Date Introduced: 1 December 1983
House: Senate
Presented by: Senator Gareth Evans, Attorney-General

Short Digest of Bill

Purpose

To implement the recommendations of the Australian Law Reform Commission (ALRC) for a uniform law governing life insurance and most forms of optional general insurance, giving greater protection to insured persons.

Background

This legislation follows closely the draft Insurance Contracts Bill appended to the 1982 report of the ALRC on insurance contracts (Report No.20). In a departure from normal practice that draft Bill and the Report are intended to be used as aids in interpreting this legislation (section 3).

In 1975 the ALRC was given a reference requiring it to report on the adequacy of the law governing insurance contracts.

Marine, workers compensation and compulsory third party insurance were excluded from the reference and so were not covered in the report. Consequently they are not covered in this Bill which also excludes State insurance, health insurance and re-insurance of their risk by insurers (clause 10).

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.

The main principles behind the Bill are:

1. the need for uniformity and modernization in a national industry governed by a 200 year accumulation of inconsistent and ambiguous law;

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.

The Bill aims to provide clearer information for insurers by fixing standard forms of insurance. Where an insurer deviates from these forms he must tell the insured of the deviation if he wishes to rely on that term.

Although Commonwealth transpose power under section 51(xiv) extends to State insurance beyond the limits of the State, in fact this Bill does not cover any State insurance. It is hoped that the State and Northern Territory
Attorneys-General will agree to the application of Commonwealth legislation to intra and extra-State insurance activities.

Main Provisions

Clause 9 provides that the Bill applies to contracts of insurance governed by the law of the States or territories and that insurers cannot change the proper law of the contract. It does not apply to contracts entered into before the commencement of the Act (clause 5).

Clause 14 makes it clear that the duty of the utmost good faith applies to the insurer as well as to the insured.

Clause 16 excludes alternative remedies in relation to harsh or unfair contracts under State or Territory law.

Clauses 17 to 20 deal with insurable interest. Under a general contract of insurance the insured need only have an interest in the subject matter of the contract at the time when the loss occurs. Under clause 17 a life insurance contract he must still have an insurable interest at the date when the contract is made. Clause 20 lists the lives in which a person is deemed to have an insurable interest and modifies the categories listed in Section 86 of the Life Insurance Act 1945.

Clause 22 restricts the duty of disclosure in general contracts. The insured is required to disclose only what he knows, or a person in his position could reasonably be expected to know, would be relevant to the insurer in deciding whether to accept the risk. Clause 27 similarly alters the law relating to misrepresentations by providing that the test of truth or relevance is the reasonable belief of the insured, not the insurer.

Clause 23 provides that the insurer must inform the insured in writing of the general nature and effect of the duty of disclosure before the contract is entered into. Failure to do this will mean that the insurer cannot exercise his rights unless the non-disclosure is fraudulent.

Clause 29 deals with remedies for non-disclosure and misrepresentation in general contracts. The insurer only has a remedy if he would not have entered the contract knowing the true state of affairs. He may avoid a contract only in the case of fraud. Otherwise he is only entitled to the loss actually caused to him by the non-disclosure or misstatement. He may still cancel the contract (clause 60).
Clauses 30 and 31 make similar provision 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 (clause 31(3)). He must act within three years of entering into the contract or he has no remedy except cancellation (clause 60). A contract cannot be avoided for a misstatement of age (clause 31). 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 according to a formula which reflects the damage he has suffered. A separate formula is provided in relation to misstatements of age (clause 31). Clause 34 excludes all other remedies. Clause 32 allows the court to ignore an avoidance where it would be harsh and unfair not to do so.

Clause 35 to 37 deal with standard cover. They provide that certain classes of contracts and events covered by those contracts may be prescribed by regulation. In respect of claims relating to those events a prescribed minimum amount must be paid by the insurer unless before the contract he has informed the insured in writing that he will pay less or not cover the event.

Clause 38 gives the insured protection in relation to other contracts by providing that an insurer cannot rely on unusual clauses unless he has brought them to the attention of the insured before the loss occurred.

Clause 48 alters the law relating to privity of contract. It provides that persons who are not parties to an insurance contract may nevertheless claim for loss if they are intended to be covered by the contract. Similar provisions already exist under State legislation in relation to compulsory third party motor-vehicle insurance.

Clause 52 provides that an insurer cannot contract out of the Act to the prejudice of anyone but himself.

Clause 60 specifies the reasons for which an insurance contract may be cancelled by the insurer and clause 63 provides that a contract may only be cancelled according to the provisions of the Act. Clause 75 provides that reasons for cancellation must be given in writing on request.

Clause 65 provides that an insured may cancel a life insurance policy within 14 days of receiving a copy of the contract.
Clauses 65 to 68 deal with subrogation. Clause 65 provides that an 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. Nor can the insurer recover more than the amount which the third party may recover under his insurance (clause 65(3)).

Clause 60 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.

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 Act may be given orally or in writing as soon as practicable and clause 72 provides that the writing must fulfill any standard of legibility which is prescribed.

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

Clause 75 provides that 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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4 January 1984