INSURANCE CONTRACTS BILL 1984

Date Introduced: 29 May 1984
House: House of Representatives
Presented by: Hon. L.F. Bowen, M.P. Minister representing the Attorney-General

Short Digest of Bill

Purpose

To reform and modernise the law relating to certain contracts of insurance in order to improve the flow of information from the insurer to the insured, and to provide a uniform and fair set of rules to govern the relationship between the insurer and the insured.

Background

In September 1976, the Australian Law Reform Commission (ALRC) was given a reference by the then Attorney-General 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. The ALRC subsequently produced two reports, one on Insurance Agents and Brokers (No. 16) and one on Insurance Contracts (No. 20). The report dealing with insurance agents and brokers was completed in 1980. It studied the rules applying to the conduct of insurance intermediaries. A Bill has been introduced to implement the major recommendations of the report. For further information, refer to the Bills digest on Insurance (Agents and Brokers) Bill 1984.

The ALRC report on Insurance Contracts was produced in 1982. Any proposal to change insurance law must be made in the context of 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 law of insurance contracts is essentially a mixture of common law principles and a number of Imperial, Federal and State statutes. In its report on insurance
contracts, the ALRC believed that, because insurance is a national industry, the law relating to insurance contracts should, as far as is possible, be uniform throughout Australia. The ALRC recommended that it should be amended to clarify uncertainties which have risen in principles, and to specify acceptable rules for the relationship of insurer and insured. The need for reform was further highlighted by the widespread dissatisfaction experienced by insureds who have made claims under their contracts which were subsequently rejected. The ALRC recommended the making of a national law regulating insurance contracts that would be superimposed on, and effect reform of existing laws. It appended draft legislation to its report.

The ALRC referred to the Campbell Committee Report and believed that its recommendations were consistent with the approach advocated by the Campbell Committee, namely, that "the most efficient way to organise economic activity is through a competitive market system which is subject to a minimum of regulation and government intervention".[1]

After consulting representatives of all branches of the insurance industry, other interested agencies and the public, the ALRC found that the insured who acted in good faith required greater protection in the following areas:

1. The duty of disclosure. At present the insurer sets the standard of what material is relevant.

2. The insured's remedies. At present if the insured is in breach of contract, an insurer can refuse to pay a claim even if he has suffered no loss from the breach.

3. Subrogation (the right of the insurer to sue third parties in the name of the insured to recover loss or damages to the subject matter of the insurance and so recoup their loss). At present the insurer may compel the insured to sue even a member of his own family or an employee to recover insurance moneys paid.

4. Insolvency. The insured may suffer a disastrous loss because the insurer is insolvent and unable to meet a claim.

On 1 December 1983, the Insurance Contracts Bill 1983 was introduced in the Senate and was allowed to lie on the table for public submissions on its detailed provisions. Private and State Government insurers, industry and consumer representative groups presented submissions. The Government
introduced a number of amendments to the Bill during the Committee stage in the Senate in response to the submissions and discussions. These amendments are incorporated into this Bill.

Outline

The main principles behind this Bill are:

1) the need for uniformity and modernisation;
2) fair competition;
3) informed choice by insureds;
4) the utmost good faith by the insurer as well as the insured;
5) the need to avoid unfair burdens on an insured as a result of the law governing misrepresentation, non-disclosure and breach of contract; and
6) the need to avoid catastrophic loss where an insured loses his insurance cover through no fault of his own.

This Bill will apply to both life and general insurance contracts and does not apply to contracts of reinsurance, medical and hospital insurance written by any health benefit organisation registered under the National Health Act 1953, workers' compensation insurance, compulsory third party insurance and insurance to which the Marine Insurance Act 1909 applies. Furthermore, it will not apply to the Export Finance and Insurance Corporation and friendly societies, nor to intra or extra State Government or Northern Territory insurance.

The main reforms recommended by the ALRC which are provided for in the Bill deal with:

- duty of the utmost good faith;
- insurable interests;
- misrepresentation and the duty of disclosure;
- standard cover;
- notification of unusual terms of the contract and certain terms limiting the insurer's liability;
average provisions;
right of third parties to recover against the insurer;
claims;
expiration, renewal and cancellation;
subrogation;
the manner in which information is provided to an insured;
insured's entitlement to interest; and
"cooling off" in respect of life insurance.

Main Provisions

Under clause 4, this Bill will apply to most insurance contracts entered into after the legislation has been proclaimed.

Clause 8 provides that the Bill applies to contracts of insurance governed by the law of the States or Territories.

Part II of the Bill contains provisions which require the duty of the utmost good faith. An insurance contract is one based on the utmost good faith and both the insurer and the insured are duty-bound to act accordingly (clause 14).

Part III deals with insurable interest. Under a general insurance contract, the insured need not have an interest in the subject matter except when the contract provides for payment on the death of a person by accident or sickness (clause 16). With a life insurance contract, an insured is required to have an insurable interest at the date of the contract (clause 18).

Clause 19 lists the lives in which a person is deemed to have an insurable interest. It modifies the categories listed in section 86 of the Life Insurance Act 1945. A person has an insurable interest in his own life and that of his spouse. A parent or guardian of a child will have an insurable interest in the life of a child under the age of 18 years. A person who is likely to suffer a pecuniary or economic loss as a result of the death of some other person will have an insurable interest in that other
person's life. Furthermore, a person's insurable interest in the life of another will be unlimited.

Under clause 20, an insurer of either a life or general insurance contract will not be relieved of liability by reason only that the names of the persons who may benefit under the policy are not specified in the policy document.

Part IV deals with disclosures and misrepresentations. Before the relevant insurance contract is entered into, the insured has a duty to disclose to the insurer those facts which he knows, or those which a reasonable person in the circumstances could be expected to know, or would be relevant to the insurer in deciding whether to accept the risk (clause 21).

Under clause 22, before a contract of insurance is entered into, the insurer must clearly inform the insured in writing of the general nature and effect of the duty of disclosure. Failure to do this will mean that the insurer cannot exercise his rights unless the non-disclosure is fraudulent.

If a misrepresentation is made to the insurer by a person whose life is insured before a contract of life insurance is entered into, the misrepresentation will be regarded as having been made by the insured himself (clause 25).

Clause 26 alters the law relating to misrepresentations by providing that even though a statement is untrue, it will not be treated as a misrepresentation if a reasonable person in the circumstances could be expected to have believed the statement to be true.

Failure to answer a question in a proposal form does not constitute misrepresentation (clause 27).

Clause 28-33 deal with remedies for non-disclosure and misrepresentation. Under clause 28, with regard to general insurance contracts, the insurer only has a remedy if he would not have entered the contract had he known the true state of affairs. He may avoid a contract in the case of fraud. Otherwise he is only entitled to the loss actually caused to him by the non-disclosure or misrepresentation. He may still cancel the contract (clause 60).

Clauses 29 and 30 make similar provisions for life insurance contracts except that an insurer is entitled to avoid a contract for innocent non-disclosure or misrepresentation if he would not have entered it on any
terms knowing the true state of affairs. He must act within three years of entering into the contract. If the insurer does not avoid the contract either for fraud or otherwise, he can, within three years of entering the contract reduce the sum insured in accordance with a formula which takes into account the premium that would have been charged had there been no misrepresentation or non-disclosure. A life insurance contract cannot be avoided for a misstatement of age (clause 30). Clause 32 allows the court to ignore an avoidance where it would be harsh and unfair not to do so.

Part V deals with matters relating to the contract. Clause 34 provides that regulations may prescribe the standard cover to be given by certain classes of contract. In respect of a claim, made by an insured under a prescribed contract (i.e. one to which the standard cover provisions apply), relating to an event prescribed in the regulations, the insurer must pay a minimum amount to the insured (clause 35). There is a requirement, however, that the insurer clearly informed the insured in writing, before the contract was entered into, that less, or no cover was provided, or the insured knew, or a reasonable person in the circumstances could be expected to have known that he would be entitled to lesser or no cover.

Clause 37 gives the insured protection in relation to contracts other than prescribed contracts by providing that an insurer cannot rely on unusual provisions unless he has brought them to the attention of the insured before the loss occurred.

Under clause 38, an insurer will no longer be able to rely on a term in an interim insurance contract that the insurer's liability is dependent upon the completion of a proposal for a contract of insurance intended to replace that interim contract.

An insured's failure to pay a premium need not necessarily remove an insurer's liability to pay a claim (clause 39) unless the insurer before the contract was entered into, has given notice in writing of a provision limiting the insurer's liability, and at least one instalment has remained unpaid for at least 14 days.

Clause 44 will modify the operation of the average provisions. An insurer will not be able to rely on an average clause unless he has clearly informed the insured in writing, before the contract is entered into, of its nature and effect. However, an average clause will be ineffective where the sum insured represents 80 per cent or more of the value of residential property and/or the contents of that property. Where the sum insured is less than 80 per cent of
the value, an average clause will operate by allowing the insurer to reduce the claim by a formula based on the difference between 80 per cent of the value of the property at the time the contract was entered into and the sum insured, and not between the full amount of the value and the sum insured.

Clause 48 provides that persons who are not parties to a general insurance contract may claim for loss if they are intended to be covered by the contract. Where a person effects a contract of life insurance upon his own life for the benefit of another, whether named or not, that other person may recover under the contract even though not a party to it.

Under clause 51, third parties will, in all types of liability insurance, have the right to proceed directly against the insurer in the event of the insured dying or cannot be found after reasonable enquiry.

Under clause 54, the insurer may refuse to pay a claim, either in whole or in part because the insured or a third party has done some act after the contract was entered into.

Part VI deals with claims. Under clause 56, where a fraudulent claim is made, the insurer will be unable to avoid the contract but may refuse to pay the whole of the claim.

Part VII relates to expiration, renewal and cancellation of contracts. Clause 60 specifies the reasons for which a general insurance contract may be cancelled by the insurer and clause 63 provides that such a contract may only be cancelled in accordance with the provisions of the Bill.

Clause 64 provides for a cooling-off period for life insurance contracts whereby an insured may cancel a policy within 14 days of receiving a copy of the contract.

Part VIII deals with subrogation i.e., the insurer's right to exercise, in the insured's name, such rights as the insured has against a third party in respect of the subject-matter of the insurance. The right of subrogation exists only in relation to indemnity insurance. Clause 65 provides that the insurer is not entitled to be subrogated to the insured's rights against a third party who is a member of the insured's family or close friend unless the third party is insured.
Clause 66 provides that the insurer cannot be subrogated to the rights of the insured against an employee except where the employee is guilty of serious or wilful misconduct.

Part IX deals with information, notices and reasons. Clauses 69 to 75 deal with the provision of information to insureds. Clause 69 provides that information to be given in writing to the insured under the Bill may be given orally or in writing as soon as practicable. Clause 72 provides that the writing must fulfil any standard of legibility which is prescribed.

Clause 74 provides that if the insured so requests in writing the insurer must give him a copy of the policy. Penalty for failure is $5000.

Under clause 75, an insurer must also provide written reasons for refusal of insurance, cancellation, non-renewal or special less-advantageous terms, if requested in writing by the insured. Penalty for failure is $5000.

For further information, if required, contact:

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Economics and Commerce Group
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References