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AUSTRALIAN SOCIETY OF ACCOUNTANTS

VICTORIAN DIVISION

ANNUAL STATE CONGRESS, ROYAL EXHIBITION BUILDING, MELBOURNE

17 NOVEMBER 1982

# INSURANCE LAW REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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## A DELICATE POSITION

The sensitive amongst you will feel compassion for me in my predicament this morning. Put shortly, I cannot speak to you about the subject on which I was 'billed' to speak. At least, I cannot do so with authority and detail. This is because the Law Reform Commission's report Insurance Contracts[1] has not yet been tabled in Federal Parliament. In fact, the printed version of the report has not yet been handed to the Acting Federal Attorney-General. It is now a race between the printer, on the one hand, and the determination of the Parliament to keep sitting, on the other, that will determine whether the report on insurance contracts will be available this year. A further factor will be the willingness of the Acting Attorney-General, Mr. Neil Brown, Q.C., to table the report before Christmas, notwithstanding the fact that one House of the Parliament has risen and notwithstanding the entitlement to hold the report for 15 sitting days. In short, it is possible that the report will be available before the end of the year. But it is not available yet. Accordingly, you will understand that I am not able today to reveal the Commission's precise recommendations.

I tossed up in my mind, whether I would take an entirely different tack. In the past two weeks, I have spoken on extremely interesting subjects. As citizens, you should be concerned about reform of the law of standing to sue, a matter I addressed at the First National Environment Law Conference. You should also be concerned about our industrial relations laws, the subject of my speech to the Employers' Federation of New South Wales last Friday. There is not a person in Australia who is unaware of the Azaria Chamberlain

case. I expressed some views on lessons it has for reform of the law of infanticide at a conference in this city 10 days ago. The right to an interpreter, I dealt with last Wednesday in conjunction with the Law Reform Commission's enquiry into the reform of the rules of evidence in Federal and Territory courts. I could even break my rule and repeat my speech about professionalism and accounting, which I delivered to the N.S.W. Division last year.

The Law Reform Commission is engaged in a wideranging mandate to suggest improvements to the Federal laws of our country. It works only on tasks specifically assigned to it by the Federal Attorney-General. It works with small resources and always by the most exhausting procedures of public consultation yet adopted in lawmaking Australia. A number of its reports have been acted upon both at a Federal and State level. It is not an academic institution. It is part of the permanent machinery of administration set up to assist the improvement of Government and lawmaking in our country.

You will be pleased to know that I have decided, in the spirit of truth in advertising, to endeavour to say something about the advertised theme. If consumer protection does not extend to participants in conferences, it ought to. I sometimes feel there ought to be speaker protection, against eventualities such as have occurred in this case. When I accepted the engagement, I expected I would be talking to you today in a timely address about major proposals for insurance law reform. Perhaps by the time of your next Congress those proposals will be in Parliament. Law reformers are an optimistic bunch!

NATIONAL INDUSTRY, NATIONAL REGULATION?

In 1976, Attorney-General Ellicott gave the Law Reform Commission a Reference to report on reform of the law governing contracts of insurance. Although the Australian Constitution permits the Federal Parliament to make laws with respect to insurance (other than State insurance)[2], until now, Federal Parliament has not utilised this power to enact a general law on insurance contracts for the whole of Australia. It has passed laws on marine insurance[3], life insurance[4] and financial regulation of general insurers.[5] But these Federal laws have largely left unregulated the private contract of insurance entered into in Australia. Apart from a limited number of provisions of the Life Insurance Act, statutory modification of common law rules, many of them developed in England in past centuries, has been left to the States and Territories. The modification has not been extensive. It has varied in content from one Australian jurisdiction to another.

The private insurance industry in Australia today is organised on a national basis. It did not take the Law Reform Commission long to conclude that it was undesirable and uneconomic in important aspects of the law governing relationships with the insuring public, that this national industry should be subject to vague and uncertain rules developed long before the growth of modern insurance, especially consumer insurance.[6] The Commission also reached the view without too much trouble, that it was undesirable that the Australian insurance industry, now nationally organised and to some extent nationally regulated, should be subject to a myriad of differing legislative and common law requirements from one Australian jurisdiction to another. The combination of imperial, Federal, State and common law decisions, in differing permutations, made a businessman's nightmare. The development of national policies of insurance, of computer systems to transact business nationally, cast an obligation on the law to get its house in order and to offer a single national code.

Often, in Australia, the needs of efficiency and business cannot be met by a single Federal law. For example, save for the telecommunications power, there is no clear constitutional power to permit the national regulation of the computing industry. We face squarely the spectre of the development of differing State laws to regulate computers in respect of their social impact. But in insurance, there is no excuse. There is Federal constitutional power and it has been there, very largely unused in the area of insurance contracts, since Federation. The Law Reform Commission's response to its Reference provides an important national opportunity to produce a single nationwide law laying down minimum standards of fair insuring practices, within which the insurance industry must operate. Inaccessible judicial texts will be replaced by a single, simply expressed national law. Rules developed for the earlier insuring market in which shippers sent their vessels to the distant colonies, will be replaced by rules more apt to modern insurance, often sold through the media and providing vital coverage to consumers of modest means and little business acumen. The Commission has taken as its goals in the field of insurance law reform:

* uniformity, to the extent that the Australian constitution permits;
* clarity, by removing doubts in existing case law and statutes; and
* relevance, in recognising the reality of the respective position of the insured, the insurer and insurance intermediaries.[7]

In preparing its reports, the Commission followed its usual methodology. In 1978 a detailed discussion paper was published setting out tentative proposals for law reform.[8] This paper provoked comment and criticism from the insurance industry and other interested persons and bodies. At the request of the Commission, the Australian Insurance Institute and State and Territorial Insurance Institutes arranged a series of seminars at which hundreds of members of the industry turned up in all parts of Australia to scrutinise the proposals. A great deal of assistance was also obtained from

private consultations with persons and organisations within the Australian insurance industry. A team of 40 honorary consultants from all branches of the industry, all Government agencies affected and from consumer groups, worked with the Commission at every stage of its project right up to the drafting of the final proposed legislation. The entire enterprise was led by my former colleague, Professor David St.L. Kelly, Bonython Professor of Law within the University of Adelaide. In the midst of the project, and in response to the Commission's discussion paper, the Australian Treasury published a most detailed and thoughtful critique of the Commission's tentative positions. This initiative says something for the self-confidence and willingness to expose policy issues which is a happy feature of that most professional of Australian Federal departments. At the end of the day, the Commission has produced two reports. One of them is, as I have said, still with the printer. An earlier report Insurance Agents and Brokers[9] dealt with the important, related but severable question of the regulation of insurance intermediaries in Australia. Between them, these two reports will present the first national review in Australia of the law on insurance contracts. Never has there been such a concentration of effort and talent upon insurance law in Australia. It will be critical that all of this energy should not be wasted and that the high expectations for reform action will receive due attention from officials and from the Government. Everyone acknowledges the vital importance of the insurance industry to Australia. It offers private individuals and businesses coverage against losses and liability that would otherwise be ruinous. It creates extensive investment opportunities. It supports large numbers of employees and intermediaries.[10]

Insurance in Australia is a highly competitive industry, stimulated into competition after years of comfortable lethargy by the advent of the Trade Practices Act 1974. The competition within the industry has resulted in price cutting that has benefited the consumer. The consequent decline in premium income, combined with recent claims experience typical of a time of economic downturn, has put pressure upon the industry and its honourable practices. Laws typically must deal not only with gentlemanly professionals who feel bound by honour and proper dealings (of whom there are a goodly number in the Australian insurance industry) but also with those operators who will cut corners, take unexpected points, act dishonourably and even dishonestly.

I have now sufficiently introduced the subject of insurance contracts law reform. I will spend the balance of this talk addressing, in turn, the two projects into which the Law Reform Commission divided its response. I can be more specific about the first, insurance intermediaries, for the reason that the report is available. The second, insurance contracts, I needs must cover with a broad brush.

INSURANCE INTERMEDIARIES

The report on insurance agents and brokers contained some rather startling information about recent broker collapses in Australia:

* between 1970-79 at least 44 broking firms became insolvent;

* of these, 27 insolvencies were ascertained to have involved estimated losses of premiums paid to brokers of $7.28 million;

* in 1979 one insolvency alone involved estimated losses of $2 million;

* further insolvencies since the report have probably doubled the losses of premiums paid to brokers to about $15 million.

The Commission's report accepts three main principles to guide its recommendations:

* the need to protect the consumer from unforeseeable losses which were innocently suffered;

* the need to ensure that consumers can make an informed choice when purchasing insurance; and

* the need to avoid unnecessary regulation and lessening of competition amongst insurers and their intermediaries.

The draft legislation attached to the Commission's report proposed important changes in the current law and industry arrangements affecting intermediaries:

* in respect of insurance matters, an insurer should be responsible in law for the conduct of its agents;

* because it lacks control over their conduct, an insurer should not generally be responsible for the acts and omissions of brokers with whom it deals;

* to deal with broker liability, a system of occupational control should be implemented, administered by the Insurance Commissioner, requiring compulsory professional indemnity and fidelity guarantee insurance for all insurance brokers;

* requiring the maintenance of trust accounts by brokers; and

* limiting broker investment of insurance premiums (pending payment to the insurer) to prescribed investments. Investment of life insurance premiums should be forbidden.

One controversial recommendation in the report proposed that an insurance broker should be required to disclose to its client and to the insurer amounts paid or payable by the other to the broker. Until now, brokers have generally been paid commission by the insurer and the amount has not been disclosed to the insuring public. In order to ensure that market forces can work, it is obviously necessary that those affected should be aware of the facts.

The report recommended a continuing place for industry self-regulation, particularly in the case of agents and insurance loss assessors. Somewhat acidly, the report commented on the irony of the fact that a large proportion of insurance brokers themselves remain uninsured against risks of professional negligence, whilst urging their clients onto insurance against risks.

You will observe that this report deals only with an isolated aspect of the problem of insurance law in Australia. However, it attends to principles of insurance responsibility for intermediaries which have troubled generations of lawyers and many insurance people too. The hard line decision of the High Court of Australia in Jumna Khan v Bankers and Traders Insurance Ltd[11] is the leading case. An illiterate Afghan, at the request of an agent, signed a blank proposal form. Without asking any questions, the agent then filled in the form. No disclosure was made of a previous fire. It was held that the insurer was not liable, the agent being the agent of the insured not the insurer. It was up to him, an illiterate with no business acumen, little knowledge of our ways, to know that he should have disclosed the previous fire and to have insisted, even against the agent's instructions to him, to do so. The report would change this law. It would make the insurer, in law, responsible for the relevant conduct of its agent.

When this report of the Law Reform Commission was tabled in Parliament, the Attorney-General reported that the Government proposed to 'seek the views of the insurance industry organisations and other interested parties' and to consult with 'State governments and with other departments of the Commonwealth'. Coinciding with the tabling of the report was a major statement by the Prime Minister, Mr. Fraser, on 'The Philosophical Basis of Liberalism'. Mr. Fraser made it clear that a 'completely unregulated and uncontrolled private enterprise system was neither desirable nor possible at the macro or micro level'.[12] The debate was about the proper function of government and the

limits of effective regulation of economic and other activities. So the winds looked fair for implementation of the limited measure of regulation proposed by the Law Reform Commission.

However, in June 1981, the Federal Treasurer, Mr. Howard announced the Government's rejection of the recommendations of the Law Reform Commission for a system of registration of insurance brokers and a requirement of brokers to maintain client funds in order to trust accounts. Put shortly, the Treasurer accepted the view of his department, as expressed in the submission to the Law Reform Commission. In essence this was that the number of brokers who went insolvent and default in payment of funds was insufficient to warrant even the low key proposal of the Commission. Instead, the function of sorting out reliable and unreliable, honest and dishonest brokers should be left to market forces and the general criminal law.

In mid-November 1981, the report of the Commission of Enquiry into the Australian Financial System (the Campbell report) became available. Interestingly enough, that report commented on the Law Reform Commission's report on insurance intermediaries. It noted that there had been little regulation of them in Australia and that self-regulation had been fragmented. It pointed out, as the Law Reform Commission had done before, that neither common law nor statute are clear concerning the legal responsibility of insurers for the actions of their agents.[13] It was to clarify this responsibility that much of the Law Reform Commission's report had been directed. The Campbell report, though generally favouring reduction of government regulation, significantly did not embrace complete faith in self-regulation as the cure for the problems of insurance intermediaries and their clients. On the contrary, the Campbell Committee expressed concern about the proliferation of differing State laws to regulate insurance brokers, as was likely to occur in default of a Commonwealth initiative:

> 'The Committee would not favour sole reliance on self-regulation. Governments clearly have a role in protecting individual consumers against fraud and misrepresentation. The Committee also stresses the desirability of consistent regulation...It believes every action should be taken by the Government to ensure that appropriate co-operative national legislation is developed. It could provide for holding of funds in trust accounts in connection with their business as brokers, as recommended by the Law Reform Commission'.[14]

Not surprisingly, the Campbell report also favoured the Commission's proposal that brokers should have to disclose the commission received as remuneration for insurance transactions.

In the face of the Government's announced decision not to implement the Law Reform Commission's report, the Shadow Attorney-General, Senator Gareth Evans late in 1981, introduced a Private Members Bill into the Senate. With one minor amendment, this Bill substantially reproduced the Bill attached to the Commission's report.

The result of the debate in the Senate was interesting. All Labor Senators supported the Bill. All Democrats supported it. Intensive lobbying from the insurance industry ensued, much of it in support of the measure. It apparently became clear that a large number of Government Senators proposed to support and vote for the Bill. Some spoke in its favour. It was allowed to pass the Senate on the voices. I can only assume that this was so that a vote against the Government would be avoided.

The measure is now in the House of Representatives. The second reading has been proposed by Mr. Ralph Jacobi. The debate stands adjourned. It remains to be seen whether it will be revived. In his speech on 17 November 1981, Mr. Jacobi laid stress on the importance of clarifying, without the necessity of expensive litigation, the precise legal responsibility of insurers for agents and brokers. The spectre of differing State regulation of insurance brokers, a process that has already begun with the enactment of strict and detailed licencing requirements in Western Australia in August 1981, was pointed to by Mr. Jacobi:

> 'New South Wales intends to legislate. It will follow the Western Australian Act but will include life insurance. Victoria has made no official announcement but has indicated that it will be obliged to legislate. Tasmania and the Northern Territory have made indication at this point...In South Australia we have the spectacle of the State Liberal Government implementing negative licencing. What a shambles we will have. Senator Missen in support of this much needed legislation summed up this aspect more cogently [by reference to the State Consumer Affairs Ministers to call for legislation]. This is not something which has to be imposed on the States. It is something which they have requested'.[15].

He might have added that the Constitution of Australia confers on the Federal Parliament the power to enact national laws on insurance, except State insurance. Generally speaking, the insurance industry itself, including representatives of brokers and other intermediaries desired a single national statute, if only to avoid a multiplicity of State laws which brokers, many of them practising in multiple jurisdictions, would have severally to comply with.

The final word has not yet been spoken on this debate. Meanwhile, cases continue to present themselves to illustrate at least the need for clarification of the legal rights and duties of insurance intermediaries. Where a broker becomes insolvent, it often happens that premiums which have been paid to be broker by insureds are lost. In that event, insurers claim the right to require the relevant insured to pay the premiums the second time. Despite three recent decisions, the status of such a claim remains in doubt. In E.H. Niemann Pty. Ltd. v Heartsview Insurance Australia Pty. Limited[16] Mr. Justice Gobbo of the Supreme Court of Victoria expressed his view, that in the circumstances of that case, the insurer did have a right to the second payment of the premium from the insured. The opposite conclusion was reached by the Victorian Full Court in another case where the premiums have been received by an insurance 'consultant' who was not shown to be a broker in the strict sense.[17] In the Supreme Court of New South Wales, Mr. Justice Rogers has reached the same result as the Victorian Full Court, placing much reliance on the need to imply in the contract between the insurer and the broker, a term making the broker the insurer's agent for the relevant purpose in order to make the contract work in a commercially viable way.[18] In the absence of legislation, expensive litigation will be necessary to clarify the precise legal position. In its report, the Law Reform Commission suggested that the broker should be deemed to receive a premium on behalf of the insurer, not the insured. If this were the law, it would reinforce the economic pressure on insurers to recoup monies paid to brokers promptly, rather than, as at present, leaving them with brokers for long periods - sometimes invested in speculative ways, with consequent loss.

The Law Reform Commission's report, the Government's response, the insurance industry's reaction, the passage of the Bill through one Chamber of the Federal Parliament with strong support, the enactment of differing State laws and the promise of more, all indicate that we are going to hear more of this topic in the future. We are also going to hear much more about the costs and benefits of law reform. The decision to be made on the Law Reform Commission's report requires an evaluation of the costs of the regulation proposed, the opportunity cost of avoiding proliferating State laws weighed against the benefit of reducing unfair insurance practices and reinforcing, by law, the most desirable conduct on the part of all parties to the insurance transaction: insured, insurer and the intermediary.

INSURANCE CONTRACTS

I now turn to the subject matter of the Commission's forthcoming report on insurance contracts. As I have said, I must deal it in a way much more superficial than I had hoped, for the reasons I have explained.

The report, like the Commission's 1978 discussion paper deals with the law governing insurance contracts at the principal stages of the relationship between an insurer and the insured. These stages include:

* Before the contract:

    ** the rules that should govern the information that the prospective insured would have to give the insurer and vice versa;

    ** the question of whether, in classes of consumer insurance, a form of 'standard cover' should be adopted;

    ** the question of the requirement of insurable interest;

    ** the vexed problem of unjustifiable discrimination in not offering insurance to some classes of insured, especially women.

* During the contract:

    ** the question of the breach of the terms of the contract.

* Cancellation and renewal of the contract:

    ** provisions which proport to permit automatic cancellation of insurance cover;

    ** whether the insurer should have to give notice to the insured of cancellation and whether reasons should have to be stated.

* On making a claim:

    ** whether any limits should be placed on 'average' clauses;

    ** problems arising from delay in payment of claims;

    ** courts and tribunals that should hear insurance disputes;

    ** protection for the insured in the event of insolvency of the insurer.

In the Commission's discussion paper a number of important suggestions were made. These have now been reviewed in the light of the consultation process. However, it may be valuable to repeat the chief of them:

* Standard cover: The Commission suggested that standard cover should be introduced, at least in particular areas of insurance. This was not the same as standard forms. It contemplates the requirement that purchasers of common kinds of insurance should not be prejudiced by unusual or unnecessary limitations on cover which are not specifically brought to their notice. It was proposed that derogation from standard cover should have to be drawn specifically to the insured's attention and acknowledged by him.[19] The Commission received a great deal of comment and many suggestions on this proposal. At the heart of the proposal is the notion that, particularly in consumer insurance.

the law can say what it likes but you will just not get ordinary insureds to read consumer insurance policies. Generally, all they know is that they a 'fire' policy or a 'householders' policy. Against this ignorance of detail, it was suggested that it was necessary to provide protection. But, obviously, consistent with the aim of preserving competition and innovation, the possibility of variation should be assured, so long as the insured was made aware of it.

* Discrimination: The Commission found various categories of discrimination in offering insurance principally on the basis of the sex of the proposed insured. Legislation forbidding this kind of discrimination has been passed in three Australian States. However, it does not exist or is unlikely to be passed in some States. Thus the law operates unevenly in different parts of the country. Detailed examples of discrimination in insurance have been offered by a report of the Anti-Discrimination Board of New South Wales.[20] Accordingly, the Commission's discussion paper proposed that sex based discrimination which was not directly referrable to actuarial data was unacceptable and should be forbidden. Since the Commission's proposal, the Human Rights Commission has been established by the Commonwealth. The Law Reform Commission has had to consider whether the complaints function of that body is relevant and sufficient and, if not, whether it or some other watchdog should have enhanced power. The subsidiary question of whether the Commonwealth guardian should exclude State discrimination bodies also had to be dealt with.

* Insurable interest: The question of insurable interest was discussed in the discussion paper. In most contracts of insurance, a person who takes out cover must possess an 'interest' in the subject matter of the insurance. This policy derives from at least the Life Assurance Act of 1774, passed to eradicate the then prevalent practice of wagering on lives. But since that 1774 legislation, gaming and wagering legislation and criminal laws have been enacted to deal with the dangers of misuse of insurance. At present the law does not prohibit an insurer from paying out where an insurable interest was lacking at the time of securing cover. Many insurers do not refuse to pay in such cases. The requirement operates in an inconsistent manner. But the Law Reform Commission's discussion paper listed a number of arguments for retaining the requirement, including to protect lives, to reinforce the criminal law and because no great harm was proved. This was one subject on which the Commission invited views on whether the interest requirement should be modified or abandoned or substituted by a pre-condition of the insured's consent, which is the path that has been taken by a number of European and North American reforms. The forthcoming report contains specific recommendations.

* Duty of disclosure: At the present, the duty of an insured to disclose material facts to the insurer is judged by asking what an prudent insurer would regard as relevant. It is not judged by asking what the insured or even what a reasonable person in the insured's circumstances would have known to be relevant to the assessment of the risk. It is now generally conceded that the present test is unsatisfactory and indeed unfair. The issue is how to tackle the reform. Should it be tackled by reference to:

  ** the state of mind, i.e. the guilt or innocence of the insured in making or failing to make a representation;

  ** if this were considered too vague, should it be determined by reference to the conduct that might be imputed to a reasonable insured in the general population;

  ** if this would be too onerous on a particular insured, say a person not fluent in the English language or an Afghan, like Mr. Jumna Khan, it is safer and fairer to have regard to factors personal to the particular insured? Or would this be too subjective and uncertain of proof, making it difficult to distinguish between an unreasonable failure to provide information only in the possession of the insured and a perfectly reasonable failure to disclose something which the person involved did not know was important and was not asked about it?

  ** or is there some intermediate position, by reference to the insured's own knowledge of what he should do and what may be imputed to a person in the insured's actual personal circumstance?

* Cancellation of Insurance. Much injustice can be done if an insurance policy is cancelled and the insured does not know of the cancellation and has not secured alternative insurance. Given the circumstances of cancellation, is it reasonable to impose an obligation of notification to the insured? Is it reasonable to insist upon days of grace within which the insured can secure, or seek to secure, alternative insurance? Should reasons have to be given for decisions to cancel an insurance contract? In the past this last mentioned obligation has not been required. But there are important moves in Commonwealth legislation to require the giving of reasons in the public sector. It seems unlikely that these moves for greater openness of decision-making will stop at the public sector. But is the time ripe for (and is the relationship between insurer and insured such that) the giving of reasons should be required? Proponents of the view that it is point out that a cancellation of insurance generally has to be disclosed to subsequent insurers and can have a great deal of impact on the ability of an insured to get alternative insurance. Openness of reasons, at least in most cases, could permit correction of false facts

and an opportunity to renegotiate the insured's position. On the other hand, opponents suggest that rules appropriate to the public sector are not appropriate to private contracts. The giving of reasons, particularly in cases of cancellation might be embarrassing and difficult and is not required elsewhere in private dealings.

* Slow payment: One issue that had to be considered by the Commission relates to interest on slow payment of insurable claims. Especially where, as now, insurers can enjoy great advantages by holding on to capital sums and investing them at high rates of interest there may be a need for additional pressures on insurers to pay claims promptly. Sometimes court rules provide protection for the insured by affording rights to interest from the commencement of legal proceedings. But not all insurance claims are dealt with in legal proceedings. Entitlement to interest based upon commencement of such proceedings may be inadequate and even undesirable. The Law Reform Commission's report addresses this practical problem.

* Average: One of the most vexed rules of general insurance is the principle of 'average' in the case of underinsurance. If an insured undervalues the goods insured, his payout will, in some domestic policies, be reduced to the proportion which the undervalue bears to the true value of the goods. The policy aim behind the rule is to encourage people accurately to state the value of their property insured thereby to maintain appropriately high premium income. But in a time of inflation, property values can increase without the full purport being realised by the insured. Furthermore, many insured's have little knowledge of the value of their goods and little reason to find that value until a loss occurs. In the discussion paper, the Commission proposed that in relation to householders and contents insurance, the rule of average should be abolished. Many objections were raised to this proposal and it is dealt with in the report.

* Subrogation: Disputes arise about subrogation, that is to say the right of the insurer to step into the shoes of the insured and to recover from any third party who may be liable to the insured. It was suggested in the discussion paper that subrogation should not be available in respect of rights which do not arise directly from a loss nor in respect of rights arising from the conduct of a third party which was neither reckless nor intentional. In particular, it was proposed that it should not be available against members of an insureds family or against the insured's employees. It was pointed out that it was precisely against such risks that most people took out insurance. Many would be astonished to know that the insurer could require them to sue members of the family or employees. Yet it has happened.

* Solvency protection: In Britain and elsewhere, to meet the possible problem of the insolvency of a general insurer, provisions have been made for a policy holders' guarantee scheme. The aim is to apply the principle of insurance to the whole insurance industry so that protection will be afforded innocent insureds and all insureds will have a stake in it, through the statutory scheme. One question which the forthcoming report of the Law Reform Commission addresses is whether such a scheme should be established to protect insured's under contract of general insurance against insolvency of insurers.

There are many other topics which are dealt with in the forthcoming report. I only regret that I have not been able to outline with them for you today. However, I hope that enough has been said to whet your appetite for the report when it arrives. It will be, by any account, a major document. It will be important that it should become the catalyst for change and improvement of Australia's law on insurance contracts. The insurance industry is under great pressure. Part of that pressure comes from the introduction of new technology to the industry. That technology will promote greater efficiency and also much urgency for uniform laws and business practices regulating the industry in all parts of Australia. It is a tribute to the insurance industry that it has so vigorously adapted its practices and marketing techniques, especially in the past decade or so. It is now important that the law should adapt its ways in order to better service the dynamic, competitive and vitally important insurance industry of Australia.

## FOOTNOTES

1. The Law Reform Commission, Insurance Contracts (ALRC 20), 1982 forthcoming.
2. Australian Constitution, s 51(xiv).
3. Marine Insurance Act 1909 (Cwlth).
4. Life Insurance Act 1945 (Cwlth).
5. Insurance Act 1973 (Cwlth).
6. The Law Reform Commission, Insurance Agents and Brokers (ALRC 16) 1980, xii.
7. ibid.
8. The Law Reform Commission, Insurance Contracts, Discussion Paper No 7 (ALRC DP 7) 1978.
9. ALRC 16.
10. ibid, 2.
11. (1925) 37 CLR 457.
12. J.M. Fraser, The Philosophical Basis of Liberalism (1980) 5 Cwlth Record 1840, 1841.
13. See Gobbo J. in E.H. Niemann Pty. Ltd. v Heartsview Insurance Aust. Pty. Limited (1981) 1 ANZ Insurance cases, para 60-436.
14. Australia, Committee of Enquiry into the Australian Financial System, Report 1981.
15. Commonwealth Parliamentary Debate (House of Representatives) 17 November 1981.
16. (1981) 1 ANZ Insurance cases, para 60-436.
17. Norwich Union Fire Insurance Society Limited v. Brennans (Horsham) Pty. Limited (1981) 1 ANZ Insurance cases, para 60-446.
18. Rogers J. in Norwich Winterthur Insurance (Aust.) Limited v. Con-Stan Insurance Industries of Australia Pty. Limited (1981) 2 ANZ Insurance cases, para 60-457.
19. ALRC DP 7, 11.
20. Anti-Discrimination Board (N.S.W.), Discrimination in Superannuation, 1978.