PART XIII OF THE INSURANCE ACT 1996 : PAYMENT OF POLICY MONEY UNDER A LIFE INSURANCE POLICY OR PERSONAL ACCIDENT INSURANCE POLICY

INTRODUCTION

Who benefits from policy moneys payable under a life insurance policy or a personal accident insurance policy upon the death of the policy owner? This is a question which every policy owner would want a clear answer in order to plan his estate effectively in his lifetime. The answer to this question can be found in Part XIII of the Insurance Act 1996[1] (Insurance Act) that specifies the beneficiaries to such policy moneys. Part XIII of the Insurance Act applies to life insurance policies and personal accident insurance policies that are in force on or after 1 January 1997. It also applies to nominations made before, on or after 1 January 1997.[2] This paper will attempt to examine Part XIII of the Insurance Act and discuss the payment of policy moneys to beneficiaries of non-Muslim and Muslim policy owners in two parts, *ie*, Parts I and II respectively.

Part XIII of the Insurance Act seeks to promote expeditious claims settlement by insurers in respect of payment of policy moneys under life insurance policies or policy moneys in death claims under personal

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[1]Act 553.

[2]S 172(1) of the Insurance Act. S 172(2) provides that Part XIII shall have full force and effect notwithstanding anything inconsistent with, or contrary to, any other written law relating to probate, administration, distribution, or disposition of the estates of deceased persons, or in any rule of law, practice or custom in relation to these matters.

accident insurance policies. Any discussion on Part XIII of the Insurance Act would not be complete without examining the background of, and reasons for, such express provisions. The predecessor to Part XIII of the Insurance Act is section 44 of the repealed Insurance Act 1963[3] (repealed Act) which only dealt with the payment of policy moneys under life insurance policies. The Insurance Act extends the provisions on expeditious claims settlement in section 44 of the repealed Act to death claims under personal accident insurance policies. It also takes into account the repeal of estate duty laws[4] that took effect from 1 November 1991.[5]

A. Section 44 of the Insurance Act 1963

Section 44(1) of the repealed Act provided that a life insurer may pay to the proper claimant the amount of policy moneys prescribed by regulations without the production of probate or letter of administration and the insurer shall be discharged from all liability in respect of the sum paid. The Insurance (Payment of Life Policy Moneys) Regulations 1983[6] prescribed that a life insurer may pay to the proper claimant sixty thousand ringgit or nine-tenths of the policy moneys, whichever was the lower.

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[3]Act 89 (Revised 1972).

[4]Estate Duty Enactment 1941 (F.M.S. 7/41), Estate Duty Ordinance of Sabah (Sabah Cap. 42), Estate Duty Ordinance of Sarawak (Sarawak Cap. 29), Finance (Estate Duty) Act 1965 (Act 29/65), Finance (Estate Duty) Act 1971 (Act 38), Finance (Estate Duty) Act 1979 (Act 219) and Finance (Estate Duty) Act 1980 (Act 224).

[5]Although the Finance Act 1992 (Act 476) came into force on 21 February 1992, the repeal of estate duty laws was deemed to have come into force on 1 November 1991: see ss 45 and 46 of the Finance Act 1992.

[6]PU(A) 293/83.

Section 44(5) of the repealed Act, among others, defined 'proper claimant' as follows:

> 'proper claimant' means a person who claims to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum (whether for his own benefit or not) and is the widower, widow, parent, child, brother, sister, nephew or niece of the deceased; and in deducing any relationship for the purposes of this subsection an illegitimate person shall be treated as the legitimate child of his actual parents.

Under the repealed Act, life insurers were required to deposit, through Bank Negara Malaysia (Bank Negara), the balance of the life policy moneys with the Treasury of the Federal Government (Treasury). The life insurers need not deposit with the Treasury if, within one year from the date of their initial payment to the proper claimants, the balance of the policy moneys was included in a schedule or certificate of estate duty.[7] The Treasury may apply the whole or part of the policy moneys so deposited to settle any unpaid estate duty levied on the estate of the deceased policy owners. Upon subsequent production of estate duty clearance and relevant supporting documents, the deposits were refunded to the life insurers upon their application to Bank Negara. The life insurers would forward the refunded deposits to the proper claimants.

With the abolition of estate duty,[8] section 44 of the repealed Act relating to the payment of estate duty no longer applies to policy owners who died on or after 1 November 1991. As a result, life insurers are not required to deposit the balance of policy moneys with the Treasury. Pursuant to the Director-General's circular dated 4 November 1993,[9] the balance of the policy moneys is held by the life insurers before payment to the proper claimants. The life insurers can pay to

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[7]S 44(4) of the repealed Act.

[8]*Supra*, n 4.

[9]Surat Pekeliling JPI: 16/1993.

the legal representatives of the estates of the deceased policy owners. The circular sets out that the legal representative is a person -

(a) who has obtained a grant of probate of the will of the deceased or a grant of letter of administration to the estate of the deceased under the Probate and Administration Act 1959;[10] or

(b) who is entitled to such policy moneys under a Distribution Order issued under the Small Estates (Distribution) Act 1955.[11]

If a person to whom the balance of the policy moneys is legally payable does not make a claim to the life insurer within one year of the date of the death of the deceased policy owner, the life insurer may deal with the moneys in accordance with the Unclaimed Moneys Act 1965.[12]

B. Transitional Provision for Refund of Policy Moneys Deposited with the Treasury

Bank Negara's 1996 Insurance Annual Report[13] states that the outstanding balance of life policy moneys deposited with the Treasury as at 31 December 1996 was 8.2 million ringgit, of which 3.5 million ringgit remained unclaimed for more than seven years. Section 224(1) of the Insurance Act facilitates the life insurers' refund of the balance of policy moneys. The procedure for claiming a refund of the balance of policy moneys in the Treasury is now simplified as follows -

(a) the life insurer submits its application in writing to Bank Negara and the application must be accompanied by the original receipt issued by the Treasury; and

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[10]Act 97 (Revised 1972).

[11]Act 98 (Revised 1972).

[12]Act 74.

[13]Page 26.

(b) a letter of consent from the person who received the initial payment of the policy moneys and where there is no such person, from the deceased policy owner's spouse, child or parent in that order of priority.

C. Objective of Part XIII of the Insurance Act 1996

In view of the onerous procedure in obtaining a refund of the life policy moneys of deceased policy owners, Part XIII of the Insurance Act sets out expeditious procedures for licensed insurers to pay policy moneys of deceased policy owners to their nominees. With the abolition of estate duty, there is no longer any need for the Government to require the policy moneys to be forwarded to the Treasury pending estate duty clearance and extraction of probate or letters of administration. Under the Insurance Act, licensed insurers now do not have to concern themselves with the distribution of the policy moneys to the beneficiaries of the deceased policy owners. The licensed insurers merely have to pay the policy moneys to the nominees of the deceased policy owners or where there are no nominations, pay to the persons specified in section 169 of the Insurance Act. With these provisions, the Insurance Act caters to the objectives and wishes of policy owners in ensuring that their nominees or beneficiaries benefit from the policy moneys upon their death. The Treasury and licensed insurers need not withhold the policy moneys until estate duty clearance or extraction of probate or letters of administration. Expeditious settlement of claims under a life insurance policy or personal accident insurance policy would also avoid any financial hardship that the family members of deceased policy owners may encounter immediately after their death. In addition, licensed insurers, which fail to settle claims under life insurance policies or death claims under personal accident insurance policies within sixty days of notification of the claims, are liable to pay interest on the policy moneys. Licensed insurers are liable to pay compound interest at not less than four per cent per annum on the policy moneys. Compound interest is payable upon expiry of sixty

days from the date of the licensed insurers' receipt of the claims notification until the date of their payment.[14]

I. PAYMENT OF POLICY MONEYS TO NOMINEES OF NON-MUSLIM POLICY OWNERS

Application of Part XIII of the Insurance Act 1996 to Non-Muslim Policy Owners

Section 162 of the Insurance Act provides that Part XIII applies to a life insurance policy, and a personal accident insurance policy, effected by a policy owner upon his own life providing for payment of policy moneys on his death. This provision also expressly includes a life insurance policy issued pursuant to section 23(1) of the Civil Law Act 1956[15] (section 23 CLA insurance policy) which creates a trust in respect of policy moneys payable under a life insurance policy effected by -

(a) any man on his own life and expressed to be for the benefit of his wife or child; or
(b) any woman on her own life and expressed to be for the benefit of her husband or child.

It also expressly provides that such policy moneys do not form part of the estate of the policy owner. The full text of section 23 of the Civil Law Act 1956 reads as follows -

23(1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall

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[14]S 161 of the Insurance Act.

[15]Act 67 (Revised 1972).

create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.

(2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.

(3) The insured may by the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

(5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Part XIII of the Insurance Act would also apply to a section 23 CLA insurance policy which is in force on or after 1 January 1997,

including a life insurance policy issued before 1 January 1997.[16] A licensed insurer, therefore, is obliged to honour the terms of the section 23 CLA insurance policy by applying the claims procedure set out in Part XIII of the Insurance Act. The licensed insurer is required to pay the policy moneys to the appointed trustee under the section 23 CLA insurance policy and the appointed trustee's receipt of the policy moneys would discharge the licensed insurer of all its liability in respect of the policy moneys so paid.[17]

Policy Owner's Power to Make Nomination

Under section 163(1) of the Insurance Act, a policy owner whose age is eighteen years or more may nominate a natural person to receive policy moneys payable upon his death under a life insurance policy or a personal accident insurance policy. For the purpose of the nomination, the policy owner has to notify the licensed insurer in writing of the nominee's name, date of birth, identity card number or birth certificate number and address. The policy owner's nomination must be witnessed. The witness has to be a person who is of sound mind, whose age is eighteen years or more and is not a nominee.[18] The nomination may be made at the time when the insurance policy is issued or after the insurance policy has been issued. If the nomination is made after the insurance policy is issued, the policy owner may forward the insurance policy for the licensed insurer's endorsement of the nomination on the insurance policy. If so, the licensed insurer has to endorse the nomination on the insurance policy. If the insurance policy is not forwarded to the licensed insurer for this purpose, it may issue an endorsement to the original insurance policy. The licensed insurer has to return the endorsed insurance policy or issue the endorsement, if it is a separate document, to the policy owner by registered mail.[19] Section 163 of the Insurance

[16]See texts to *supra* n 2 and 15.

[17]S 166(3) of the Insurance Act.

[18]S 163(2) of the Insurance Act.

[19]S 163(3)(c) of the Insurance Act.

Act also imposes other requirements on the licensed insurer in relation to the nomination. However, the licensed insurer's non-compliance with the requirements does not affect the validity of the nomination. The nomination is valid so long as it is proved that the policy owner made the nomination and that notice of it was given to the licensed insurer.[20]

If one person is nominated, the sole nominee is entitled to receive all the policy moneys. If there is more than one nominee, the nominees are entitled to receive such share of the policy moneys as may be specified by the policy owner. If the policy owner has not specified the shares in respect of each nominee, then the nominees are entitled to receive equal shares.[21] In the event the sole nominee predeceases the policy owner and in the absence of a subsequent nomination, it is implied that the estate of the sole nominee is entitled to receive the policy moneys.

Revocation of Nomination

Section 164(1) of the Insurance Act provides that a nomination can be revoked upon the death of the nominee or by the policy owner's notice in writing or subsequent nomination. In the event the policy owner has nominated more than one nominee, the nomination would only be revoked upon the death of all the nominees during the policy owner's lifetime. If one of the nominees dies during the lifetime of the policy owner, the remaining nominees are entitled to receive the deceased nominee's share of the policy moneys in proportion to their respective shares.[22] Under section 164(2) of the Insurance Act, the policy owner cannot revoke his nomination by will or by any other act, event or means. A policy owner cannot revoke a nomination creating a trust

[20]S 163(4) of the Insurance Act.

[21]S 165(3) of the Insurance Act.

[22]S 164(3) of the Insurance Act.

under section 166(1) of the Insurance Act without the written consent of the trustee.[23]

Nomination Creating a Trust or Otherwise

The provisions of section 166 of the Insurance Act are similar to those in section 23 of the Civil Law Act, that is to say, with respect to the policy moneys, a trust is created in favour of a nominee who is a spouse or child of the policy owner. However, section 166 of the Insurance Act extends the creation of a trust policy to include a trust created under a nomination where the nominee is a parent of the policy owner if there is no spouse or child living at the time of the nomination.[24] Section 166(2) of the Insurance Act expressly provides that policy moneys payable under trust policies do not form part of the estate of the deceased policy owner or be subject to the debts of the policy owner. The policy owner may appoint the trustee in the life insurance policy or in the personal accident policy. Alternatively, he may appoint the trustee by a written notice to the licensed insurer. Where the policy owner has not appointed a trustee, the nominee who is competent to contract or the parent of the incompetent nominee (and if there is no surviving parent, the Public Trustee) is deemed to be the trustee under section 166(3). The licensed insurer's payment of the policy moneys to the trustee and the trustee's receipt of the policy moneys discharges the licensed insurer's liability in respect of the policy moneys. Under section 166(4) of the Insurance Act, the policy owner cannot, among others, vary or surrender a trust policy without the consent of the trustee. The policy owner cannot pledge the policy moneys under a trust policy as a security for a loan unless he has obtained the consent of the trustee. The policy owner may appoint himself as the sole trustee in order to retain control over the trust policy. If the nominees are the parents of the policy owner, who has not appointed himself as the

[23]S 166(4) of the Insurance Act.

[24]S 166(1)(b) of the Insurance Act.

trustee of the policy, then he has to obtain the consent of his parents. If the nominees are his spouse and children, it is necessary that he obtains the consent of his spouse (on her own behalf and that of the minor children, if any)[25] and children who have attained the age of majority and are competent nominees.

In respect of a nomination, which does not create a trust, the nominee receives the policy moneys payable upon the death of the policy owner as an executor. Under section 167 of the Insurance Act, the policy moneys received by the nominee form part of the estate of the deceased policy owner and are subject to the debts of the deceased policy owner. The licensed insurer's payment of the policy money to the nominee and the nominee's receipt of the policy moneys discharges the licensed insurer's liability in respect of the policy moneys.

For example, a non-Muslim bachelor, Mr. A has effected a life insurance policy on 24 February 1990 and named his parents, Mr. B and Mdm. C as beneficiaries. After his marriage, he named his wife, Mdm. D as an additional beneficiary under the life insurance policy. After the Insurance Act came into force on 1 January 1997, the policy will become a trust policy in respect of the policy moneys for the benefit of the policy owner's wife, Mdm. D only. Mr. A may appoint a trustee in respect of the policy moneys for the benefit of his wife or in the absence of a trustee being appointed, his wife who is competent to contract will be the trustee by virtue of section 166(3)(a) of the Insurance Act. If Mr. A were to surrender the insurance policy, he needs to obtain the consent of the trustee who is appointed. If no trustee is appointed, the consent of his wife, Mdm. D. The surrender value is payable to the trustee or if he is not appointed, Mdm. D. However, with the consent of the trustee or if he is not appointed, Mdm. D, the surrender value may be payable to Mr. A. The policy moneys payable upon the death of Mr. A are payable to the trustee (if he is appointed) in respect of Mdm. D's portion and Mr. B and Mdm. C in respect of their portions specified in the insurance policy. If the

[25]Under s 166(3) of the Insurance Act, the spouse becomes the trustee of policy moneys payable to nominees who have not attained the age of majority or are incompetent.

portions are not specified, the policy moneys would be prorated equally among Mr. B, Mdm. C and Mdm. D.[26] The policy owner's parents, Mr. B and Mdm. C will receive their portion of the policy moneys as executor and not as beneficiaries. The policy moneys they received will form part of the deceased policy owner's estate and be subject to his debts. Policy moneys received by the policy owner's widow, Mdm. D do not form part of the deceased policy owner's estate and are not subject to his debts.

For example, Mr. X effected a policy on 13 May 1992 and named his wife, Mdm. Y as his beneficiary. With the consent of his wife, he added his father, Mr. Z as an additional beneficiary. In this example, a trust is only created for the portion of policy moneys due to Mdm. Y. His father, Mr. Z remains a nominee who will receive the policy moneys as executor of Mr. X's estate. As no trust is created in favour of Mr. Z, his consent is not required if Mr. X wants to revoke his nomination. In the event of Mr. X's death, Mdm. Y will received the specified portion of the policy moneys as a beneficiary. If the portions are not specified, Mdm. Y and Mr. A will receive an equal proportion of the policy moneys.[27] It is to be noted that a trust is statutorily created in respect of a nomination under section 166 of the Insurance Act. However, Mr. X can also create a trust in favour of his father by way of a trust instrument. Mr. X cannot revoke the appointment of Mdm. Y as trustee or her nomination as nominee except with her written consent.

Assigned or Pledged Policy Moneys

If the intention of the policy owner is for a person (including a nominee, other than a nominee under a nomination creating a trust) to receive the policy moneys beneficially and not as executor, he should assign the policy moneys to the nominee. As a nominee under a nomination creating a trust receives the policy moneys beneficially, there is no

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[26]S 163(5) of the Insurance Act.

[27]*Supra*, n 26.

need for the policy owner to assign the policy moneys to him. Under section 168 of the Insurance Act, the claim of the person who is entitled to the policy moneys pledged as security or assigned to him has priority over the claim of the nominee, including a nominee under a nomination creating a trust under section 166(1). If more than one person is entitled to the policy moneys pledged as security or assigned, their respective rights under the security or the assignment is in the order of priority according to the dates on which the security or assignment was created. The security or assignment is created when the licensed insurer is notified of the security or the assignment. For example, if Mr. X assigned his policy moneys to a Madam Y on 1 June 1996 and to a Madam Z on 13 May 1997. Madam Z gave notice to the licensed life insurer on 15 May 1997 and Madam Y gave notice on 31 May 1997. Madam Z's claim for the policy moneys has priority over that of Madam Y because the assignment for Madam Y was created later, that is to say, Madam Z's assignment was created on 15 May 1997 whereas Madam Y's assignment was created on 31 May 1997. The licensed insurer has to pay the balance of the policy moneys, if any, to the nominee of the policy owner.

A policy owner who is a minor, and has attained the age of ten years but not sixteen years, may assign policy moneys under an insurance policy on his own life with the consent of his parent or guardian.[28] If the policy has been assigned, the assignee can give good discharge to the insurer. If the policy has not been assigned, the policy moneys are payable to, or receivable by, the minor. As the minor cannot give a good discharge, the policy moneys can be paid to his parent or guardian who had consented in writing to the minor effecting the policy. In the absence of such a parent or guardian, the moneys can be paid to any other parent or guardian of the minor.[29] A minor policy owner whose age is sixteen years or more may assign policy

[28]S 153(1) of the Insurance Act.

[29]S 16 of the Guardianship of Infants Act 1961 (Revised 1988) provides that a guardian of an infant may not give a good discharge for any legacy or other capital moneys. By necessary implication, the guardian of a minor may give a good discharge for policy moneys receivable by him. This is because policy moneys are not capital moneys.

moneys under an insurance policy on his own life under section 153(2) of the Insurance Act. The same provision empowers him to give a good discharge to the insurer for any policy moneys paid to him.

A policy owner of a life insurance policy or a personal accident insurance policy may assign the policy moneys payable under his insurance policy conditionally or absolutely. Where the assignment is conditional upon the death of the policy owner, the policy owner can enjoy the policy moneys during his lifetime. The assignee of the conditional assignment is only entitled to receive the policy moneys upon the death of the policy owner. The policy owner who has assigned the policy moneys conditionally can vary or surrender the policy without the consent of the assignee. However, the policy owner cannot change the assignee or the nominee without the consent of the assignee or the nominee. If he has assigned the policy moneys payable under his policy absolutely, he cannot deal with the policy moneys in any manner during his lifetime because the assignee has acquired the policy owner's rights to the policy moneys. The policy owner also cannot, pursuant to section 166(4) of the Insurance Act, pledge as security, or assign, an insurance policy to which section 166(1) of the Insurance Act applies, that is where his nomination creates a trust, unless he has obtained the written consent of the trustee.

Payment of Policy Moneys Where There is Nomination

The licensed insurer has to pay the policy moneys of a deceased policy owner according to the direction of his nomination under the policy. The licensed insurer has to pay the deceased policy owner's nominee (or the appointed trustee) upon receipt of his claim. The claim of the nominee (or the trustee) must be accompanied by proof of the policy owner's death.[30] The licensed insurer may treat the policy as though no nomination was made under it by the policy owner if no nominee claims the policy moneys within twelve months of the licensed insurer

[30]S 165(1) of the Insurance Act.

becoming aware of the policy owner's death.[31] Where the nominee is incompetent to contract and if the policy moneys are ten thousand ringgit or less, the licensed insurer may pay to a person whom it is satisfied will apply the policy moneys for his maintenance and benefit.[32] However, that person must execute an undertaking to the licensed insurer that the policy moneys will be applied solely for the maintenance and benefit of the nominee. The licensed insurer has to pay policy moneys in excess of ten thousand ringgit to the Public Trustee or a company nominated by the Public Trustee.

Payment of Policy Moneys Where There is No Nomination

Where there is no nomination, a person who has obtained a grant of probate of the will of the deceased or a grant of letter of administration to the estate of the deceased or who is entitled to such policy moneys under a Distribution Order can apply to the licensed insurer for the policy moneys of the deceased policy owner.[33] The same applies where nomination is deemed not to be made under section 165(3) of the Insurance Act. If no such person comes forward to claim the policy moneys, the licensed insurer may pay the policy moneys[34] to the policy owner's spouse, child or parent in that order of priority. Where there are more than one spouse, child or parent, the licensed insurer may pay to each person of that class in equal shares. Where there is no spouse, child or parent and the policy moneys do not exceed a hundred thousand

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[31]S 165(3) of the Insurance Act.

[32]S 170(a)(i) of the Insurance Act. S. 170 sets out that a nominee is incompetent to contract if he has not attained the age of eighteen years or he is certified by a medical practitioner in the public service to be of unsound mind or to be incapable, by reason of infirmity of mind or body, of managing himself and his property and affairs.

[33]*Supra*, n 28.

[34]S 169(3) of the Insurance Act provides that policy moneys refers to an aggregate amount of policy moneys under all policies of the deceased policy owner with that licensed insurer where there is no nomination or where nomination is deemed not to be made under s 165(3) of the Insurance Act.

ringgit, the licensed insurer may pay to the person whom it is satisfied as likely to be given the grant of probate, letter of administration or distribution order or is beneficially entitled to the estate of the deceased policy owner.[35] If the policy moneys exceed one hundred thousand ringgit, the licensed insurer may pay an amount not exceeding one hundred thousand ringgit to that person.[36] The licensed insurer will pay the balance amount which is in excess of the one hundred thousand ringgit to the same person after the expiry of twelve months from the time the initial amount was paid if no other person produces the grant of probate, letter of administration or distribution order during that period.[37] Under section 169(7) of the Insurance Act, the licensed insurer is discharged from liability in respect of the policy moneys that are deemed to be duly paid regardless of the absence, invalidity or defect in the grant of probate, letter of administration or distribution order.

Where there is no nomination and the person to whom policy moneys are payable under section 169 of the Insurance Act is incompetent to contract, the insurer may pay the policy moneys to the Public Trustee or a trust company nominated by the Public Trustee.[38] Where there is no nomination or where nomination is deemed not to be made, the person who receives the policy moneys receives as executor and not as beneficiary. He is required to distribute the policy moneys in due course of administering the estate of the deceased policy owner according to the terms of the will of the deceased policy owner. If there is no will, he is required to administer the estate of the deceased policy owner according to the law applicable to the administration, distribution and disposition of the deceased policy owner's estate.[39]

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[35]S 169(2)(a) of the Insurance Act.

[36]S 169(2)(b) of the Insurance Act.

[37]S 169(6) of the Insurance Act.

[38]S 170 of the Insurance Act.

[39]S 171 of the Insurance Act.

In this respect, the Distribution Act 1958[40] was amended by the Distribution (Amendment) Act 1997[41] which apportions the estate of a deceased non-Muslim who died intestate as follows -

Heirs	Proportion of Estate
(a) Spouse only	100%
(b) Spouse; a parent or parents	50%; 50%
(c) Issue only	100%
(d) A parent or parents	100%
(e) Spouse; issue	1/3; 2/3
(f) Issue; a parent or parents	2/3; 1/3
(g) Spouse; issue; a parent or parents	1/4; 1/2; 1/4

Subject to the rights of a surviving spouse or parent or parents, as the case may be, the estate of an intestate who leaves issue shall be held on trusts set out in section 7 of the Distribution Act 1958.[42] If the intestate dies leaving no spouse, issue, parent or parents, the whole of the estate of the intestate shall be held on trusts for the following persons living at the death of the intestate -

[40]Act 300.

[41]Passed in July 1997 Parliamentary session (yet to be numbered).

[42]*Supra* n 40.

Heirs	Proportion
(a) brothers and sisters	in equal shares under trusts
(b) if no brothers and sisters;	if more than one survive the intestate, grandparents in equal shares
(c) if no grandparents; uncles and aunts	in equal share under trusts
(d) great grandparents	if more than one, in equal shares
(e) great uncles and great aunts	in equal shares under trusts

II. PAYMENT OF POLICY MONEYS TO NOMINEES OF MUSLIM POLICY OWNERS

Application of Part XIII of the Insurance Act 1996 to Muslim Policy Owners

Part XIII of the Insurance Act applies to the payment of policy moneys to a nominee of a Muslim policy owner under a life insurance policy or personal accident insurance policy effected by the policy owner upon his own life providing for payment of policy moneys on his death. However, section 166 of the Insurance Act, which provides for the creation of a trust under a nomination where the nominee is the policy owner's spouse or child and if there is no spouse or child living, the policy owner's parent, does not apply to a Muslim policy owner. Hence, the nominee of a Muslim policy owner receives the policy moneys payable on the death of the Muslim policy owner as an executor and not as a beneficiary.[43] The policy moneys also form part of the estate of the deceased policy owner and is subject to his debts. The nominee who received the policy moneys is required to distribute the policy moneys in accordance with Islamic law.[44]

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[43] S 167(1) of the Insurance Act.

[44] S 167(2) of the Insurance Act.

Section 23 Civil Law Act Policy of a Muslim Policy Owner

Part XIII of the Insurance Act also applies to a section 23 CLA insurance policy effected by a Muslim policy owner that is in force on or after 1 January 1997. The licensed insurer is required to pay the policy moneys to the appointed trustee under the section 23 CLA insurance policy. The appointed trustee's receipt of the policy moneys would discharge the licensed insurer of its liability in respect of the policy moneys so paid.

The issues that arise are -

(a) whether the policy moneys under a section 23 CLA insurance policy form part of the estate of the deceased Muslim policy owner and are subject to his debts; and

(b) whether the appointed trustee has to distribute the policy moneys to the named beneficiaries in the insurance policy or to distribute the policy moneys according to *faraid*.

The insurance industry has adopted the decision of Suffian J. in the case of *Re Man bin Mihat*[45] in issuing section 23 CLA insurance policies to Muslim policy owners. The facts of the case were that on 20 February 1962, the assured, Man bin Mihat, took out an insurance policy for forty thousand ringgit on his life. By the terms of the insurance policy, the insurance company agreed to pay the sum at the end of twenty-five years from the commencement of assurance or the previous death of the assured. That sum would be paid to the assured or to his assigns if he is living at the maturity of the policy. In the event of the assured's death, that sum would be paid to his beneficiary named in the policy. The beneficiary named in the policy was 'Chik binti L. Man, wife of the assured.' In addition, the assured, by an instrument dated 26 March 1962, assigned the insurance policy to the same Chik

[45][1965] 2 MLJ 1.

binti L. Man, his wife. On the death of the assured, Chik binti L. Man, his widow took out letters of administration to his estate. The question then arose whether the money payable under the insurance policy belonged to the widow beneficially or formed part of her late husband's estate to be distributed among his heirs of whom there are two, his widow, Chik binti L. Man and a minor son. It was contended on behalf of the widow that it did not form part of the deceased assured's estate. The Assistant Registrar of the High Court, acting as the guardian *ad litem* of the minor, argued that it formed part of the deceased assured's estate.

Suffian J. held that as the insurance policy was effected by the assured on his own life and expressed to be for the benefit of his wife, the money payable under the insurance policy did not form part of the estate of the deceased assured. This is so by virtue of section 23 of the Civil Law Ordinance 1956.[46] The learned judge had little doubt that if the parties were non-Muslims the policy moneys would not form part of the deceased assured's estate. As the parties here were Muslims, he had a certain degree of doubt. In order to satisfy himself that the same position applied to Muslims, he had to overcome section 25 of the Civil Law Ordinance 1956 which provided -

> Nothing in this Part shall affect the disposal of any property according to Muslim law or, in Sabah and Sarawak, native law and custom.

In spite of the above provision, Suffian J. was of the opinion that the widow was entitled to take the policy moneys beneficially. His judgment was based on the following grounds -

> Muslim law rigidly prescribes the share of every heir and no alteration of these shares may be made by will, for a bequest to an heir requires the consent of all co-heirs and a bequest to strangers may not take effect beyond 1/3 of the testator's estate, but there are no restrictions beyond these two limitations. So it is lawful for a Muslim to alter the prescribed shares of his heirs by disposing outright during his

[46] *Supra* n 15.

> lifetime part or whole of his property to a favoured wife, either by way of a gift *inter vivos* or indirectly through trustees. If there is no legal objection to a Muslim altering his heir's share by himself during his lifetime making a gift through trustees to a favoured wife, in my judgment equally there should be no objection in principle to the validity of a similar gift made not by himself but by statute.[47]

With respect, there is no deductive logic in the grounds of judgment. The learned judge appeared to have totally ignored section 25 of the Civil Law Ordinance 1956. While there is no objection in principle to the validity of a similar gift by a Muslim, the gift by statute under section 23 of the Civil Law Ordinance 1956 was taken away by section 25 of the same Ordinance if the parties were Muslims or natives of Sabah and Sarawak.

Alternatively, it may be suggested that section 25 of the Civil Law Ordinance 1956 did not exclude Muslims from the benefits of an insurance policy under section 23 of the Civil Law Ordinance 1956. It may be argued that section 25 gave Muslims an option to use Muslim law if they so wished. However, this argument is not acceptable as the wording of section 25 is clear. The legislators at the time of colonial rule were aware of the personal law of Muslims and natives of Sabah and Sarawak and had made appropriate provisions to exclude the application of Part VII of the Ordinance on disposal and devolution of property. With respect, the learned judge was wrong in relying on section 23 of the Civil Law Ordinance 1956, which was not applicable to Muslims. The learned judge also failed to make a distinction between a gift *inter vivos* and a legacy.

In the case of *Re Ismail bin Rentah*,[48] the deceased, a member of the Malay Public Servants Co-Operative Credit Society Ltd. of Seremban, nominated his daughter to receive his share or interest in the Society in the event of his death. Several beneficiaries entitled to share in his estate according to the Muslim law survived the deceased.

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[47]*Supra* n 45 at p 3.

[48][1940] MLJ 77.

The learned judge held that the nomination did not confer a right on the deceased's nominee, his daughter, to take beneficially. In his judgment, Raja Musa Ag. J. held that where Malay members of a co-operative society were concerned, a nomination did not confer a right on the nominee to take beneficially. He summarised the Muslim law as follows:

(a) a man may make a gift *inter vivos* of a definite ascertainable thing;

(b) a gift *mortis causa* is treated as a disposition by will;

(c) a man may not will away more than one third of his property;

(d) a bequest in excess of this limit is bad to that extent unless the heirs consent; and

(e) a bequest to an heir is wholly inoperative unless the heirs consent.

The guardian *ad litem* in the case of *Re Man bin Mihat, decd* relied on the judgment of Raja Musa J. in *Re Ismail bin Rentah, decd.*, but Suffian J. said that the case had no effect as it was a decision based on the Co-operative Societies Federated Malay States Enactment No. 7 of 1922. In addition, there appeared to be nothing corresponding to section 23 of the Civil Law Ordinance 1956 or at least there was no reference to such provision in the judgment of Raja Musa J. With respect, Suffian J. had failed to note that the issues in both cases related to the legacy of a Muslim and hence section 25 of the Civil Law Ordinance 1956 did not apply.

The judgment of Suffian J. in *Re Man bin Mihat (decd.)* was also followed by Abdul Hamid J. in *Re Bahadun bin Haji Hassan (decd.)*[49] In that case, the deceased was survived by a widow, two daughters,

[49][1974] 1 MLJ 14.

two sons and an aged mother. In his lifetime, the deceased had taken out a life insurance policy under which the sum assured was made payable to the wife of the assured or should she predecease the assured, his estate. The Official Administrator applied by way of originating summons for the determination of the following issues -

(a) whether the money nominated to the widow was valid and the amount could be paid direct to her as nominee; and

(b) whether the nomination was void under Muslim Law and the amount formed part of the estate and should be subject to distribution according to Muslim Law.

Abdul Hamid J. in delivering his oral judgment held that the sum payable under the policy should be paid to the widow for her own benefit and the sum did not form part of the estate of the deceased assured. The learned judge held that -

> On the authority *Re Man bin Mihat, Deceased,* I am also of the view that there was nothing in the Muslim Law to prevent the deceased from making such a disposition in his lifetime of the policy money to the respondent on his death. There was a complete gift even though the gift was contingent upon the life assured predeceasing the respondent before the maturity of the life policy.
>
> It is my finding that the disposition was in the circumstances a gift by the deceased to the respondent and such a gift does not constitute a disposition by will.
>
> For this reason it is my judgment that the sum payable under the policy should be paid to the respondent for her own benefit and this sum does not form part of the estate of the deceased.[50]

[50]*Supra.*

With respect, even though the parties were Muslims, the learned judge relied solely on the decision of Suffian J. in the case of *Re Man bin Mihat, decd.* He made no reference to any authority in Muslim Law and had failed to appreciate the difference between a gift and a disposition by will under the Muslim Law.

In Muslim Law, a gift is not valid without delivery of possession of the gift. The taking of possession of the subject matter of the gift by the donor is necessary to complete the gift. This principle of Muslim Law was deliberated in the case of *Kiah binte Hanapiah* v *Som binte Hanapiah.*[51] The facts were that the deceased had during his lifetime erected a wooden house on a piece of land belonging to the appellant. The deceased gave the house in the presence of witnesses to his granddaughter, the respondent. On his death the appellant entered into possession of the house which stood on her land. On being asked by the respondent to hand over the house to the respondent, the appellant refused and the respondent instituted proceedings against the appellant. The learned judge held that the house was given to the respondent by word of mouth which gift was complete by the plaintiff/respondent taking immediate possession of it. The appellant appealed on the following grounds -

(a) that the house was attached to her land and therefore belonged to her as owner of the land; and

(b) the gift was incomplete as the gift was not to take effect till the death of the donor.

A majority of the judges in the Court of Appeal held there was a constructive delivery of the possession at the formal presentation of the house before witnesses and the gift was complete at the moment of the formal presentation. However, Murray-Aynsley C.J. dissented on the ground that the evidence of two out of the three witnesses

[51][1953] MLJ 82.

showed that the gift was to take effect only on the death of the donor and therefore the gift was incomplete. The learned judge approached this issue from the standpoint of English law and it was his belief that Muslim law on the subject was the same as English law.

In *Roberts alias Kamarulzaman* v *Ummi Kalthom*,[52] Raja Azlan Shah J. (as he then was) was of the same view as Murray-Aynsley C.J. in his dissenting judgment in the case of *Kiah binte Hanapiah* v *Som binte Hanapiah*. The plaintiff in that case claimed, after divorcing the defendant, a half share in a house, which had been purchased during the marriage. The house was bought for the sum of 50,000 ringgit, out of which the plaintiff raised 40,000 ringgit while the defendant raised 10,000 ringgit. The house was registered in the name of the defendant. The defendant contended that the plaintiff had made a gift of the property to her. The learned judge rejected the contentions of the defendant on the facts of the case. He held that the evidence produced by the defendant failed to establish fully the unequivocal manifestation of the plaintiff of an intention to make a gift of the property to the defendant. The learned judge said -

> Under Muslim Law a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled. (1) Manifestation of the wish to give on the part of the donor. (2) The acceptance of the donee, whether impliedly or expressly. (3) The taking possession of the subject matter of the gift by the donee whether actually or constructively (see *Outlines of Muhammadan Law* by Fyzee at page 187; *Principles of Mahomedan Law by Mulla*, 15th Edition, at page 130).[53]

The more recent case of *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor* v *Government of Pahang*,[54] also decided that a gift failed because it was not perfected by the taking of delivery. The facts were that on 19 January 1888, the Sultan of Pahang made a gift *inter*

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[52][1966] 1 MLJ 163.

[53]*Supra* n 43 at p 166.

[54][1987] 2 MLJ 74.

vivos to his two daughters, Tengku Long and Tengku Dalam. The gift of a large tract of land described as 'all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the state of Pahang' in a document. The appellants, who were the son and grandson of Tengku Long, claimed that they were lawfully entitled to the land. The application of the appellants was dismissed by the High Court and their appeal to the Supreme Court was also dismissed. On the issue of the gift of land, Salleh Abas L.P. in his judgment said the law applicable to the gift, which was made almost two years before the Pahang 1889 Land Regulations, was the Shariah or Islamic Law. He held that -

> By this law a Muslim acquires ownership of any piece of land which has never been cultivated in a Muslim country by clearing and working upon it. A non-Muslim however cannot acquire title in this way. He has either to get it from the sovereign or from a Muslim owner by way of a gift or sale (*Minhaj-et-Talibin* p. 226). As regards gift of land, whether it be to a Muslim or to a non-Muslim the gift will not be valid unless the donee takes possession of the gift land at the time the gift is made. In other words, a gift will transfer the ownership of the subject matter of the gift to the donee only upon the latter taking possession of it (*Minhaj-et-Talibin* p. 234). In *Mohammad Abdul Ghani & Anor.* v *Fakhr Jahan Begam & Ors.*, and *Amjad Khan* v *Ashraf Khan*, which dealt with the validity of gift under Muslim law the Privy Council applied the same principle. In these two cases their lordships accepted the view of Syed Ameer Ali (the learned author of *Mohammadan Law*, 4th ed. Vol. I, p. 41) to the effect that to constitute a valid gift there must be three constituent elements, namely (1) a manifestation of the wish of the donor to give; (2) the acceptance of the donee either implied or expressly; and (3) the taking possession of the subject matter of the gift by the donee, either actually or constructively.
>
> Turning now to the royal document which is relied upon by the appellants, we have no hesitation to say that the first two elements of a valid gift, *i.e.* offer and acceptance are established. But as to the third element there is nothing to show in the statement of claim that the donees had ever taken possession of the gift land at all either actually or constructively. Hence the gift failed. It failed because it was never perfected or consummated by the taking of possession.

The foregoing analysis of case authorities on gifts by Muslims substantiates the position of Muslim law with respect to policy moneys under a life insurance policy (including a section 23 Civil Law Act policy), or personal accident insurance policy, effected by a Muslim policy owner upon his own life providing for payment of policy moneys on his death. With respect, the decisions in *Re Man bin Mihat, decd.*, *Re Bahadun bin Haji Hassan (decd.)*, the majority decision in the Court of Appeal in the case of *Kiah binte Hanapiah* v *Som binte Hanapiah* failed to make a distinction between a legacy and gift *inter vivos*. It is submitted that the correct position of Muslim law in relation to gifts by Muslims is established in the following case authorities -

(a) in *Re Ismail bin Rentah, decd.* Raja Musa J.'s judgment, among others, that a gift *mortis causa* is treated as a disposition by will;

(b) the dissenting judgment of Murray-Aynsley C.J. in *Kiah binte Hanapiah* v *Som binte Hanapiah* that the gift of wooden house from the grandfather to his granddaughter was incomplete as it was to take effect only on the death of the donor;

(c) Raja Azlan Shah J.'s decision in *Roberts alias Kamarulzaman* v *Ummi Kalthom* where he set out the three conditions necessary for a gift *inter vivos* by a Muslim *i.e.* (1) manifestation of the wish to give on the part of the donor; (2) the acceptance of the donee, whether impliedly or expressly; and (3) the taking of possession of the subject matter of the gift by the donee whether actually or constructively; and

(d) Salleh Abas L.P.'s decision in *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor.* v *Government of Pahang* that a gift of a large tract of land in Pahang failed because it was not perfected by the taking of delivery.

The gift of policy moneys under a life insurance policy, or personal accident insurance policy, effected by a Muslim policy owner upon his own life providing for payment of policy moneys on his death cannot

be perfected by the donee taking delivery of the policy moneys during the policy owner's lifetime. As such, the policy moneys form part of the estate of the deceased Muslim policy owner and are subject to his debts.

In 1973, the *Majlis Kebangsaan Hal Ehwal Ugama Islam Malaysia* (National Council for Muslim Religious Affairs Malaysia) issued a *fatwa* on succession and wills. Under the *fatwa*, it is the responsibility of the recipient of the policy moneys to divide the policy moneys among the persons who are entitled according to the Muslim law of inheritance. The letter from the Council dated 9 October 1973 addressed to the State Secretary, Selangor is translated[55] as follows -

> Sir,
>
> Succession and Wills
>
> I have the honour to send to you the view of the *Jawatankuasa* which has been agreed to by the Council of Rulers (comprising only the States which took part) in its 96th meeting held on the 20th September, 1973 (second day) as follows:-
>
> 'Nominees of the funds in the Employees Provident Fund, Post Office Savings Bank, Bank, Insurance and Co-operative Societies are in the position of persons who carry out the will of the deceased or the testator. They can receive the money of the deceased from the sources stated to be divided among the persons who are entitled according to the Muslim Law of Inheritance'.
>
> It is understood that the Attorney-General's Department has given advice to the State Governments in regard to making suitable provision to carry out the *fatwa* arrived at as stated above in their respective State laws.
>
> All praise to Allah as this is the first *fatwa* that has been approved by the Council of Rulers for implementation by the Muslim Community.

[55][1974] 1 MLJ p x.

Yours faithfully,

Datuk Haji Ismail bin Panjang Aris,
Secretary
National Council for Muslim Religious Affairs

Pursuant to the above *fatwa*, the Melaka Administration of Muslim Law Enactment, 1959[56] was amended by the Administration of Muslim Law (Amendment) Enactment, 1974[57] by the inclusion of the following new section 133A -

> 133A. Any person nominated to receive monies payable on the death of the nominator under any law, shall receive and hold the monies for the benefit of the estate of the nominator and shall pay the monies to the executor or administrator of the estate of the nominator, as the case may be, and executor or administrator shall distribute the monies in accordance with Muslim law;
>
> Provided that for the purpose of the distribution of the assets of the nominator in accordance with Muslim law, the monies payable under nomination to the nominee shall be deemed to be a bequest in favour of the nominee by a will duly made by the nominator.

In view of the *fatwa* and the Melaka state enactment, the trustees appointed by a Muslim policy owner in Melaka is legally bound to distribute the policy moneys under a life insurance policy, or personal accident insurance policy, effected by the Muslim policy owner upon his own life providing for payment of policy moneys on his death, according to *faraid*. In respect of those states that have not made suitable provisions to carry out the *fatwa*, a Muslim policy owner, his appointed trustees and nominees are not legally bound but morally bound by their Islamic religion to distribute the policy moneys according to *faraid*.

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[56]Enactment No 1 of 1959.

[57]Enactment No 1 of 1974.

Bank Negara Malaysia had referred this matter to *Jabatan Kemajuan Islam Malaysia* for the consideration of the Shariah Review Panel. *Jabatan Kemajuan Islam Malaysia*, in its letter dated 2 July 1997 advised that -

(a) provisions under sections 166 and 167 of the Act relating to trust policies have taken into consideration the eligibility of specified parties for receiving trust policy moneys for Muslims by applying the 1973 decision of *Majlis Kebangsaan Hal Ehwal Ugama Islam Malaysia* relating to nominees;

(b) *Jabatan Kemajuan Islam Malaysia*'s views in (a) above does not mean that the entire operations of trust policies are in line with the requirements of Islam. This is because trust policies still have the following *mu'amalah* elements which are in conflict with Islamic principles; in relation to contract, *gharar (tidak ketentuan), maisir (judi)* and *riba (faedah)* in its business dealings and investment; and

(c) Even if trust policy moneys form part of the estate received by the nominee and is distributed according to *faraid*, it is restricted to the principal sum that is invested as premium only. Profit in excess of that has to be surrendered to *Baitumal* (translated from the national language text).

The advice of *Jabatan Kemajuan Islam Malaysia* is consistent with the 1972 *fatwa* of the *Majlis Kebangsaan Hal Ehwal Ugama Islam Malaysia* which ruled that insurance as carried on by insurance companies then is *mu'amalah yang fasad* because it conflicts with Islamic principles and *haram* because of the elements of *gharar, maisir and riba*. This ruling was re-confirmed in 1979 by the *Majlis Kebangsaan Hal Ehwal Ugama Islam Malaysia*.

In view of the 1972 and 1973 *fatwas* and the ruling of the Shariah Review Panel, conventional insurance is *haram* and therefore, not acceptable to the Muslim community. It is also doubtful that Muslim policy owners intending to dispose of their properties during their lifetimes can apply section 23 of the Civil Law Act.

Until today, only Melaka has given legal effect to the 1973 *fatwa*. Any person nominated by Muslim policy owners in Melaka is legally bound by the Administration of Muslim Law (Amendment) Enactment, 1974[58] to receive moneys payable on the death of the policy owners for the benefit of their estates. A nominee has to pay the policy moneys to the executor or administrator of the estate of the Muslim policy owner who is required to distribute the policy moneys according to the Islamic law. For the purpose of the distribution, the policy moneys payable under the nomination to the nominee is deemed to be a bequest in favour of the nominee of a will duly made by the nominator.[59]

Muslim policy owners in States, other than Melaka, that have not given legal effect to the *fatwas* are not legally but morally bound to be guided by the *fatwas* and the ruling of the Shariah Review Panel in conducting affairs relating to their estate. Since conventional insurance is not in accordance with Islamic law, it would be advisable that the Muslim community chose *takaful* products and deals with *takaful* operators in their estate planning.

Conclusion

In the final analysis, Parliament would have achieved its objective if the insurance industry is able to effect settlement of death claims and other claims expeditiously. It is heartening to note that the Government has taken steps to review the position of Islamic laws in the country with the aim of standardising the Islamic laws in the various states.

The comprehensive provisions in Part XIII of the Insurance Act and the standardisation of Islamic laws in the country would certainly clarify the position of Muslim and non-Muslim policy owners in relation to the payment of policy moneys under their life insurance policies and

[58]*Supra* n 55.

[59]*Supra* n 55 at s 133A.

personal accident insurance policies. This move towards more transparency is in the interests of policy owners, *takaful* participants, the insurance industry and the *takaful* industry in Malaysia.

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