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INSURANCE (AGENTS AND BROKERS) BILL 1984

Date Introduced: 10 May 1984
House: House of Representatives
Presented by: Hon. Chris Hurford, M.P., Minister
Assisting the Treasurer

Short Digest of Bill

Purpose

To regulate the activities of life and general insurance brokers and, to an extent, life and general insurance agents.

Background

Essentially, the difference between an insurance agent and an insurance broker is that an agent acts for the insurer while a broker acts for the insured. However, the description used by an intermediary may not necessarily reflect its real legal status. Some intermediaries describe themselves as brokers and yet are tied to individual offices by exclusive agency agreements. Where a broker operates under a "binder" from an insurer, the broker is authorised by an insurer to grant final cover himself and to settle claims in certain classes of business, subject to specified limits. On strict agency principles, it would appear, therefore, that the broker is acting as an agent for the insurer, not for the insured. A member of the public, when dealing with such a broker, may not be aware of his special arrangements with the insurer. Binders are common in general insurance and exist on a limited scale, in life insurance activities.

Little regulation of insurance brokers or agents exists in Australia and in the states, and apart from Queensland, the actions of both agents and brokers are constrained by common law. Any proposal to change the law relating to insurance intermediaries must be made in the context of the limitations, imposed by section 51(xiv) of the Australian Constitution, on the power of the Commonwealth Parliament to make laws with respect to insurance. The power of the Commonwealth extends to all insurance in the private sector, to insurance effected by a statutory authority of the Commonwealth or of a Territory, and to State insurance only when that insurance extends beyond the limits of the State.
The Australian Law Reform Commission (ALRC) was given a reference by the then Attorney-General, in September 1976, requiring the Commission to report on the adequacy of the law governing insurance contracts. Marine insurance, worker's compensation and compulsory third party insurance were excluded from the inquiry. Two reports, namely the report on Insurance Agents and Brokers (No. 16) and on Insurance Contracts (No. 20) were produced by the ALRC.

The report on agents and brokers, completed in 1980, studied the rules applying to the conduct of insurance intermediaries. The terms of reference required the ALRC to consider the interests of the insurer, the insured and the general public.

One important issue considered by the Commission was the question of responsibility, namely who is responsible to whom. The law has been unclear regarding the insurer's responsibility for the actions of their agents. In its report, the ALRC recommended that insurance companies should be responsible for loss or damage caused by misrepresentation or other conduct of their employees, agents, and brokers operating under a 'binder' which is relied on in good faith by an insured or intending insured in relation to any insurance matter. The Commission recommended against regulation of agents because the costs would most probably outweigh any possible benefits.

The problem with the broker situation revolves principally around the relationship between an insurance company and an insurance broker and the broker and his client. The broker is responsible for the payment of the insured's premiums to the insurer. However, it is common practice for brokers not to pass on to the insurance companies the premiums at the time of receipt. The broker is able to invest funds for a period and, consequently, the insured is not, in fact, covered in the event that the broker fails. The retention of premiums for lengthy periods together with the mixing of funds received on behalf of the insurers and on behalf of the insured with a broker's general business funds, are two main practices identified by the Commission which increase the risk of broker insolvency. The Commission recommended that a system of statutory regulation be introduced for brokers. The Campbell Committee, however, favoured "a system of 'co-regulation', with government legislation laying down the ground rules for an arrangement basically involving self-regulation by an appropriate industry body on which there would be some government representation".[1] Furthermore, the Committee believed that guidelines for the disclosure of information by brokers to their clients should also be developed.
In February 1979, the Treasurer indicated to the Insurance Brokers' Council of Australia, the Government's intention of introducing a Bill to provide for a system of self-regulation of insurance brokers. However, the Government failed to implement ALRC's recommendations.

In 1981, the Shadow Attorney-General introduced the Insurance (Agents and Brokers) Bill which was based on the draft Bill appended to the Report. The Bill was passed in the Senate but was defeated in the House of Representatives.

With the number of broker insolvencies increasing, the need for some form of regulation of insurance intermediaries was again highlighted. Consequently, the Treasurer introduced the Insurance (Agents and Brokers) Bill in December 1983 which incorporated the ALRC's major recommendations. The Bill was left to lie on the table of the Senate for public submissions and these were subsequently reviewed by the Government. A number of amendments were proposed to the 1983 Bill and these have been incorporated in the 1984 Bill.

Outline

In his Second Reading Speech, the Minister stated that the main provisions of the Bill will:

- establish the responsibilities of insurers for the conduct of their intermediaries;
- determine the arrangements concerning the discharge of financial obligations between an insured and intermediaries;
- deal with questions of misrepresentation by insurance intermediaries;
- require annual registration of brokers and permit suspension or cancellation of registration;
- establish financial controls and requirements for insurance which indemnifies brokers in respect of liabilities arising out of business operations; and
- establish measures to minimise the risk of compromise of a broker's impartiality.
Main Provisions

The provisions of the Bill will not apply to State Government Insurance or Northern Territory Insurance (clause 8).

An "insurance intermediary" is a person who for reward, and as an agent for one or more insurers or for intending insureds, arranges contracts of insurance in Australia or elsewhere. It also includes an insurance broker (clause 9).

Part II of the Bill deals with insurance agents. Under clause 10, such intermediaries are required to have a written agency agreement with an insurer. Copies of the agreement are to be provided by the agent within seven days to insureds and intending insureds, and to the relevant insurance commissioner (life or general) on request.

The insurer is responsible for the conduct of his agent or employee, and, consequently any loss or damage, provided that the insured or intending insured could be reasonably expected to rely on such conduct and did rely on it in good faith. The responsibility exists even when an agent or employee acts outside the scope of his employment or authority (clause 11).

Clause 12 provides that insurance intermediaries, other than registered insurance brokers, are to be agents of the insurer, not the insured. It is an offence for an insurance intermediary, agent or employee to wilfully mislead the insured (clause 13).

An insurer is responsible for moneys payable to the insurer which are received from an insured or intending insured by an insurance intermediary (clause 14).

Intermediaries which undertake an insurance contract or claim under a binder are required to disclose to the insured or the intending insured whether they will be effecting the transaction as agent of the insurer, and not the insured (clauses 15-17).

Registration of insurance brokers is dealt in Part III of the Bill. Under clause 19, six months after the commencement of this Part, a broker may not carry on business unless he has registered and has indemnity insurance.

Clause 21 provides that the Insurance or Life Insurance Commissioner may register an applicant for one year, provided that indemnity insurance is in force, that
the relevant Commissioner has received satisfactory audited
accounts and the applicant has paid the registration fee.
Registers of life and general insurance brokers will be kept
by the relevant Commissioner (clause 22). Such registers,
together with accounts lodged by registered insurance
brokers with the relevant Commissioner, and the broker's
indemnity insurance contract, will be made available for
public inspection (clause 23).

The relevant Commissioner may suspend or cancel the
registration (clause 25).

A registered insurance broker will be required to
pay into an "insurance broking account" at a bank, all
moneys received from an insured or intending insured for an
insurer, or from an insurer for an insured or intending
insured. A broker will not, except with the relevant
Commissioner's consent, be able to withdraw from that
account except for payment to a person entitled to receive
such payment, of premiums to an insurer, for investment or
for repayment of moneys that were paid into the account in
error (clause 26).

Clause 27 deals with the broker's duties in
relation to premiums. Where a broker has received premium
moneys and knows the amount of the premium, the broker is
required to pay the premium to the insurer within a maximum
of 90 days. If that is not practicable, payment is to be
made as soon after the expiration of that period as it is
reasonably practicable for him to do so. This period is to
be measured from the date on which the cover provided under
an insurance contract commences to have effect. Where the
broker has received premium moneys, but does not know the
amount of the premium, the broker will be required to pay to
the insurer 75 per cent of the estimated premium in respect
of a new contract or 75 per cent of the previous year's
premium in respect of a renewal of a contract within 90
days. The broker must notify the insurer, within 10 days,
that the amount of the premium is unknown.

Where a broker has received moneys from his client,
and a related contract has not been accepted within 30 days
of the receipt of that money, the broker has 7 days within
which to inform the client of that fact. Where a broker
receives moneys from an insurer for an insured, the broker
must pay the insured within 7 days of receipt or, if that is
not practicable, as soon as is reasonably practicable.

Clause 28 sets out the manner in which insurance
broking account moneys are to be distributed should a
registered insurance broker become insolvent.
A registered insurance broker is not bound by any agreement which would prevent him from placing business with any insurer, except when the broker is effecting a contract under a binder given by the insurer (clause 29).

A registered broker must disclose, to an intending insured, any agency relationship with an insurer (clause 31).

Registered brokers are to inform insureds the amounts of fees imposed over and above premiums or other charges relevant to an insurance contract. Any commission or other remuneration received by a broker from an insurer is to be disclosed by the broker to the insured on request. A broker will be required to inform an insured of the name and place of business of the insurer (clause 32).

Clause 33 requires insurance intermediaries to provide certain information. Multi-agents, and insurance intermediaries generally, who act for two or more insurers will be required to inform an intending insured of the name and place of business of the proposed insurer before arranging a contract.

Under clause 34, the insurance intermediary must notify the intending insured that the contract will be arranged with an unauthorised foreign insurer.

Remarks

According to the Minister, in his Second Reading Speech, "the Bill is aimed at strengthening the financial stability of the insurance industry overall; protecting the insuring public against the negligence or misconduct of an agent or broker; and encouragement of practices consistent with the interests of the insuring public and the maintenance of standards of conduct of, and quality of advice offered by, agents and brokers".

For further information, if required, contact:

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References
