
6. New remedies are available for life insurers, which make better sense having regard to the non-traditional life insurance products now on the market; and
7. The priority of payment in subrogated recovery matters has been reworked.

The various provisions commence at different times between 28 June 2013 and December 2015.

PROVISION	DETAILS	COMMENCEMENT
Schedule 1	Duty of utmost good faith, bundled contracts	28 June 2013
Schedule 2	Electronic communications	28 December 2013
Schedule 3	Powers of ASIC	28 June 2013
Schedule 4	<b><u>Disclosure and misrepresentations:</u></b>	
• Part 1	Insured's duty of disclosure	28 December 2015
• Part 2 div 1	Eligible contracts of insurance (disclosure at renewal)	28 December 2015
• Part 2 div 2	Eligible contracts of insurance (disclosure at inception)	28 December 2015
• Part 3	Insurer's duty to inform of duty of disclosure	28 December 2015
Schedule 5	Life insurance contracts – not considered	28 June 2013 and 28 June 2014
Schedule 6	<b><u>Third parties</u></b>	
• Part 1	Requests by third party beneficiaries (TPB) to insurers for information	28 June 2014 (parts 1-4)
• Part 2	Insurers' defences in actions by TPBs	
• Part 3	Rights and obligations of TPBs under life insurance – not considered	
• Part 4	Rights of third parties to recover against insurers	
• Part 5	Representative actions by ASIC on behalf of TPBs	28 June 2013 (part 5)
• Part 6	Non-disclosure or misrepresentation by members of group life insurance schemes – not considered	28 June 2014 (part 6)
Schedule 7	Subrogation	28 December 2013

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## DUTY OF UTMOST GOOD FAITH

S 13 of the ICA states that the duty of good faith is implied in all insurance contracts.

The ICA does not define the duty of good faith and there is no widely accepted definition of what is good faith.

The scope of the duty remains as before and the recent amendments do not amend the duty in any way. However, the courts generally interpret it widely.

Insurers now owe a duty of good faith to Third Party Beneficiaries - those who may not be a party to the insurance policy but benefits under the policy. The duty only commences after the contract is entered into and not before. However, it is unlikely that this change will have neither any significant costs burden nor any material day-to-day effect as most insurers are already take the duty of good faith seriously and are already treating third party beneficiaries in the same way as they treat named insureds.

A breach of the duty of good faith is now a breach of the ICA as well as a simple breach of contract. However, it will not be an offence under the ICA and no penalties can be imposed for a breach.

### New Section 13 wording

#### **INSURANCE CONTRACTS ACT 1984 - SECT 13**

##### ***The duty of the utmost good faith***

- (1) *A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.*
- (2) *A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.*
- (3) *A reference in this section to a party to a contract of insurance includes a reference to a third party beneficiary under the contract.*
- (4) *This section applies in relation to a third party beneficiary under a contract of insurance only after the contract is entered into.*

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## ELECTRONIC COMMUNICATIONS

The Insurance Contracts Act contains a number of provisions, which require an insurer to notify an insured of certain information in writing where there is no broker acting (unless the broker is acting on binder). From 13 December 2013, all notices, information, documents, and statements under ICA can now be sent by electronic communication (via internet or email). This is because Section 9 of the Electronic Transactions Act 1999 now applies to the ICA. This is a significant change for the industry.

Any changes to processes should take into account:

- The Electronic Transmissions Act. The ETA default rules state that certain requirements in relation to the on time and place of dispatch, and receipt and that the insured must consent to receiving electronic communications.
- The SPAM Act;
- The Privacy Act 1998; and
- Chapter 7 (Financial services and markets) of the Corporations Act 2001

### New S70 & 72A wording

#### **70 Content and other requirements for notices etc. to be given in writing**

*A reference in this Act to the giving of a notice or other document or information to a person, in writing, is a reference to giving the person a notice or other document or information in writing that complies with the requirements (if any) prescribed as to:*

- (a) *the content and legibility of the notice, other document or information; and*
- (b) *the material that may accompany the notice, other document or information.*

#### **72A Method for giving written notices or documents**

*A notice or other document that is required or permitted by this Act to be given to a person in writing may be given:*

- (a) *to a body corporate in any way in which documents may be served on the body corporate; or*
- (b) *to a natural person:*
  - (i) *personally; or*
  - (ii) *by post to that person at the person's last-known address.*

*Note: A notice or other document may also be given to a person by electronic communication in accordance with the Electronic Transactions Act 1999 and any regulations made under that Act.*

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## GREATER POWERS FOR ASIC

ASIC already had the broad responsibility for the general administration of the Act and has a right to request documents. However, ASIC now has greater powers akin to those which it has under the Corporations Act. For all proceedings commenced from 28 June 2013, ASIC now has a statutory power to intervene in any proceeding relating to a matter arising under the ICA (S11F). It can take representative action on behalf of an Insured or a third party beneficiary against an Insurer under S55A of the Act. It can be represented by a staff member, a delegate, solicitor or counsel. This means that ASIC will be able to take a proactive role in court proceedings and will also be joined as a party to those proceedings.

Because a breach of the duty of good faith is now a breach of the ICA, ASIC can now intervene and commence or continue representative action on behalf of an insured in any proceeding under the ICA to take action to address breaches of the duty of utmost good faith by insurers in the *handling or settlement of a claim or potential claim under the policy*.

### New section 14A wording

#### **INSURANCE CONTRACTS ACT 1984 - SECT 14A**

##### ***Powers of ASIC--insurer's failure to comply with the duty of the utmost good faith in relation to handling or settlement of claims***

- (1) *This section applies if an insurer under a contract of insurance has failed to comply with the [duty of the utmost good faith](#) in the handling or settlement of a claim or potential claim under the contract.*
- (2) *Despite any provision of Chapter 7 of the [Corporations Act 2001](#) or any regulation made under that Chapter, ASIC may exercise its powers under Subdivision C of Division 4 of Part 7.6 of that Act or Subdivision A of Division 8 of that Part in relation to the insurer as if the insurer's failure to comply with the [duty of the utmost good faith](#) were a failure by the insurer to comply with a [financial services law](#).*

*Note: Subdivision C of Division 4 of Part 7.6 of the [Corporations Act 2001](#) deals with variation, suspension and cancellation of an Australian financial services licence, and Subdivision A of Division 8 of that Part deals with banning persons from providing financial services.*

- (3) *In this section:*

**"financial services law"** has the meaning given by [section 761A](#) of the [Corporations Act 2001](#) .

### New wording (Part 1A Section 11F)

#### **INSURANCE CONTRACTS ACT 1984 - SECT 11F**

##### **ASIC's power to intervene in proceedings**

- (1) *ASIC may intervene in any proceeding relating to a matter arising under:*
  - (a) *this Act; or*
  - (b) *Part 3 of the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 .*

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- (2) *If ASIC intervenes in a proceeding under subsection (1):*
- (a) *ASIC is taken to be a party to the proceeding; and*
  - (b) *ASIC has all the rights, duties and liabilities of such a party (subject to this Act or Part 3 of the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003, as the case requires).*
- (3) *Without limiting subsection (2), ASIC may appear and be represented in a proceeding in which it intervenes under subsection (1):*
- (a) *by a staff member of ASIC; or*
  - (b) *by a natural person or body to whom ASIC has delegated its functions and powers under this Act; or*
  - (c) *by a solicitor or by counsel.*



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## DUTY OF DISCLOSURE (S21b)

The Insured has a duty to make a prior disclosure of what:

- the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms (subjective test)
- a reasonable person in the circumstances could be expected to know to be a matter so relevant (objective test)

Following the amendments (for all new policies entered into from 28 December 2015 or entered into prior to 28 December 2015 but renewed after 28 December 2015), in determining whether a reasonable person in the circumstances could be expected to disclose a matter, two factors must be taken into account:

- nature and extent of cover;
- the class of persons who would ordinarily apply for insurance cover of the kind the non-disclosure concerns.

### New wording (S21(1)(b))

*A reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including, but not limited to:*

- (i) *the nature and extent of the insurance cover to be provided under the relevant contract of insurance; and*
- (ii) *the class of persons who would ordinarily be expected to apply for insurance cover of that kind.*

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## **ELIGIBLE CONTRACTS OF INSURANCE – POLICY INCEPTION (S21A)**

Under existing S21A, certain ‘eligible’ insurance policies are subject to a more enhanced disclosure regime when the policy is first entered.

An eligible contract is defined in Regulation 2B as a policy required by an individual consumer. These are:

- motor vehicle
- home buildings
- home contents
- accident & sickness
- consumer credit
- travel insurance

Under s 21A, an insurer has to:

- ask one or more specific question relevant to its decision whether to accept the risk; and
- The insurer can also ask a catch-all question to the insured to disclose exceptional circumstances

that a reasonable person could be expected to know is relevant to the insurer’s decision whether to accept the risk and which would be unreasonable for the insurer to ask a specific question about.

For all new eligible policies entered into after 28 December 2015, the Insurer can no longer ask the exceptional circumstances question.

If the insurer asks the insured to disclose exceptional circumstances or any other matter covered by the insured’s duty of disclosure, then there is no duty of disclosure.

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## **New S21A Wording**

### **21A Eligible contracts of insurance--disclosure before contract originally entered into**

#### *Position of the insurer*

- (2) *Before the contract is originally entered into, the insurer may request the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.*
- (3) *If the insurer does not make a request in accordance with subsection (2), the insurer is taken to have waived compliance with the duty of disclosure in relation to the contract.*
- (4) *If the insurer:*
- (a) *makes a request in accordance with subsection (2); and*
  - (b) *requests the insured to disclose to the insurer any other matter that would be covered by the duty of disclosure in relation to the contract;*

*then the insurer is taken to have waived compliance with the duty of disclosure in relation to that other matter.*

#### *Position of the insured*

- (5) *If:*
- (a) *the insurer makes a request in accordance with subsection (2); and*
  - (b) *in answer to each specific question included in the request, the insured discloses each matter that:*
    - (i) *is known to the insured; and*
    - (ii) *a reasonable person in the circumstances could be expected to have disclosed in answer to that question;*

*then the insured is taken to have complied with the duty of disclosure in relation to the contract.*

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## ELIGIBLE CONTRACTS OF INSURANCE – POLICY RENEWAL (S21B)

From 28 December 2015, upon renewal of all policies and regardless of the date of inception, the insurer can no longer rely on the current broad duty under section 21 and must either:

- ask specific disclosure questions at renewal and/or
- provide a copy of the answers previously provided at inception and ask the insured to disclose any changes each time the policy is renewed.

Insurers can no longer ask the exceptional circumstances question.

Insurers can opt in earlier to this requirement if they wish but they must inform the insured in writing of the nature and effect of the new section.

### **New Section 21B wording**

#### **21B Eligible contracts of insurance--disclosure before contract renewed**

- (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 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).*

### **Position of the insurer**

- (3) *Before the contract is renewed, the insurer may do either or both of the following things:*
  - (a) *request the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms;*
  - (b) *give the insured a copy of any matter previously disclosed by the insured in relation to the contract and request the insured:*
    - (i) *to disclose to the insurer any change to that matter; or*
    - (ii) *to inform the insurer that there is no change to that matter.*

*Note: Change, to a matter previously disclosed by an insured in relation to an eligible contract of insurance, is defined in subsection (13).*

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(4) *If the insurer does not:*

- (a) *make a request in accordance with paragraph (3)(a); or*
- (b) *give the insured a copy of any matter previously disclosed by the insured and make a request in accordance with paragraph (3)(b);*

*then the insurer is taken to have waived compliance with the duty of disclosure in relation to the renewed contract.*

(5) *If the insurer:*

- (a) *makes a request in accordance with paragraph (3)(a); and*
- (b) *also requests (other than in accordance with paragraph (3)(b))*

*the insured to disclose to the insurer any other matter that would be covered by the duty of disclosure in relation to the renewed contract; then the insurer is taken to have waived compliance with the duty of disclosure in relation to that other matter.*

(6) *If the insurer:*

- (a) *gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b); and*
- (b) *also requests (other than in accordance with paragraph (3)(a)) the insured to disclose to the insurer any other matter that would be covered by the duty of disclosure in relation to the renewed contract;*

*Then the insurer is taken to have waived compliance with the duty of disclosure in relation to that other matter.*

**Position of the insured**

(7) *If:*

- (a) *the insurer makes a request in accordance with paragraph (3)(a), but does not give the insured a copy of any matter previously disclosed by the insured or make a request in accordance with paragraph (3)(b); and*
- (b) *before the contract is renewed, the insured discloses, in answer to each specific question included in the request, each matter that:*
  - (i) *is known to the insured; and*
  - (ii) *a reasonable person in the circumstances could be expected to have disclosed in answer to that question;*

*then the insured is taken to have complied with the duty of disclosure in relation to the renewed contract.*

*Note: This subsection is affected by subsection (12).*

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- (8) *If:*
- (a) *the insurer gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b), but does not make a request in accordance with paragraph (3)(a); and*
  - (b) *before the contract is renewed, the insured:*
    - (i) *discloses any change to the matter; or*
    - (ii) *if there is no change to the matter--informs the insurer that there is no change to the matter; then the insured is taken to have complied with the duty of disclosure in relation to the renewed contract.*

- (9) *If:*
- (a) *the insurer:*
    - (i) *makes a request in accordance with paragraph (3)(a); and*
    - (ii) *gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b); and*
  - (b) *before the contract is renewed, the insured:*
    - (i) *discloses each matter referred to in paragraph (7)(b);*
    - (ii) *does either of the things referred to in paragraph (8)(b);*

*then the insured is taken to have complied with the duty of disclosure in relation to the renewed contract.*

- (10) *If:*
- (a) *the insurer gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b); and*
  - (b) *before the contract is renewed, the insured does not disclose any change to the matter;*

*then the insured is taken to have informed the insurer that there is no change to the matter.*

- (11) *If:*
- (a) *the insurer gives the insured a copy of any matter previously disclosed by the insured and makes a request in accordance with paragraph (3)(b); and*
  - (b) *before the contract is renewed, the insured informs the insurer under subsection (8) or (9), or is taken to have informed the insurer under subsection (10), that there is no change to the matter;*

*then neither subsection 21(3) nor section 27 applies in relation to any failure by the insured to disclose any change to the matter.*

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Effect of failure to comply with duty of disclosure in relation to original contract of insurance or previous renewal

- (12) *If the insured failed to comply with the duty of disclosure in relation to the contract as originally entered into or any renewal of that contract, then, despite any other provision of this section:*
- (a) *the insurer is not taken to have waived compliance with the duty of disclosure in relation to the earlier failure; and*
  - (b) *the insured is not taken to have complied with the duty of disclosure in relation to the earlier failure.*

*Definitions*

- (13) *In this section:*

**change**, to a matter previously disclosed by an insured in relation to an eligible contract of insurance, means a change to the matter that:

- (a) *is known to the insured; and*
- (b) *a reasonable person in the circumstances could be expected to disclose in relation to that matter.*

**eligible contract of insurance** has the same meaning as in section 21A.

**renewed contract means** an eligible contract of insurance that is entered into by way of renewal.

**transition period** means the period of 30 months beginning on the day this section commences.

At the end of subsection 22(1) Add:

*If the insurer wishes to rely on section 21B during the transition period (within the meaning of section 21B) in relation to the renewal of an eligible contract of insurance, the insurer must also comply with subsection 21B(2) before the contract is renewed.*

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## NOTIFICATION OF THE DUTY OF DISCLOSURE (S22)

Insurers have an obligation, before the policy is entered into, to clearly inform the insured in writing of the general nature and effect of the duty of disclosure and its application. The form of notice will change for eligible contracts to take the above into account and new versions are to yet to be provided by Government.

If an insurer's acceptance or counter offer is made more than 2 months after the insured's most recent disclosure under the duty, then the insurer's acceptance or counter offer must remind the insured that the duty applies until the proposed contract is entered into. If not, the insurer cannot rely on any non-disclosure after that last disclosure.

The amendments have expanded the obligation on insurers to inform the insured in writing of the nature and effect of the duty of disclosure, (failing which an insurer may not exercise any right in respect of a failure to comply, unless the insured was fraudulent).

### **New Section 22 wording**

#### **22 Insurer to inform of duty of disclosure**

- (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) *If:*
  - (a) *an insurer complies with subsection (1) in relation to a proposed contract of insurance; and*
  - (b) *the insurer accepts an offer by the insured to enter into the proposed contract, or makes a counter-offer to enter into another contract of insurance with the insured; and*
  - (c) *the insurer's acceptance or counter-offer is made more than 2 months after the insured's most recent disclosure for the purpose of complying with the duty of disclosure in relation to the proposed contract; then the insurer must give to the insured, with the acceptance or counter-offer, a reminder notice stating that the duty of disclosure applies until the proposed or other contract is entered into.*



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- (4) *If the regulations prescribe a form of writing to be used:*
- (a) *for informing a person of the matters referred to in subsection (1); or*
  - (b) *for the reminder notice referred to in subsection (3); the writing to be used may be in accordance with the prescribed form.*
- (5) *An insurer who has not complied with subsection (1) and (if applicable) subsection (2) may not exercise a right in respect of a failure to comply with the duty of disclosure, unless the failure was fraudulent.*
- (6) *If:*
- (a) *an insurer is required to comply with subsection (3) in relation to a contract of insurance; and*
  - (b) *the insurer does not do so;*
- then the insurer may not exercise a right in respect of a failure to comply with the duty of disclosure in relation to a new matter relating to the contract, unless the failure was fraudulent.*
- (7) *For the purposes of subsection (6), a **new matter** relating to a contract of insurance is a matter of which the insured first becomes aware after the insured's most recent disclosure for the purpose of complying with the duty of disclosure in relation to the contract.*

### **13 Application**

*The amendments made by this Part apply to:*

- (a) *a contract of insurance that is originally entered into after the commencement of this item; and*
- (b) *a contract of insurance that was originally entered into before the commencement of this item and is renewed, extended, varied or reinstated after that commencement.*

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## **RIGHTS OF THIRD PARTY BENEFICIARIES (s41)**

The definition of Third party beneficiaries (TPB) has changed (SS11(1)).

*“third party beneficiary, under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends”.*

TPBs now have rights on par with those of insureds. New rights and obligations for third party beneficiaries who are not the insured have been brought about by the legislation.

Section 41 has been amended to give third party beneficiaries the same rights as insureds in relation to the requirements of an insurer to advise whether it admits a claim is covered and whether or not it intends to take over the defence of that claim.

An insurer now has to advise a TPB whether it admits a claim is covered and whether or not it intends to take over the defence of that claim.

## **INSURERS' DEFENCES IN ACTIONS BY TPBS (S48 & 48AA)**

Sections 48 and 48AA deal with the defences now open to insurers (general and life respectively) against claims by third party beneficiaries.

Those sections have been tidied up to include references to the newly defined term 'third party beneficiaries' and clarify that the intent of the ICA is that third party beneficiaries are in no better position than named insureds.

The amended ICA confirms that the acts or omissions of an insured before or after the contract is entered into can be raised as a defence to a third party beneficiary's claim.

## **RIGHTS OF THIRD PARTIES TO RECOVER AGAINST INSURERS (S51)**

The ICA provides under section 51 that, where an insured cannot be located, under a contract of liability insurance a third party may bring an action against an insurer directly to recover an amount under the policy equal to the liability of the insured.

The ICA will now be amended so a third party can do the same in relation to a TPB covered under the relevant policy.

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## REPRESENTATIVE ACTIONS BY ASIC ON BEHALF OF TPBS (S55A)

ASIC also has the power to bring action against representative parties on behalf of a third party beneficiary.

### New Section 55A wording

#### **Representative actions by the ASIC**

- (1) If:
- (a) *an insured has entered into a contract of insurance with an insurer; and*
  - (b) *ASIC is satisfied that the insured or any third party beneficiary under the contract has suffered damage, or is likely to suffer damage, because the terms of the contract, or the conduct of the insurer, breaches the requirements of this Act;*

*ASIC may, by application, if ASIC is of the opinion that it is in the public interest to do so:*

- (c) *bring an action against the insurer on behalf of the insured or third party beneficiary under or in respect of that contract; or*
- (d) *take over and continue, on behalf of the insured or third party beneficiary, an action brought against the insurer by the insured or third party beneficiary under or in respect of that contract.*

- (2) If:
- (a) *a number of insureds have entered into contracts of insurance with an insurer; and*
  - (b) *ASIC is satisfied that those insureds or any third party beneficiaries under the contract have suffered damage, or are likely to suffer damage, because the terms of the contracts, or the conduct of the insurer, breaches the requirements of this Act;*

*ASIC may, by application, if ASIC is of the opinion that it is in the public interest to do so, bring a single action against the insurer on behalf of all of those insureds or third party beneficiaries under or in respect of the contracts so entered into.*

- (3) *ASIC may only bring or take over an action under subsection (1), or bring an action under subsection (2), if ASIC has obtained the written consent of the insured or third party beneficiary, or of each of the insureds or third party beneficiaries, on whose behalf the action is being brought or is being continued.*

New remedies for misrepresentation and non-disclosure in relation to contracts of life insurance that are offered as part of a group scheme that is unrelated to superannuation and new remedies are available in respect of any misrepresentation or non-disclosure that occurs between the time an insured became a member of a superannuation or other group scheme and when the life insurance cover takes effect.

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## SUBROGATION (S67)

The principle of Subrogation is an extension and another corollary of the principle of indemnity. It also applies to all contracts of indemnity. According to the principle of subrogation, when the insured is compensated for the losses due to damage to his insured property, then the ownership right of such property shifts to the insurer. This principle is applicable only when the damaged property has any value after the event causing the damage. The insurer can benefit out of subrogation rights only to the extent of the amount he has paid to the insured as compensation.

Prior to the amendments, s67 of the ICA provided a poor guide for how the proceeds of recovery actions are to be divided between an insurer and an insured.

The new rules seek to amend the practice of subrogation to ensure just results and are extended to apply to TPBs.

The 2013 Act has substantially amended s 67 and has put in place a regime where: the party funding the recovery action is entitled to be reimbursed for the costs of doing so. If both parties contribute, both should be reimbursed (fully is possible but if not, then pro rata);

- any remaining sum after costs are paid is divided based upon who funds the recovery. If an insurer funds the recovery, once it has recovered the amount paid to or on behalf of the insured, anything left over must be paid to the insured up to the full amount of its loss. If the insured funds the recovery action, the order of recovery is reversed;
- if the action is funded jointly by both the insurer and insured, they are both entitled to the same amounts as referred to above pro rata if there are insufficient funds to reimburse them in full;
- any excess or windfall recovery is to be distributed to both parties in the same proportions as they contributed to the administrative and legal costs of the recovery action.

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## **New S67 wording**

### **67 Rights with respect to money recovered under subrogation etc.**

- (1) *This section applies if:*
- (a) *an insurer is liable under a contract of general insurance in respect of a loss; and*
  - (b) *the insurer has a right of subrogation in respect of the loss; and*
  - (c) *an amount is recovered (whether by the insurer or the insured) from another person in respect of the loss.*

### **Amount recovered by insurer**

- (2) *If the amount is recovered by the insurer in exercising the insurer's right of subrogation in respect of the loss:*
- (a) *the insurer is entitled under this paragraph to so much of the amount as does not exceed the sum of:*
    - (i) *the amount paid by the insurer to the insured in respect of the loss; and*
    - (ii) *the amount paid by the insurer for administrative and legal costs incurred in connection with the recovery; and*
  - (b) *if the amount recovered exceeds the amount to which the insurer is entitled under paragraph (a)--the insured is entitled under this paragraph to so much of the excess as does not exceed the insured's overall loss; and*
  - (c) *if the amount recovered exceeds the sum of:*
    - (i) *the amount to which the insurer is entitled under paragraph (a); and*
    - (ii) *the amount (if any) to which the insured is entitled under paragraph (b);*
- the insurer is entitled to the excess.*

### **Amount recovered by insured**

- (3) *If the amount is recovered by the insured:*
- (a) *the insured is entitled under this paragraph to so much of the amount as does not exceed the sum of:*
    - (i) *the insured's overall loss; and*
    - (ii) *the amount paid by the insured for administrative and legal costs incurred in connection with the recovery; and*
  - (b) *if the amount recovered exceeds the amount to which the insured is entitled under paragraph (a)--the insurer is entitled to so much of the excess as does not exceed the amount paid by the insurer to the insured in respect of the loss; and*
  - (c) *if the amount recovered exceeds the sum of:*
    - (i) *the amount to which the insured is entitled under paragraph (a); and*
    - (ii) *the amount (if any) to which the insurer is entitled under paragraph (b);*
- the insured is entitled to the excess.*

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### **Amount recovered by insurer and insured jointly**

- (4) Subsections (5), (6) and (7) apply if the amount is recovered by the insurer and the insured jointly.
- (5) If the amount recovered is less than the sum of the paragraph (2)(a) amount and the paragraph (3)(a) amount, the insurer and the insured are each entitled to a portion of the amount recovered, calculated on a pro rata basis in proportion to the paragraph (2)(a) amount and the paragraph (3)(a) amount.
- (6) If the amount recovered is equal to the sum of the paragraph (2)(a) amount and the paragraph (3)(a) amount:
- (a) the insurer is entitled to the paragraph (2)(a) amount; and
  - (b) the insured is entitled to the paragraph (3)(a) amount.
- (7) If the amount recovered exceeds the sum of the paragraph (2)(a) amount and the paragraph (3)(a) amount, then:
- (a) the insurer is entitled to the paragraph (2)(a) amount; and
  - (b) the insured is entitled to the paragraph (3)(a) amount; and
  - (c) in addition to those amounts, the insurer and the insured are each entitled to a portion of the remainder of the amount recovered, calculated on a pro rata basis in proportion to the amounts referred to in subparagraphs (2)(a)(ii) and (3)(a)(ii).

### **Amount awarded by way of interest**

- (8) If an amount (the interest amount) by way of interest is awarded in respect of the amount recovered (the principal amount), the following apply:
- (a) if the principal amount was recovered by the insurer, the insurer is entitled to the interest amount;
  - (b) if the principal amount was recovered by the insured, the insured is entitled to the interest amount;
  - (c) if the principal amount was recovered by the insurer and the insured jointly, the interest amount is to be divided fairly between the insurer and the insured, having regard to:
    - (i) the amounts to which the insurer and the insured are each entitled under subsection (5), (6) or (7), as the case requires; and
    - (ii) the periods of time during which the insurer and the insured have lost the use of their money.

### **Rights of insurer and insured are subject to contract and any agreement**

- (9) The rights of the insurer and the insured under this section in respect of a loss are subject to:
- (a) the relevant contract of insurance; and
  - (b) any agreement made between the insurer and the insured after the loss occurred.
- (10) In this section: insured's overall loss, in relation to a loss incurred by an insured to which this section applies, means the amount of the loss reduced by any amount paid to the insured by the insurer in respect of the loss.

paragraph (2)(a) amount means the sum of the amounts referred to in subparagraphs (2)(a)(i) and (ii).  
paragraph (3)(a) amount means the sum of the amounts referred to in subparagraphs (3)(a)(i) and (ii).

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## **Application**

The amendments made by this Schedule apply to:

- (a) a contract of general insurance that is originally entered into after the commencement of this item; and
- (b) a contract of general insurance that was originally entered into before the commencement of this item and is renewed after that commencement.

## **Disclaimer**

The contents of this seminar paper are general in nature and should not be relied on as legal advice. No person should act on the information contained without first consulting Holman Webb.

### **Sydney**

Level 17 Angel Place  
123 Pitt Street  
Sydney NSW 2000  
T: +61 2 9390 8000  
F: +61 2 9390 8390

### **Melbourne**

Level 10  
200 Queen Street  
Melbourne VIC 3000  
T: +61 3 9691 1200  
F: +61 3 9462 3183

### **Brisbane**

Level 13  
175 Eagle Street  
Brisbane QLD 4000  
T: +61 7 3235 0100  
F: +61 7 3235 0111