Comments on the draft Insurance Contracts Amendment Bill

1. Is the draft Bill consistent with the recommendations made in the report into Section 54?

I believe that the draft Bill is fairly consistent with the recommendations of the Report. However, I believe some further amendments should be considered for inclusion in the draft Bill. New suggested inclusions are shown in "red" and suggested deletions are shown in ~~"green strikeout".~~ Some comments are shown in "blue".

Suggested Additional Amendments to Section 40

Following amendments to Section 40(1) are suggested:

Section 40

Certain contracts of liability insurance

(1) This section applies in relation to a contract of liability insurance the effect of which is that:

(a) the insurer's liability is excluded or limited by reason that a claim against the insured in respect of a loss suffered by some other person is not made during the period of insurance cover provided by the contract; or

(b) the insurer's liability is ~~-~~excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer during ~~before the expiration of:~~

(i) the period of the insurance cover provided by the contract; or
(ii) the period specified by the contract.

The reason I am suggesting this amendment to Section 40(1) is that the current wording of this subsection seems to be saying that section 40 applies only to "claims made and notified" policies. Therefore, if Insurers removed the "notification" requirement from their wording, there may be a possibility that the Insurer may be able to "by-pass" Section 40 altogether. In such cases, the Insured may have no avenue to get coverage for "facts/circumstances". As the current case law is that the Insured's failure to comply with the "notification" requirement is remedied by Section 54 (other than prejudice suffered by the Insurer by the late

notification), Insurers may be willing to convert “claims made and notified” policies to “claims made” policies to avoid the application of Section 40.

The intention of Section 40 providing for a “deeming provision” is relevant to “claims made” policies regardless of whether the policy requires the Insured to notify the Insurer of claims made against the Insured during the period of insurance (“claims made and notified” policies) or not (just “claims made” policies).

It is not the notification, of claims made against the Insured, to the Insurer during the period of insurance which is relevant for the purpose of “deeming provision” which deems “facts and circumstances” of which the Insured becomes aware during the period as claim made against the Insured during the period of insurance if the facts/circumstances leading to such claim is notified to the Insurer during the period of insurance.

“Claims made” policies (whether **or not** they have the requirement that such claims must be notified to the Insurer during the Period of Insurance) exclude claims arising out of any facts/circumstances of which the Insured is aware (or ought reasonably to have been aware) as at the inception date of the period of insurance. Therefore, the Insured would not be able to access coverage in the period when the claim is made against them (due to the exclusion of “known facts/circumstances) if they were aware of the facts before that period of insurance commenced. Also, if it were not for Section 40, the Insured would also have no avenue to access coverage in the period when they became aware of the facts/circumstances because a claim has not been made against the Insured as yet.

Therefore, Section 40 should apply to all “claims made” policies regardless of whether **or not** the policy contains a requirement that the Insured must notify the Insurer during the period of any claim made against them. Hence the suggestion that 40(1) be amended as per above.

<u>“during” Vs “before the expiration of”</u>

You will note that the suggested amendments include replacing “before the expiration of” with “during”.

“Before the expiration of” implies that claim may be covered even if the claim was made against the Insured before the period of insurance as it only states “before the expiration of”. However, the correct reference should be “during” the period of insurance.

Also, the reason behind including (b)(ii) “the period specified by the contract” is to remove any ambiguity that Section 40 applies even to policies which have an extended reporting or extended notification period (e.g. notified to the insurer during the period of insurance or within 3 months after expiry of the period of

insurance). Such policies with extended reporting period may be able to escape Section 40 as it does not require the notification to be made to the insurer "before the expiration of" the period of insurance.

Suggested Additional Amendments to Section 54

Insurer may not refuse to pay claims in certain circumstances

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as ~~being capable of causing or contributing~~ having caused or contributed to ~~a~~ the loss which gave rise to the claim ~~in respect of which insurance cover is provided by the contract~~, the insurer may refuse to pay the claim.

Currently, it could be argued that if the act could be regarded as being capable of causing or contributing to <u>any</u> loss which is covered by the policy, the insurer may refuse to pay the claim even where the act had nothing to do with the claim. Furthermore, even if the act is capable of causing the loss but, in the claim concerned, did not cause or contribute to the loss, then the insurer should not be able to refuse the claim only by reason that, whilst the act did not cause the loss in this case, it could have caused similar losses. I don't believe this is the intention of the Act.

(3) Where the insured proves that no part of the loss that gave rise to the claim could reasonably be regarded as having been ~~was~~ caused or contributed to by the act, the insurer may not refuse to pay the claim by reason only of the act.

Currently, the terms and phrases used in subsections 54(2) and 54(3) are different. Therefore, potential exists where both subsections may be triggered in one claim. For example, the act may not have caused the loss but contributed to the loss. In such a case, insurer will refuse the claim relying on subsection 54(2). The insured, however, will rely on subsection 54(3) arguing that "no part of the loss was caused by the act".

It is submitted that both subsections should use the same or similar terms and phrases.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or
(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and
(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

Suggested Amendments to draft Bill

1 After subsection 40(2)

Insert:

(2A) The insurer must, during the period that:
(a) starts 30 days before the insurance cover provided by the contract expires: and
(b) ends 7 days before that insurance cover expires;
give the insured or the person acting as agent for the insured, in writing, information that clearly informs the insured of the effect of subsection (3).

~~(2B) Subsection (2A) does not apply if:~~
~~(a) the contract was arranged by an insurance broker; and~~
~~(b) during the period mentioned in that subsection, the insurer becomes aware that the insurance broker has, during that period, given the insured, in writing, the information mentioned in that subsection.~~

The reason for this suggested amendment is that it would seem impractical for the insurer to know whether or not the broker has given that information to the insured. Furthermore, where a broker has acted as agent of the insured in arranging the contract, it should be the broker's duty to inform the insured.

This proposed subsection 40(2B) would seem to go against the general intention of the Act with respect to notices required to be given by the insurer to the insured. The general intention of the Act would seem to be that where a broker, acting as agent of the insured, has arranged the contract, insurer is relieved of such duty to inform or notify the insured. The intention being that it is the duty of the broker, as agent of the insured, to inform or notify the insured.

Whilst Section 71 of the Act applies to notices to be given to the insured before the contract is entered into, it clearly states that if the contract was arranged by a broker acting as agent of the insured, provisions of the Act requiring notice, etc. to be given to the insurer does not apply if a broker, acting as agent of the insured, arranged the contract. Also, Section 58 of the Act, regarding expiry notices, also states that the insurer can give the notice to the insured or a person acting as agent for the insured.

Furthermore, in some cases, it would not be practically possible for the insurer as the insurer may not have adequate information about the insured to send the notice to the insured. For example, the insurer may be insuring many insureds under a scheme covering homogenous risks. In such a case, the insurer may not have details such as the name of the contact person or the mailing address of the insured whilst the broker would obviously have such details.

It is submitted that the requirement under this proposed Subsection 40(2A) that notice must be given to the insured should be deemed complied if the information/notice is given to the agent of the insured.

2 Subsection 40(3)

Repeal the subsection, substitute:

(2) If:

(a) the insured became aware, ~~before the~~ during the period of insurance cover provided by the contract ~~expired~~, of facts that might give rise to a claim against the insured; and

(b) the insured gave notice in writing to the insurer of those facts as soon as was reasonably practicable after becoming aware of them but no later than 45 days after the expiration of the period of insurance cover provided by the contract expired;

the insurer is not relieved of liability under the contract in respect of the claim or claims, when made, by reason only that it was made after the expiration of the period of insurance cover provided by the contract.

The reason for the suggested amendments to the proposed new Subsection 40(3) is that this subsection should apply to facts of which the insured became aware during the period of insurance and not for those facts which the insured became

aware before the inception date of the period of insurance (because those are facts which should have been notified to the insurer for the prior period of insurance). However, the words "before the insurance cover provided by the contract expired" would also include facts which the insured became aware before the insurance cover commenced, which is not the intention.

Based on the same reasoning for suggested amendments to Section 40, it is suggested that the proposed Section 54A be amended as follows:

54A Subsection 54(1) not to apply to certain omissions in relation to liability insurance contracts

(1) This section applies if, apart from this section, subsection 54(1) would have the effect that an insurer may not refuse to pay a claim, either whole or in part, by reason only that the insured, having become aware ~~before~~ during the period of insurance cover provided by the contract ~~expired~~ of facts that might give rise to a claim or claims against the insured, did not give notice in writing to the insurer of those facts during ~~a period provided for in~~ the period specified by the contract, or in this Act, for giving such notice.

(2) Subsection 54(1) does not have that effect if the contract is a contract of liability insurance the effect of which is that:
  (a) the insurer's liability is excluded or limited by reason that a claim against the insured in respect of a loss suffered by some other person is not made ~~before~~ during the period of insurance cover provided by the contract ~~expires~~; or
  (b) the insurer's liability is excluded or limited by reason that:
    (i) a claim against the insured in respect of s loss suffered by some other person is not made ~~before~~ during the period of insurance cover provided by the contract ~~expires~~; and
    (ii) notice of such a claim is not given to the insurer ~~before~~ during:
      (ii)(a) the period of insurance cover provided by the contract ~~expires~~; or
      (ii)(b) the period specified by the contract

2. <u>Is there a need to define what a "claim" is?</u>

It may be argued that a definition of "claim" should be included in the Act. This would make it clear perhaps but also risks limiting the application of Sections 40 and 54 to those claims which fall within the Act definition. Furthermore, whilst most claims made policies contain definitions of "claim", they can differ between policies. In particular, London wordings are usually poorly drafted and can contain "claim" definitions which are either completely unsuitable or unreasonably narrow. Two examples of such definitions are:

(i) definition of “claim” contained in Marketform’s Medical Malpractice Insurance Policy (unless it has been amended in the last 12 months) is as follows:

> *The expression "Claim" shall mean any event or series of events arising from one originating cause and for which the Assured is required to give notice to Underwriters in accordance with General Condition 2.*

I am sure you will agree that this definition is clearly wrong. This is more like an Occurrence definition in “Occurrence” or “Losses occurring” type policies and clearly not relevant to a “claims made” policy as an “event” cannot be made against the Insured.

(ii) definition of “claim” contained in Newline’s Clinical Trials Policy is as follows:

> ***Claim*** *shall mean any suit or proceeding brought against the* ***Insured*** *for compensation in respect of* ***Bodily Injury*** *insured by this Policy*
>
> *For the purpose of this Policy the date of such suit or proceeding shall represent the date* the **Claim** is first made against the **Insured**

This definition is inadequate in that it does not allow for letters of demand or verbal demand for compensation as it only deems “suit” or “proceedings” as claims.

It is submitted that it may be better to leave “claim” undefined in the Act or have a definition which only applies if there is no definition in the contract of insurance concerned. This is in an endeavour to prevent any problems from occurring due to the Act definition and Policy definition being different.

A suggested definition may be:

> *“Claim” means claim or claims as defined in the contract of insurance. However, if the contract of insurance does not clearly define what a claim or claims may mean, then claim shall mean:*
>
> *(i) any suit or proceedings for compensation; and/or*
>
> *(ii) any written or verbal demand for compensation.*

Many definitions of claim include the words at the end “brought against the Insured”, etc. However, considering that the Operative/Insuring clauses all state

"claim made against the Insured…", it is submitted that such words at the end should be removed.

3. Is there a need for greater prescription in regard to the disclosure obligations under section 40?

I do not believe there is a need for greater prescription. However, for reasons outlined earlier in this paper, I believe the obligations should be to give the information to the "insured" or to "a person acting as agent of the insured" and that the proposed subsection 40(2B) should be deleted.

4. Should the amended section 54A extend to any other types of policies? If so, why?

In the spirit of striking a fair balance between the interests of insureds and insurers, I don't believe the amended section 54A should extend to any other types of policies. The current Section 54 still allows the insurer to deny indemnity if the act caused or contributed to the loss or reduce the loss by the amount representing the prejudice suffered by the insurer as a result of that act. Whilst it may be argued that the "burden" of proving prejudice is a difficult one to discharge, it would be even more difficult for the insured if the insured had to prove that the insurer did not suffer prejudice.

I hope the comments contained herein make sense and can contribute to an amended Sections 40 and 54 in an endeavour to strike a fair balance between the interests of insurers and insureds. If you have any queries regarding any comments or suggestions I have made, please do not hesitate to contact me.

Yours sincerely,

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