THE AUSTRALIAN INSURANCE INSTITUTE

1983 ANNUAL CONFERENCE

HILTON INTERNATIONAL HOTEL, ADELAIDE

WEDNESDAY, 20 APRIL 1983

DISTRIBUTION OF INSURANCE AND THE ROLE OF THE INTERMEDIARY - ISSUES IN AUSTRALIA

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

TIMES OF CHANGE AND REFORM

We live in times of change and reform. Nothing is quite what it seems and things long established are changing. A few weeks ago I noticed an item in the Melbourne Herald[1] under the heading 'Full Cover for Motorists'. Because of my passionate interest in the insurance industry and the recent pronouncements of the Law Reform Commission on 'full cover' I thought I would read this item and explore the latest innovations of plain language policies offering full cover insurance to the motorist. Instead, I discovered that the item, originating in London, told the tale of a certain Sussex garden in England where the owner had placed on display a number of nude statues, men and women, near Arundel in Sussex. According to the owner, there were so many accidents each week on a nearby bridge that he had agreed to cover the figures with overcoats if this would help. I imagine there are a few insurers in the United Kingdom grateful for this kind of 'full cover'. The provision of 'full cover' for people who suffer loss is the theme of this address. Because you have chosen to examine the role of the intermediary I will concentrate on his position. But I want, first of all, to place my comments on insurance intermediaries in context. I want to say a few things about the position of insurance today. I will introduce the Law Reform Commission. I will then examine the most relevant report of the Commission on Insurance Agents and Brokers[2]. I will then offer a few comments about the most recent report of the Commission on Insurance Contracts law.[3]

First, then, the context. In March 1983 came the change of Federal Government in Australia. Under the Australian Constitution, the Federal Parliament has significant legal power in respect of insurance regulation in Australia. The attitudes and philosophies of the Government which sits on the Treasury Benches in Canberra is therefore of the greatest importance to the insurance industry. In the announced policies of the incoming Labor Government, three items are of special interest to the insurance industry and to this conference:

* The first, announced in the business policy, is the undertaking to proceed with the Insurance (Agents and Brokers) Bill 1981. That Bill, introduced by the new Federal Attorney-General when in Opposition, passed through the Senate in 1981. However, it was rejected by the then Government. It now seems that it will proceed.

* Secondly, in the law and justice policy of the incoming Government, Senator Evans has indicated his intention to give early consideration to the recommendations of the Law Reform Commission in its recent report on insurance contracts law reform. The prospect of enactment of legislation based on that report before too long must clearly be considered reasonably high.

* Thirdly, in the law and justice policy, Senator Evans has also committed the incoming Government to 'a major reform of accident compensation law but on the basis of Commonwealth/State co-operation rather than the unilateral Commonwealth action of the kind recommended by the Woodhouse Committee'. On the eve of the election on 2 March 1983, the Insurance Council of Australia indicated that it was 'not happy' with the 'solution' offered by the ALP. It criticised the policy on accident compensation which it claimed would result in withdrawal of about one quarter of the Australian insurance industry's funds into a national 'Government controlled' compensation scheme. The Chief Executive of ICA, Mr Rodney Smith, said there was no justification for employers being burdened with the initial costs of extending compensation cover to 24 hours a day, thereby accepting responsibility for general economic welfare in circumstances over which they have no control.

The terrible bushfires in February and the equally shocking floods in March have pointed up once again the cruel impact of the natural elements in Australia on the lives and property of its residents. The call on the insurance industry arising out of the fires of February 1983 are said already to exceed $200 million. The heavy losses and the consequential claims on insurers has given a special focus to the national attention on insurance law reform. Anyone doubting that insurance law reform will come in Australia and at a Federal level should read the incoming Government's policy documents:

> Despite the clear existence of Commonwealth constitutional power and despite strong support shown by commercial and consumer interests, the Fraser Government failed utterly to implement its undertaking, first given in 1976, to improve the legal regulation of the insurance industry in the interests of policyholders and the industry itself. A Labor Government will enact the Insurance (Agents and Brokers) Bill 1981 and regulate the form and content of insurance contracts. The Australian Law Reform Commission has recently drafted a comprehensive report on this area of the law. Labor will give immediate priority for the consideration of this report with a view to the early implementation of its major recommendations.[4]

There could not be a more definite and unequivocal undertaking than this. Senator Evans' commitment was given during the election campaign, soon after the Minister of Consumer Affairs and Attorney-General of South Australia, Mr Sumner, announced his intention to introduce State legislation to regulate insurance intermediaries. Mr Sumner's announcement followed the collapse of Regal Insurance Brokers Proprietary Limited : as just the latest in a lamentable series of Australian insurance broker failures. At the time of making his announcement, Mr Sumner said that the regulation of intermediaries was 'a national problem' and that 'the ideal solution would be Federal legislation as recommended by the Australian Law Reform Commission.[5] Mr Sumner foreshadowed that, in default of Federal legislation, the Government of South Australia would proceed to secure legislation in this State. However, he also indicated that if Federal legislation were to proceed, it would be his intention not to go ahead with State laws. Such State laws have been enacted in Queensland and Western Australia. They have been foreshadowed in Victoria and New South Wales. But in view of the unequivocal statement of intention of Senator Evans to proceed with Federal legislation, it would now appear likely that a national approach, as proposed by the Law Reform Commission, will be achieved.

THE AUSTRALIAN LAW REFORM COMMISSION

Now, let me say something briefly about the Law Reform Commission itself. What is this body which has produced two reports and draft legislation that look likely, now, profoundly to affect the future organisation and operations of the insurance industry and its intermediaries in Australia?

The Commission is a permanent national authority established by the Australian Federal Parliament. It works on references received from the Federal Attorney-General of the day. It has a small establishment. There are 11 Commissioners, four only full-time. There is a staff 20 officers, only half of them legal researchers. Accordingly, the working unit of professional officers is very small indeed. The Commission is charged with the reform, modernisation and simplification of Federal laws in Australia, within the tasks assigned to it by the Federal Attorney-General. It works through procedures of expert consultation and public discussion. Its proposals for reform are ventilated through discussion papers which are widely distributed, seminars which are organised in all parts of the country and public hearings to which powerful lobby interests and ordinary citizens alike can come in the confidence that they will be heard and their views listened to.

The Australian Insurance Institute took a leading role in organising the distribution of the Commission's discussion paper on Insurance Contracts.[6] In co-operation with the Australian Law Reform Commission it organised seminars in each capital city, held after the public hearings. At these seminars, hundreds of members of the insurance industry discussed the Commission's proposals and offered constructive and detailed criticism and comment. The two reports subsequently presented by the Commission are based on that process of consultation. In addition, the Commission had, in the insurance reference, a team of 30 distinguished leaders of the insurance industry, many of them with long associations with the Insurance Institute. Mr Gordon Taylor was one of the distinguished consultants of the Commission. Consultants are not to be held responsible for every recommendation of the Law Reform Commission. Necessarily those recommendations are the views of the Law Comissioners. But there is no doubt that the Commission owes a great deal to the practical, thoughtful and diligent participation of the leaders of the insurance industry. They took part in many meetings. They offered innumerable comments and the accumulated wisdom of years of service in the insurance industry. Though it is not always possible to secure consensus in matters of reform, there was a fair degree of concurrence in many of the proposals for reform put forward by the Law Reform Commission. This, surely, is the way fundamental reforms of the law, affecting such a vital industry, should be developed. The days of fundamental law reform, achieved behind closed doors by a few talented lawyers, are gone. The days in which we should develop reforms with the full participation of the relevant experts and interests affected, are signalled by the method of operations of the Australian Law Reform Commission. You may not agree with everything we have recommended. But I believe you can be satisfied that our recommendations are based on an unequalled examination of the operations of the insurance industry.

In this regard, the Law Reform Commission was fortunate to be led in this project by Professor David St.L Kelly. Professor Kelly was one of the initial full-time Commissioners. The imprint of his brilliant mind, good practical commonsense and attention to detail can be found in every page of the Commission's two reports on insurance law. He has now returned to his post as Professor of Law in the University of Adelaide. He is one of the finest jurists in our country and it is fortunate that he was available to lead the insurance reports to their conclusion. The high quality of the reports owes a great deal to his leadership.

NATIONAL INDUSTRY, NATIONAL REGULATION?

I have now sufficiently introduced the subject of insurance contracts law reform. I will spend the balance of this paper addressing, in turn, the two projects into which the Law Reform Commission divided its response. Although the Australian Constitution permits the Federal Parliament to make laws with respect to insurance (other than State insurance)[7], 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[8], life insurance[9] and financial regulation of general insurers.[10] 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.[11] 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.[12]

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.[13]

Insurance in Australia is a highly competitive industry, stimulated into competition after years of relatively 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.

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.

Indeed, the failure of Regal Insurance Brokers Pty Ltd in South Australia was, as Mr Ralph Jacobi MP pointed out, 'only the most recent of a long line of broker collapses in Australia'.[14]

The Commission's report on intermediaries 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 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[15] 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 was tabled in Federal Parliament, Attorney-General Durack 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 then 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'.[16] 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 its 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. 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.[17]

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 then 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 the then Government's Senators proposed to support and vote for the Bill. Some spoke in its favour. It was allowed to pass the Senate on the voices.

A Second Reading Speech on the measure was offered in the House of Representatives in November 1981 by Mr Ralph Jacobi.[18] However, the measure did not proceed and this was the point reached on 5 March 1983 when the Government went to the people.

Meanwhile, cases continued 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[19] 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 had been received by an insurance 'consultant' who was not shown to be a broker in the strict sense.[20] In the Supreme Court of New South Wales, Mr. Justice Rogers 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.[21] 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 debate on the Australian legislation was not confined to this country. A law journal in England took up the discussion of costs and benefits in law reform in the context of statutory regulation of insurance intermediaries.[22] The commentator praised the Law Reform Commission's attention to cost/benefit analysis, whilst questioning some of the conclusions reached. He contrasted the approach taken by the Insurance Brokers' (Registration) Act 1977 (Eng) which came into force in England in late 1981. The English Act creates a non exclusionary system in which only those registered under the Act can call themselves 'insurance brokers'. Others can still trade. But they must use an alternative title such as 'insurance consultant' or 'insurance adviser'. The Australian Law Reform Commission took the view that the non exclusionary system did not provide sufficient protection for the public. Publicity campaigns designed to educate the public about the difference between registered insurance brokers and other insurance intermediaries (who did not comply with the statutory standards) were considered ineffective, costly and incapable of enabling the average consumer to make an informed choice.[23] The commentator took the view that the costs of any regulation of insurance intermediaries must prevent at least so many broker collapses as to justify those costs.[24] But cost/benefit in law reform must include due allowance for intangible benefits. No system of statutory regulation is breach-proof. Certainly, we must seek to contain the costs. We must avoid unnecessarily bureaucratic systems of regulation that are disproportionately expensive to operate. On the other hand, there is a clear need to discourage broker impropriety, to reassure the public, to protect the good name of honourable brokers and to ensure that innocent members of the insuring public are not disadvantaged. All of these considerations have intangible, as well as tangible, consequences, many of them flowing to the advantage of the insurance industry as a whole.

THE COMMISSION'S LEGISLATION

There is no substitute in legislation or draft legislation for the examination of the written text of the statute. So it is with the legislation appended to the Law Reform Commission's report which is the basis of Senator Evans' proposed legislation. However, it might be helpful to point out a number of key provisions[25]:

* Clause 6 makes it plain that the legislation applies to all contracts of insurance other than reinsurance and health care insurance the latter already regulated under the National Health Act.
* Clause 7 excludes State insurance, not for reasons of principle but because the Constitution limits the Federal Parliament's power over State insurance.
* Clause 10 makes it plain that an insurer is responsible for the conduct of agents or employees, being conduct relied on in good faith by the insured. Agreements to the contrary are void. The insurer is liable for loss or damage suffered by the insured as a result of the conduct of an agent or employee.
* Clause 11 makes it plain that any insurance intermediary who is not an insurance broker shall be deemed to be the agent of the insurer and not of the insured.
* Clause 12 establishes a number of criminal offences for conduct by insurance intermediaries, including wilful and intentionally deceptive conduct involving providing false information, omitting material information or wrongfully advising the insured or intended insured.
* Clause 13 clarifies the law by making it plain that payment of insurance premiums to an intermediary is a discharge as between the insured and the insurer of the liability of the insured. It may be expected that this provision will place proper pressure on insurers to recoup monies paid to intermediaries, especially brokers, more quickly than in the past. Many of the failures of Australian brokers have arisen from speculative investments of monies held by them, sometimes over long periods, pending payment to the insurer.
* Clause 15 requires an insurance intermediary, who intends to act under a binder, to inform the insured in advance.
* Clause 17 forbids the conduct of the business of an insurance broker unless the broker is registered and unless an approved professional indemnity policy is in force.
* Clauses 18, 19 and 20 provide machinery provisions for registration and suspension or cancellation of registration.
* Clause 21 requires registered insurance brokers to maintain a trust account into which all monies received by him on account of another person are to be paid.
* Clause 22 makes it plain that a life insurance broker is not bound by any agreement with an insurer that purports to require him to effect some or all contracts of life insurance only with that insurer.
* Clauses 23 and 24 provide for offences on the part of life insurance brokers and general insurance brokers.
* Clause 25 requires an insurance broker promptly to give the insured particulars in writing of any remuneration or other benefit received by the broker in relation to the contract.

* Clause 26 renders it a criminal offence for an insurance broker to receive any gift, gratuity, benefit or other reward from an insurer except as remuneration (and by inference disclosed remuneration). In other words, secret payments or commissions that may distort the exercise of the independent duty of the broker are to be forbidden).
* Clause 30 forbids an insurance intermediary, who is not a registered insurance broker, from describing himself in a way that would lead a person to believe that he was an insurance broker.
* Clause 33 contemplates inspection and audit of the books, accounts and records of registered insurance brokers.
* Clause 34 requires the respective insurance commissioners to supply annually to the Parliament details of registered brokers, suspensions, cancellations and prosecutions as well as insolvencies of insurance intermediaries which come to notice.

This is a Cook's tour of the draft legislation. I stress again that it is important to have regard to every word of a statute or draft statute. Furthermore, it is still to be seen whether the Government's legislation as introduced will follow, in every respect, the legislation proposed by the Law Reform Commission.

INSURANCE CONTRACTS REPORT

I would not wish to lose this opportunity, briefly to outline some of the principal recommendations made in the report on insurance contracts. The report proposes that outdated English, Federal and State legislation and judge-made law be replaced by a single Federal Act. Among major reforms recommended in the report are:

* introduction of 'standard cover' in a number of areas of consumer insurance to ensure that any derogations from a legislative standard are clearly brought to the attention of people taking out those types of insurance;
* introduction of a legal right to the supply of a policy of insurance and provision that, where no policy is supplied, unusual limitations in cover shall not be binding on the insured;
* modification of the law requiring a person taking out an insurance policy to disclose matters to the insurance company;
* modification of the rules which allow an insurer to avoid a contract for innocent misrepresentation;
* provisions dealing with the remedies available to an insurer in the event that the insured breaches the contract, including limitations on an insurer's right to avoid a policy for minor breaches;

* control of cancellation of insurance by limiting the circumstances in which an insurer may cancel the contract, requiring reasons to be given in the event of cancellation and by permitting a reasonable time for substitute insurance to be secured;
* limitation on the rights of insurance companies to recover money paid out, by proceeding against the family or employees of an insured;
* introduction of a right to interest on unpaid insurance moneys from the date on which the money ought reasonably to have been paid;
* provisions rendering ineffective arbitration clauses in insurance contracts ineffective;
* recommendation for the establishment of a national policyholders' guarantee scheme to protect people taking out insurance contracts against insolvency of insurance companies;
* provision for the Human Rights Commission to receive complaints concerning discrimination in insurance on the grounds of sex, marital status or physical and mental handicap.

The report attaches a 30-page Bill for a Federal Insurance Contracts Act. If this Bill is enacted, it will have the effect of replacing much of the 200 years of accumulated English and Australian law and substituting for it a single Federal Act applicable throughout Australia. The fundamental need for reform can be simply stated. The basic law of insurance was laid down 200 years ago before the advent of the consumer insurance market of today. Rules were designed to apply to a different market of parties in a much more equal bargaining position. The need for a review of the law against the realities of today's insurance methods was generally acknowledged. The need, in a vital national industry, for a single Australia-wide law was also generally agreed. It is unreasonable to persist with the confusing mixture of Imperial, State and Federal laws and judicial decisions. The achievement of a single and fairly brief national statute, laying down fair insurance practices, should help the insurance industry to uphold high standards in dealings with its customers.

The major single reform proposed by the Commission's report was undoubtedly the recommendation for the introduction of 'standard cover' in a number of specified areas of consumer insurance. The areas of insurance in which 'standard cover' provisions have been recommended by the Commission include:

* motor vehicle insurance;
* houseowners' and householders' insurance;
* personal accident insurance;
* consumer credit insurance;
* travel insurance.

The report points out that under a system of 'standard cover' every person taking out an insurance policy in the areas specified would, unless given a clear warning to the contrary, be guaranteed coverage against normal expectable risks. The report draws attention to what it describes as 'the wide diversity of terms of insurance contracts offered by different insurers and the unusual terms which sometimes appear in them'. It points out the hardship that insureds may suffer because of their understandable ignorance of these terms. It recommends that these difficulties be alleviated by the introduction of standard insurance cover. The insurer would still be free to market policies which offer less or more than the standard cover. But if it chose to offer less than the standard cover it would be bound to secure the specific approval of the insured to the variation from the standard, otherwise the valuation would be ineffective.

This is simply a recognition of the fact that, whatever the law says, it is impossible in practice to ensure that ordinary citizens purchasing consumer insurance read every detail of their policy. Very few indeed will ever do so. Most simply know that they have a class of insurance and are not aware of the precise terms and exclusions. It may be reasonable to expect businessmen and others with good advice at hand to read their policies. But in domestic insurance, the law should recognise the realities. The law itself should seek to establish the minimum cover which a person will secure, unless he specifically agrees to vary it. In working out what that cover should be, the Commission has had the benefit of intensive discussions with the Insurance Council of Australia and other insurance groups. I wish to place on record the appreciation of the Law Reform Commission for the generally positive and supportive approach taken by insurance companies and officers throughout Australia during the whole inquiry. Most welcome the moves towards a reformed, modern uniform insurance law. About the details there may be dispute. About the need for modernisation and unification of the law of insurance in Australia, there is no significant difference of view.

The Law Reform Commission's report points out that present Australian law on insurance contracts frequently imposes unreasonable burdens on people taking out insurance. It may provide inadequate protection for such people, even where they act in good faith and suffer a loss. Instances quoted in the report include:

* Disclosing matters to insurer. A person taking out insurance is obliged to disclose to his insurer any fact which a 'prudent insurer' would regard as relevant to the assessment of the risk, even if the person insured has no business knowledge and not the slightest idea of what such a prudent insurer would think relevant. The Commission has proposed that this rule should be replaced by a test which has regard to what the insured knew or what a reasonable person in the insured's circumstances would have known was relevant to assessing the risk.

* Innocent irrelevant breaches. At present where the person taking out insurance is in breach of his contract, an insurance company is often entitled to refuse to pay a claim, possibly placing a large and unexpected loss on the insured, even if the breach caused absolutely no loss to the insurance company at all. The report recommends limitation on the extent to which insurers can rely on innocent mis-statements, particularly where these are not relevant to the loss suffered.

* Forced recovery from friends. An insurer can under the present law of subrogation usually require an insured person to sue even a member of his family or an employee to collect, for the benefit of the insurance company to secure reimbursement of insurance monies paid by it. The report proposes that this right should be abolished so that an insurer is not entitled to recover against an uninsured person who, because of personal or other family relationships should not reasonably be expected to pay. The similar right to recover against employees, though not frequently exercised in Australia, is also proposed to be abolished.

* Insurers becoming insolvent. An insured person may, under present law, suffer a disastrous loss because the insurance company becomes insolvent and is unable to meet a claim. In life insurance there are already protections against this. The Law Reform Commission report recommends that in the field of general insurance a guarantee scheme should be established providing for the payment of up to 75% of claims, limited to set amounts suggested to be $250,000 for each property claim and $1 million for a liability claim.

In making its recommendations on insurance contracts law the Commission was guided by a number of principles:

* the need for modernisation and uniformity in Australian insurance law;
* the assurance of fair competition between insurance companies;
* the promotion of informed choice by people taking out insurance;

* the continued requirement that insurance contracts should be made 'in the utmost good faith' on behalf of both the insurance company and the person taking out the policy;
* the need to remove, so far as possible, unfair burdens on an insured person which are 'vastly disproportionate to the loss the insured's action caused to the insurer';
* the need to avoid catastrophic losses as where an insurance company itself fails.

This report is a major reforming document by any standard. It affects one of the most important industries in our country. The insurance industry has had to struggle, to date, with a collection of sometimes out of date, often inaccessible, and frequently uncertain principles of law. The time is overdue for a major national effort of reform; but one which does not undermine the basic rule of trust that should exist between the parties to an insurance contract. The Law Reform Commission has been conscious of the stiff competition that exists in the Australian insurance market. It is aware of the need to introduce reform with care, because of the importance of the industry domestically and the international implications of reinsurance. It has also been aware of claims of increasing fraud and arson during the present economic downturn. It is conscious of the fact that good practices by insurance companies will require a measure of self-regulation and honourable dealings with customers. But the law should not opt out because many insurers or their intermediaries are honourable. It should aim at modernisation and unification. It should offer minimum protections, so that the few who do act dishonourably are left in no doubt as to the basic fair practices of insurance business in Australia. There has never been such a major inquiry into insurance law in Australia. Although, at Federation, this area of the law was assigned to the Federal Parliament, so far no comprehensive Federal Act has been enacted. The insurance industry is now a national industry. Increasingly forms and practices are being standardised and computerised. It is unreasonable and unnecessary that it should be subjected to such a confusing, uncertain and frequently antique set of rules. The Law Reform Commission's report proposes a major initiative of modernisation.

I am told that it was a Chinese curse to express the hope that a person should live in interesting times of change. For us in Australia today, change is the watchword. Modern technology assures it. Altered social attitudes reinforce it. Like it or lump it, we must learn to live with change. The insurance industry and its intermediaries must prepare to change. Those who know this distinguished industry — as I have come to know it — do not doubt for a minute its capacity to adjust and to flourish.

FOOTNOTES

1. Melbourne Herald, 26 February 1983.

2. The Law Reform Commission (Aust), Insurance Agents and Brokers (ALRC 16), 1980.

3. ibid, Insurance Contracts (ALRC 20), 1983.

4. G J Evans, Australian Labor Party, Policy on Business & Consumers Affairs, February 1983.

5. C J Sumner, 'Insurance Intermediaries to be Regulated', News Release, 8 February 1983. See also South Australia, Report of the Working Party on Development of a Code of Conduct for Insurance Intermediaries, 1982.

6. The Law Reform Commission (Aust), Discussion Paper No 7, Insurance Contracts (ALRC DP 7), 1978.

7. Australian Constitution, s 51(xiv).

8. Marine Insurance Act 1909 (Cwlth).

9. Life Insurance Act 1945 (Cwlth).

10. Insurance Act 1973 (Cwlth).

11. ALRC 16, xii.

12. ibid.

13. ALRC 16, 2.

14. R Jacobi, Adelaide Advertiser, 10 February 1983.

15. (1925) 37 CLR 457.

16. J.M. Fraser, The Philosophical Basis of Liberalism (1980) 5 Cwlth Record 1840, 1841.

17. Australia, Committee of Enquiry into the Australian Financial System, Report 1981.

18. Commonwealth Parliamentary Debate (House of Representatives) 17 November 1981.

19. See Gobbo J. in E.H. Niemann Pty. Ltd. v Heartsview Insurance Aust. Pty. Limited (1981) 1 ANZ Insurance cases, para 60-436.

20. (1981) 1 ANZ Insurance cases, para 60-436. Cf Norwich Union Fire Insurance Society Limited v. Brennans (Horsham) Pty. Limited (1981) 1 ANZ Insurance cases, para 60-446.

21. 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.

22. See Veljanovski, 'Cost Benefit and Law Reform in Australia' (1982) 132 New LJ 893.

23. ibid, 894.

24. loc cit.

25. The precise details can be found in ALRC 16, 97ff.