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Dear Ms Hope

CONSULTATION PAPER 224: FACILITATING ELECTRONIC FINANCIAL SERVICES DISCLOSURES

The Insurance Council of Australia (the **Insurance Council**) appreciates the opportunity to provide this submission responding to ASIC's Consultation Paper 224 *Facilitating Electronic Financial Services Disclosures* (the **Consultation Paper**). The Insurance Council welcomes the proposals in the Consultation Paper to facilitate electronic and more innovative forms of disclosure.

While the recent Financial System Inquiry (FSI) brought to the fore concerns about the shortcomings of the current disclosure regime, it concluded that disclosure remains a relevant and important component in the financial system regulatory architecture. As such, ongoing review and improvement to the disclosure regime is necessary to ensure that it is effective in meeting consumer needs. The Insurance Council concurs with ASIC that technological advances provide the opportunity to consider more innovative, and potentially better, ways of making financial product disclosures.

While the Insurance Council is supportive of all of the proposals outlined in options 1 – 3, as elaborated further in our submission, insurers will not be able to take advantage of the key proposals as they are limited to providing relief or guidance in relation to disclosure requirements contained in the *Corporations Act 2001* (the **Corporations Act**). Insurers' disclosure requirements are not only set out in the Corporations Act, but also the *Insurance Contracts Act 1984* (the **IC Act**).

We understand that it was not ASIC's intent to limit the scope of the proposals in relation to insurers; rather, ASIC is not similarly empowered to provide relief under the IC Act as it is under the Corporations Act. Nevertheless, there is no compelling policy reason for there to be a different regulatory approach to electronic disclosure for insurers relative to other providers of financial services.

We submit that ASIC should, as a high priority, drive the required legislative reform as recommended in our submission. The industry is keen to leverage off the momentum created by the FSI in considering more innovative forms of disclosure, and it would be disappointing if the identified regulatory barriers were to impede progress in this area.

Insurer Disclosure Requirements

Insurers' Product Disclosure Statements (PDSs) not only include disclosures required under the Corporations Act, but also contain information, statements and notices required under the IC Act; this includes important disclosures made under sections 22 and 35 of the IC Act. While section 72A of the IC Act enables electronic communications to be made, such communications must be made in accordance with the *Electronic Transactions Act 1999* (the **ET Act**) because of the applicability of that Act to the IC Act.

The effect of the application of the ET Act is that insurers will not be able to utilise:

- i) The guidance on consent in proposal B1; and
- ii) The relief to enable the provision of PDSs via hyperlinks and references to websites in proposal B2.

Our submission provides further commentary on the reasons that insurers face barriers in accessing the proposed guidance (proposal B1) and relief (proposal B2).

Insurers will be able to utilise guidance/relief that addresses requirements specific to the Corporations Act that are not similarly imposed by the IC Act and ET Act, including:

- i) The relief to enable more interactive PDSs in proposal C1; and
- ii) The guidance on the use of more innovative PDSs in proposal C2.

However, feedback from members indicates that the most substantive barrier to greater use of electronic disclosure is the need to obtain express client consent. There is also ambiguity around whether insurers can, without relying on ASIC relief, make disclosures to customers through the provision of a hyperlink to a PDS. Without the ability to access the relief and guidance in proposals B1 and B2, the industry has significant reservations about more extensive use of electronic disclosure.

Proposal B1: Consent to Receive Electronic Disclosure

ASIC proposes to update the guidance in Regulatory Guide 221 to make it clear that, if a financial services provider has an email address for a client, they do not need consent to use that address to deliver disclosures electronically.

ASIC also proposes (in proposal B2) to provide class order relief from Regulation 7.9.02A requiring providers to obtain express client consent for providers using "alternative ways" of making disclosures under s.1015C(4) of the Act.

However, section 9(2)(d) of the ET Act requires that "the person to whom the information is required to be given consents to the information being given by way of electronic communication". The ET Act defines "consent" to include "consent that can reasonably be inferred from the conduct of the person concerned". Whilst this definition of consent is not exhaustive, it would seem to revert to a dictionary definition at a minimum. By way of example, the Butterworth's Concise Australian Legal Dictionary defines "consent" as "affirmative acceptance, not merely a standing by and absence of objection."

In practice, because electronic disclosures made under the IC Act require client consent, and these disclosures are included within PDSs, insurers will not be able to utilise ASIC's more relaxed guidance on consent without legislative amendment. Specifically, there will need to

be legislative amendment to the definition of “consent” in the ET Act and also section 9(2)(d) of the ET Act requiring consent to be obtained.

Proposal B2: The Provision of PDSs via Hyperlinks and References to Websites

ASIC proposes to provide certainty in Regulatory Guide 221 that disclosure can be made by way of a hyperlink in an email or notifying the client (printed or electronic) that the disclosure is available electronically. ASIC proposes to provide relief from the requirement under Regulation 7.9.02A that the provider must be satisfied, on reasonable grounds, that the person has received the disclosure. ASIC also proposes to provide class order relief from Regulation 7.9.02A to obtain express client consent prior to the provision of such disclosure.

However, the IC Act, when read in conjunction with the ET Act, arguably requires information, statements and notices to actually be given “in writing” where reasonably practicable, not just made available. Section 9(2) of the ET Act provides that information given “in writing” may be given:

“by means of an electronic communication where ... (a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference ... [and] (d) the person to whom the information is permitted to be given consents to the information being given by way of electronic communication.”

While an email with a hyperlink to a website that sets out the information which is continually maintained may meet the requirements under section 9(2)(a), other aspects of the definition of “electronic communication” gives rise to uncertainty, including:

- (i) Section 5 of the ET Act – defines “electronic communication” to mean “a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy” [our emphasis]; and
- (ii) Section 14A(1) of the ET Act – provides that “the time of receipt of [an] electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee” [our emphasis].

In a recent case before the Queensland Supreme Court (*Conveyor & General Engineering Pty Ltd v. Basetec Services Pty Ltd & Anor* [2014] QSC 30), Justice McMurdo considered almost identical provisions in the *Electronic Transactions (Queensland) Act 2001* (Qld) in relation to the use of a Dropbox link, which operates in a similar way to a website link. Justice McMurdo concluded that the material within the Dropbox was not part of an “electronic communication” (as defined) and it could not be said that the Dropbox was “an electronic address designated by the addressee”. In particular, he noted at para [28]:

“... the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated “by guided or unguided electromagnetic energy.” Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website.”

As such, given the ambiguity around whether the definition of “electronic communication” in the ET Act actually enables disclosures to be provided through hyperlinks and references to websites, members are disinclined to provide disclosures this way. While members have

considered the possibility of addressing this ambiguity through terms inserted into PDSs, we submit that the law should be clarified where there is any uncertainty in its application.

Need for Legislative Change

While ASIC is empowered under section 926A(2)(c) of the Corporations Act to provide relief as proposed, ASIC does not have the power to provide similar relief under the IC Act or ET Act. These Acts substantially limit the ability of insurers to utilise electronic disclosure as envisioned in the Consultation Paper.

We submit that ASIC should drive the required legislative changes to the ET Act and/or the IC Act to enable insurers to utilise the guidance and relief as proposed at B1 and B2 of the Consultation Paper.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate,

Yours sincerely

Robert Whelan
Executive Director & CEO