

Appendix 2 – Insurance Contracts Act - Items of Concern

The Insurance Contract Act (in Australia) has been held up as an example of the intended “base” which will be used for the new PNG law. If this is to be the situation and we design a law from the Australian model then serious consideration will need to be given as to the application and the intended benefits arising out of such a quantum step for PNG.

At present many insurance staff in PNG have been trained to Australian standards under the ANZIIF. They use this knowledge of the insurance industry (in Australia) as a guideline and template to what is considered good practice for the insurance industry in PNG. The Australian Insurance Contracts Act effectively acts as proxy legislation governing the general conduct of the industry in PNG. There would be very few people within the PNG insurance industry that would not know and use the Insurance Contracts Act on a daily basis in their work, even though it is not in operation in PNG and is “per se” Australian legislation.

That aside, there remains a number of provisions within the Australian Insurance Contracts Act which have produced ambiguity or resulted in outcomes that have been seen as unsatisfactory by key industry stakeholders over the last twenty-two (22) years. Those of us who have worked in and around the insurance industry for more than twenty-two (22) years do recall the not inconsiderable amount of angst and foreboding which accompanied the proclamation into law, with effect from 1 January 1986, of the Insurance Contracts Act 1984.

It was, after all, the most significant and far reaching legal reform which the Australian insurance industry had experienced; an ambitious attempt to codify the greater part of Australian law governing the construction and operation of insurance contracts in most lines of business. It took that law, in several respects, in a radically different direction from the well-trodden paths of the UK common law of insurance with which most Australian insurance professionals at that time were familiar.

The industry (at the time) would recall the consternation with which some of the proposed provisions were greeted. Utmost Good Faith as an implied term, limitations on subrogation rights and, above all, tinkering with the time-honoured “prudent insurer” test for the Duty of Disclosure, all represented abhorrence to an insurance industry of the time.

It is fair to say that the insurance industry is fairly conservative in its attitudes, especially to law reform, and despite the fact that then new legislation (in Australia) represented the culmination of eight years' of prior deliberation and consultation many people were just not ready for it. Most companies, however, rose to the challenge and implementation committees were established both by individual Insurers, and on an industry basis. After careful review and a reflective analysis of the actual draft Bill, many who served upon those committees eventually formed the view, perhaps grudgingly, that most of the provisions were not as

unreasonable as might first have been thought, especially when looked at from the perspective of an Insured as well as an Insurer.

Even at the outset, of course, there were doubts and uncertainties as to how some of the new provisions might operate in practice. In particular, how much of the common law of insurance might still influence and inform the content of the new Duty of Disclosure under Section 21 of the Act, and the Insurer's remedies under Section 28, were matters keenly analysed and debated. Above all, the radical new provision Section 54, which was drafted in far wider terms than predecessor provisions such as Section 18(1) of the Insurance Act 1902 (NSW) and Section 27 of the Instruments Act 1958 (Vic) and was clearly intended to frustrate any attempt by Insurers to draft their policies so as to avoid or minimise its impact, caused some qualms among Insurers and insurance lawyers during the latter half of the 1980s in Australia. Its full significance for "claims made and notified" insurance contracts probably did not dawn upon the industry until the East End Real Estate decision in 1992.

Overall, however, the general reception of the Insurance Contracts Act was and remains positive and it was felt that whatever uncertainty surrounded the scope of application of some of the more unusual or widely drawn provisions would eventually be resolved by case law, in a manner consistent with the Insurance Contracts Act's avowed intention of striking a fair balance between the interests of Insurers and Insured.

To a considerable extent, these hopes have been realised and the Insurance Contracts Act has performed in the manner originally contemplated. While the subtle balancing of subjective and objective elements in the appreciation of materiality for the purposes of the Duty of Disclosure in Section 21 still gives rise to contention, despite the subsequent carve out of 'eligible contracts of insurance' in the domestic and consumer lines and the provision of a narrower, more consumer-friendly version in Section 21A, other problems, which were initially thought to be intractable and to require further legislative amendment appear to have been satisfactorily resolved by the courts. A good example is the issue of the scope of the Insurer's remedy for non-fraudulent non-disclosure or misrepresentation, in Sub-Section 28(3).

Nevertheless, twenty-two (22) years on there remain a number of the Insurance Contracts Act's provisions in respect of which the case law interpretations are ambiguous or have produced outcomes which are seen as unsatisfactory. These may not impact greatly upon insurances in PNG today but should the Insurance Contracts Act become law in PNG, they would effect the future sophistication of the market and possibly the direction of existing Insurers or bar those wishing to enter the market or offer claim made policies of the financial services kind that would allow for business in PNG to prosper.

There are a number of issues of equal conceptual difficulty, all relating to the proper balance to be struck between the interests of Insurers, Insured and interested third parties.

1. The extent and manner of application of the Insurance Contracts Act where 'bundled' contracts of insurance are offered, providing multiple forms of coverage some of which would be subject to the Insurance Contracts Act and some of which would not, if they were offered as separate policies.
2. The way in which Section 8 operates to determine the application (or not) of the Insurance Contracts Act to policies issued by Offshore Foreign Insurers to Insureds, in respect of domiciled risks. The PNG Exemption Process may be called into question.
3. The type of language or conduct that is necessary to 'clearly inform' an Insured of deviation from the standard terms of a contract of insurance to which Section 35 applies, or that a policy contains an unusual term within the meaning of Section 37.
4. The status of an 'innocent co-insured' in a situation where there is non-disclosure or misrepresentation affecting the availability or the terms of cover under a joint or composite policy. The challenge is to attempt to deliver "social justice" in this area.
5. The anomalous situation created by Section 29(3) of the Insurance Contracts Act, whereby a Life Insurer which is the victim of non-fraudulent non-disclosure or misrepresentation, but would still have issued a policy in respect of the life Insured but on different terms had the Duty of Disclosure been properly complied with, has no legal remedy if those alternative terms would not have involved a premium loading.
6. The application of the Insurance Contracts Act to Life Insurance is a completely onus direction.
 - Section 28 & 29 in relation to remedies of life Insurer for non-disclosure and misrepresentation.
 - Section 32 in relation to Group Life & a misrepresentation or non-disclosure that occurs between the time an Insured becomes a member of the scheme and applies for cover.
 - Section 32 should apply to non-superannuation group life schemes.
 - Trauma waiting periods & Section 47 has become an issue in relation to severely restricting the effectiveness of waiting periods on trauma policies.
 - Interim Covers/Cover Notes & Section 38 and the cancellation procedures set out in Section 59.
8. Standard cover - 'clearly inform' the Insured of the nature and extent of the derogation from the prescribed form of coverage, or the effect of

the unusual term, as those words have been construed in recent cases. After careful consideration of the various levels of meaning that have been applied to the words 'clearly informed' throughout the case law.

9. Third party beneficiaries - the principle that additional persons, who are intended by the parties to an insurance contract to be covered under it but who are not actually parties to it, should be able to claim under it and have standing to sue the Insurer, is now widely accepted in Australian insurance law. Most of the argument centres on the vexed issue of whether and to what extent such third party beneficiaries can gain any rights in respect of the contract of insurance which are not conditional upon the continued existence and the terms of coverage of that contract, as between Insurer and contracting Insured. In other words, can the third party beneficiary ever gain a right against the Insurer which is better or more extensive than that of the contracting Insured?

In all the work that has been done upon the original drafting of the Australian Insurance Contracts Act there has been a distinct failure to recognise the reality of the underwriting process and how this affects the operation of the Insurers in accepting or denying risk. There is a need to have a balanced approach to the competing concerns of helping the Insurer transact good insurance business and providing the insurance buying community with the right insurance products at the right price.

There are numerous miscellaneous issues that relate to the introduction of an Insurance Contracts Act to PNG. These could venture to concerns over interim cover; life insurance policies; subrogation issues; enforcement of the Act; problems with the postal service and delivery of "notice" by mail; the timing on the late issuance of cover; and the use of human genetic information in underwriting, including family medical histories.

The question should also be asked who will administer the Insurance Contracts Act in PNG when it is considered to be covering both general insurance and life insurance. Does this forebode the merging of the two bodies that administer the general and life insurance markets currently? Will the Insurance Contracts Act be too sophisticated for the "grassroots" insurance buyer of PNG? Who will enforce the Insurance Contracts Act? Will PNG get the comprehensive set of legislation similar to that which supports the Australian Insurance Contracts Act or will case law need to be made in PNG to support same meanings that years of court action will need to be had prior to the law having been settled down?

Our reasons for raising these concerns are obvious that the introduction of the Insurance Contracts Act should not be done in a piece-meal fashion nor should it be rushed, or introduced without full consultation. Any law to be introduced into PNG that comes from elsewhere will need to have PNG sympathies built into it. In some cases those sympathies will defeat the need for the law. The structure of the legislation in PNG will possibly defeat the intent of the law as we see the situation today.

The insurance industry supports the economy. Insurance affects everything, and everything affects insurance. It is generally understood that insurance allows those who participate in the wider economy to produce goods and services without the prospect that an adverse incident could leave them destitute or unable to function.

There is therefore substantial merit adopting a much more cautious approach to the introduction of this proposed legislation, given the broader importance of the insurance industry to the PNG economy.