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INTERNATIONAL ASSOCIATION FOR INSURANCE LAW

NEWS LETTER, MAY-JUNE 1984

AUSTRALIA : MAJOR REFORMS OF INSURANCE LAW

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

Law reform reports

In December 1983 the Federal Attorney-General in Australia, Senator Gareth Evans QC, introduced into the Australian Parliament an Insurance Contracts Bill 1983. The Bill is designed to effect major changes in Australia's laws governing insurance contracts. The Attorney-General announced that the Bill would lie on the table of Parliament for three months to permit industry and public comment before being considered by Parliament. The Australian insurance industry, legal profession and others are now in the process of providing comments and criticisms on the Bill to the Federal Attorney-General and the Federal Treasurer (Mr Paul Keating), the Ministers jointly responsible for it.

The Bill is an ambitious reforming measure. Introducing it, the Attorney-General, in his Second Reading Speech, made it clear that the new Federal Labor Government has substantially accepted, substantially, the recommendations contained in a report of the Australian Law Reform Commission (ALRC). That report had in turn been tabled in the Parliament in December 1982. It recommended the replacement of a large number of English, Federal and State provisions as well as of many common law rules made by judges, by a single Federal Australian statute. Such a statute was envisaged when the Australian Constitution established the Australian Federation in 1901. However, until now, the Federal constitutional power has not been fully used to enact a single national law.

The Australian Law Reform Commission's report was prepared under the direction of Professor David St L Kelly. Professor Kelly was a full-time Commissioner of the Law Reform Commission. He has recently been appointed Head of the Law Department in the State of Victoria, Australia. In accordance with the procedures of the Australian Law Reform Commission, the report was prepared with the assistance of a distinguished group of 50 consultants drawn from the judiciary, the legal profession, the universities, consumer

groups and all branches of the Australian insurance industry. The final report was written after a discussion paper had been distributed nationally and debated in seminars organised by the Australian Insurance Institute and after public hearings had been held by the Law Reform Commission.

Among the major reforms recommended in the ALRC report were:

- . introduction of 'standard cover' in a number of areas of consumer insurance to ensure that any reduction of cover from a prescribed standard are clearly brought to the attention of people taking out such insurance;
- . introduction of a legal right to have a policy of insurance supplied 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 insurance to disclose some matters to the insurance company;
- . modification of the rules which allow an insurer to avoid a contract for innocent misrepresentation and non-disclosure;
- . provisions dealing with reform of the remedies available to an insurance company in the event that the insured breaches the contract, including limitations on an insurer's right to avoid a claim for minor breaches;
- . control of cancellation of insurance by limiting the circumstances in which an insurer may cancel the contract, by requiring reasons to be given in the event of cancellation and by permitting sufficient time for substitute insurance to be secured;
- . limitation on the rights of insurance companies to recover claims payments by exercising their legal right of subrogation against the family or employees of an insured;
- . introduction of a right to interest on unpaid insurance moneys from the date on which the claim ought reasonably to have been paid;
- . provisions rendering ineffective arbitration clauses in insurance contracts;
- . the establishment of a national policyholders' guarantee scheme to protect insured with loss-based claims in the event of the insolvency of insurance companies;
- . provision for the Human Rights Commission to receive complaints concerning unjustifiable discrimination in insurance on the grounds of sex, marital status or physical and mental handicap.

Basic principles

The ALRC report indicates that, in developing these proposals, the Commission had been guided by a number of principles. As stated, these were:

- . the need for modernisation and uniformity in Australian insurance law;
- . the facilitation 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 insurer and the insured;
- . the need to remove, as far as possible, unfair burdens on insured persons which are 'vastly disproportionate to the loss the insured's action caused to the insurer'; and
- . the need to avoid catastrophic losses, as where an insurance company itself becomes insolvent.

The ALRC report points out that present Australian insurance law on insurance contracts frequently imposes unreasonable burdens on people taking out insurance. It gives many instances where, it is claimed, inadequate protection exists for such people, even where they have acted in good faith.

Standard cover

Probably the most important single reform proposed by the ALRC report and now incorporated in the Insurance Contracts Bill before the Australian Parliament, is the recommendation for the introduction of 'standard cover' (not 'standard contracts') in a number of specified areas of consumer insurance. The areas where 'standard cover' provisions have been recommended by the ALRC are:

- . motor vehicle insurance;
- . homeowners' and householders' insurance;
- . personal accident insurance;
- . consumer credit insurance; and
- . 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 ALRC 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 that insureds may suffer because of their understandable ignorance of these special terms. It recommends that these difficulties be reduced by the introduction of standard insurance cover. An insurer would still be free to market policies which offer less or more than the prescribed standard. But if it chose to offer less than the standard cover, it would be bound to draw that variation specifically to the insured's attention. Otherwise the variation would be ineffective.

Insurance intermediaries

Introducing the Insurance Contracts Bill 1983, Federal Attorney-General Evans told the Australian Parliament that it was the intention of the Government also to introduce legislation based on the ALRC earlier report on insurance agents and brokers. According to Attorney-General Evans, a recent spate of broker insolvencies in Australia has further 'underlined the urgent need for control' [of insurance intermediaries]. It was indicated that then Government was working towards the early introduction by the Treasurer of legislation for the regulation of insurance intermediaries in Australia. During the former conservative Government, the the Federal Treasurer (Mr John Howard) had indicated that the Government did not intend to act on the Law Reform Commission's report on intermediaries, preferring to leave regulation of insurance intermediaries to the market place rather than introducing legislative control and regulation. The main features of the ALRC report on insurance intermediaries include:

- . the clarification of the legal responsibilities of insurers for mistakes made by agents and brokers;
- . 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. However, it would be bound by the receipt of a premium by a broker;
- . a limited system of occupational control of brokers should be implemented by legislation. This would be administered by the Insurance Commissioner; it would require compulsory professional indemnity and fidelity guarantee insurance for all insurance brokers; require the maintenance of trust accounts by brokers; and limit broker investment of insurance premiums pending payment to the insurer, so that such premiums can only be invested in prescribed securities. Investment of life insurance premiums would be forbidden.

Policyholders' guarantee scheme

One of the proposals in the ALRC report not included in the legislation introduced into the Australian Parliament relates to the provision in Australia of a statutory scheme for the protection of policyholders in the event of the default of an insurer. The ALRC did not include provision for the system in its own draft legislation, expressing the view that there should be further discussion between the Insurance Commissioners and the industry on the issue.

Spokesmen for the ALRC have pointed out that such systems exist in most States of the United States and in Britain under the Policyholders' Protection Act 1975 (UK). The debate on policyholders' protection has special significance in Australia because of the recent collapse of a significant insurer (Bishopsgate Insurance). This collapse came on the top of 20 other insurance company failures in the past decade. These failures have drawn attention to the problem of policyholder protection in Australia. One of the leading ALRC consultants and an experienced underwriter and ex-broker, Mr Frank Hoffman, took exception to the ALRC recommendation in this respect. Addressing the inaugural seminar of the Australian Chapter of AIDA in November 1983, he said that risk-pooling implied that an insurer was willing to take on the insured after assessing the risk in question. He said that a guarantee fund system would amount to taking on risks which, by normal market standards, responsible insurers might have assessed to be not insurable. Mr Peter Duerden, an experienced insurance executive, urged that Australia should follow the Canadian system of establishing an insurance company-funded consumer protection plan which makes monies available for liquidation expenses and outstanding claims and then only when the assets of the insolvent company are insufficient to meet these two items. Mr Duerden also urged the 'tightening up' of company law affecting the insurance industry. He said that the collapse of Bishopsgate Insurance had raised 'fundamental questions about the efficiency and competence of our corporate affairs officers':

Summary

Australia's insurance law has drawn heavily upon and is basically similar to that of England. Until now, it has been something of a 'hotch potch', the detail being drawn from English cases and statutes, Australian case law and Federal and State legislation. Following a major review of insurance contract law by the Australian Law Reform Commission, an important reforming Bill has now been introduced into the Australian Federal Parliament. Comments have been sought from the insurance industry and others concerning the reforms proposed. It is expected that the reform legislation will be enacted before the end of 1984, following consideration of criticisms of and comments of the Bill. When enacted, the Bill will operate throughout Australia. Under the Australian Constitution, the only major exceptions to the scope of its operation will be State Government Insurance Offices. However, the convention has developed in the past that these insurers also generally comply with Federal standards in insurance, once these are laid down. Most Australian insurers have welcomed the moves towards a single, national uniform law for the insurance industry, whilst criticising particular aspects of the Law Reform Commission's proposals.

The proposals for reform of insurance contract law will be following by legislation on an earlier ALRC report dealing with regulation of insurance intermediaries. Put together, the two reforming measures will constitute a major overhaul of insurance law and practice in Australia.

REFERENCES

Australian Law Reform Commission, Insurance Agents and Brokers (ALRC 16) (1980), AGPS, Canberra.

Australian Law Reform Commission, Insurance Contracts (ALRC 20) (1982), AGPS, Canberra.