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AUSTRALIAN INSURANCE CONTRACT LAW:  
OUT OF THE CHAOS – A MODERN, JUST AND  
PROPORTIONATE REFORMING STATUTE

Australian Insurance Law Association National Conference 2010

The Hugh Rowell Memorial Lecture 2010  
Adelaide, South Australia  
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**AUSTRALIAN INSURANCE CONTRACT LAW: OUT  
OF THE CHAOS – A MODERN, JUST AND  
PROPORTIONATE REFORMING STATUTE\***

The Hon. Michael Kirby AC CMG\*\*  
(With major assistance by James Morse)

**INTRODUCTION**

This is the Hugh Rowell Memorial Lecture for 2010. Hugh Rowell was engaged with the Australian Insurance Law Association (AILA) in South Australia from the Chapter's inception in 1989 until the end of 2005. This included a term as its president in 1999 and 2000. He was widely acknowledged as an exceptional lawyer of great skill and honour, as well as a genuine humanitarian. He always demonstrated a positive outlook towards life. He was modest and he had a strong sense of humour: a fusion of qualities deserving of admiration within our field because it is comparatively rare.

Hugh Rowell was also an active contributor to the law reform work of the Law Council of Australia. Such work is a tireless, and often tiring,

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\*\* Foundation Chairman of the Australian Law Reform Commission 1975-1983; Judge of the Federal Court of Australia 1983-1984; President of the New South Wales Court of Appeal 1984-1996; Justice of the High Court of Australia 1996-2009. The author acknowledges the substantial research and drafting assistance provided by James R Morse and the editorial input of Michael J Gill and Andrew J Sharpe. The author also thanks DLA Phillips Fox for making the above resources available.

enterprise. Hugh Rowell's impact on the law governing the Australian insurance industry was strong.

The theme for this year's conference of the AILA is: '*Unravelling Insurance*'. This gives me a sense of *déjà vu* and apprehension. Over 34 years ago, I worked on unravelling the law relating to insurance, when I was Chairman of the Australian Law Reform Commission (ALRC). Is there any more unravelling to do?

The Commission produced its twentieth report (ALRC 20) on *Insurance Contracts*. That report offered a simplified and coherent framework of laws relating to that subject. So did the ALRC achieve the stated aim? Is the title of this conference needlessly pessimistic? Those involved in insurance are sometimes prone to pessimism for theirs is a life with risk.

The production of the ALRC 20 gave me a special sense of affinity with the AILA. In 1978, one of AILA's founders, John Hastings, also one of the consultants to ALRC, attended the Congress of AIDA (the International Association for Insurance Law) in Madrid. One of the themes in Madrid was 'the insurance contract'. Subsequently John Hastings agreed to assist us with the preparation of ALRC 20. He provided considered written submissions, no doubt drawing upon the discussions that had occurred in the 1978 Congress and thereafter. Not long after the Madrid meeting, at the 1982 Congress of AIDA in London, John Hastings was (along with Michael Gill) invited by the Presidential Council of AIDA to form an Australian Chapter. So indeed they did.

The planning committee for the Australian Chapter met for the first time on 26 April 1983. Apart from John Hastings and Michael Gill, those present included Syd McDonald, Robert Owen, Chris Henri, Frank Hoffmann and Stephen France. Margaret Roberts became part of the Committee shortly thereafter. By that time, half of the Committee members were assisting as consultants in the development of ALRC 20. Almost all of the members were advising or educating others on its contents.

On 8 November 1983, I launched the first AILA Seminar in Sydney. My address focused on what the ALRC, in co-operation with the Australian insurance industry, had achieved by that time: a single and comparatively brief national framework of laws which outlined fair insurance practices. That framework and which would help the insurance industry to uphold high standards in dealing with its customers, agents, brokers and the community.

Many of AILA's founders and first members contributed to the further work that led to the passage of *Insurance Contracts Act 1984* (Cth) (ICA). Thereafter, they educated and trained the legal profession and the insurance industry to use this legislation for the benefit of all stakeholders.

I thank all of these notable leaders of the Australian insurance industry for their contributions of time, effort and intellect. It has shaped, and will continue to shape, the character of the insurance industry in this country - as well as the wider society, so heavily dependent, as it is, on insurance.

In this contribution, I will review the creation and development of the ICA; comment on its application; compare it with later developments in the United Kingdom and New Zealand; and finish by analysing its effect on the industry and all relevant stakeholders. My thesis is a simple one. In the place of the pre-existing legal chaos we created a worthy charter on Australian insurance contracts. Much of the credit belongs to the Australian insurance industry and to the AILA.

## **THE PAST LANDSCAPE**

But first, I want to indulge in a few nostalgic recollections of my early days in the law. In 1959, I began my articles of clerkship. Graduation in law followed in 1962. I then worked as a solicitor in a large Sydney firm, Hickson Lakeman and Holcombe. There, I developed a practice in insurance litigation. On a day-to-day basis, I battled for and against insurers. I was engaged with countless problems relating to insurance. It was no burden. I felt comfortable with the problems.<sup>1</sup> It was something of a game at times.<sup>2</sup> Often in that game, I won. I liked winning. Still do.

I was admitted to the New South Wales Bar in July 1967 and a good part of my practice concerned insurance. Then, in December 1974, I accepted my first judicial appointment as a Deputy President of the Australian Conciliation and Arbitration Commission. Almost immediately I was seconded to be Chairman of the ALRC. The insurance reference came in 1976. Strange, but true, I accepted

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<sup>1</sup> See further, Kirby, Michael, *Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume*, Sydney, 23 February 2005

<sup>2</sup> See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, *Principles of Insurance Law in Australia and New Zealand*, Butterworths, Sydney, 1991

appointment to the ALRC with reluctance.<sup>3</sup> Like many lawyers at that time, I doubted that law reform was really necessary. After all, weren't things already bad enough? Obviously others disagreed with this approach. The ALRC was established on 1 January 1975. My time as its Chairman changed my life.

At that time, insurance contract law was not so much a moveable feast, as a gorgonzola. Insurance contracts were subject to a bewildering variety of laws.<sup>4</sup> They included the common law and the statutes of the Imperial, State and Federal Parliaments.

The common law was, frequently, antiquated. Many of the principles adopted in Australia were (except for minor variations) identical with those developed in the United Kingdom.<sup>5</sup> Issues specific to the Australian experience had never really been addressed systematically, still less nationally. There were significant gaps in the coherence of the governing law.

Additionally, a few the Imperial Acts still applied in Australia. They were generally expressed in archaic and obscure language.<sup>6</sup> Often they addressed problems of a by-gone era. They largely ignored the then current problems of widespread consumer insurance. State law had been piecemeal and sporadic, often limited to particular types of transactions or attempting to deal with specific insurance problems.<sup>7</sup>

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<sup>3</sup> See further, Kirby, Michael, '*ALRC, Law Reform and Equal Justice Under Law*', Speech to the Australian Law Reform Commission 25<sup>th</sup> Anniversary Dinner, 19 May 2000

<sup>4</sup> ALRC 20 at [16]

<sup>5</sup> Merkin, Robert, '*Reforming Insurance Law: Is There A Case For Reverse Transportation?*', A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [2.1]

<sup>6</sup> ALRC 20 at [16]

<sup>7</sup> ALRC 20 at [16]

Federal legislation had been substantially restricted to the fields of life and marine insurance. This had given rise to anomalies and uncertainties.<sup>8</sup> In combination, these features of Australia's insurance law meant that the insurance industry was subjected to a great deal of legislation. Put simply, the legal landscape constituted a kind of chaos.

As a young lawyer, it was sometimes difficult for me to navigate my way through these confusing, and at times inconsistent, provisions and authorities, let alone the many incessantly long policy wordings. Many insurers, particularly those with overseas principals, held firmly to policy terms of the distant past, written far away. For some, this was done out of a sense of tradition or out of deference to their overseas offices. Others acted in this way because the antique language, although possibly confusing to a layman, had what they hoped were 'settled meanings'. Still others adhered to old policies and fine print out of sheer administrative inertia.<sup>9</sup>

Although words are the lawyer's tools of trade,<sup>10</sup> I have always supported Montesquieu's view that the language of law should, wherever possible, be simple: using direct expression in preference to elaborate wording.<sup>11</sup> I tend to write in much the same way as I speak. Inevitably, this means shorter sentences and more Anglo Saxon than French-derived words. The language of the kitchen rather than that of the drawing room. As it stood in 1978, the Australian law of insurance contracts presented a challenge for educating those who had to use it. This created a self-perpetuating tradition where lawyers, like many in

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<sup>8</sup> ALRC 20 at [16]

<sup>9</sup> See further, Kirby, Michael, Foreword to Marks, Frank and Balla, Audrey, *'Guidebook to Insurance Law in Australia'*, 2<sup>nd</sup> edition

<sup>10</sup> Lord [Alfred Thompson] Denning, *The Discipline of Law*, Butterworths, London, 1979 at 5

<sup>11</sup> Baron Charles de Montesquieu, *L'Esprit des Lois* [The Spirit of the Laws], 1748 (Translated by Thomas Nugent), Hafner Press, New York

the industry itself, struggled to understand the proper legal analysis of a person's actions (or the legal ramifications of their actions or omissions).

All this is not to say that the Australian insurance industry was breaking down. It was active, dynamic and generally competitive.<sup>12</sup> Those who had been involved in the industry for a number of years had created ways of ensuring that the extant issues did not cause too many obstacles for efficient and effective practice. Often, this took the form of stepping back and assessing matters objectively, trying to achieve 'the right outcome' based upon ethical standards of best practice and a commercial business approach.

As a young lawyer, I recall working for hours, considering statutes and countless court decisions to formulate well reasoned legal advice, outlining in detail, and with precision, the various ways in which my insurer client could properly refuse a claim, only to be met with a response such as: "*We really appreciate your advice. But we just don't think that refusing this claim would be the right thing to do*". Considerations of goodwill, honour and customer relationships generally reigned supreme.<sup>13</sup> Even though it is always unnerving when clients reject one's recommendations, actions like this gave me a deep respect for the Australian insurance industry. It is a respect that I retain. Of course, I have no real way of knowing whether those features of insurance practice, which were, in part, a reflection of the then dominance of the Australian industry by English underwriters,

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<sup>12</sup> See further, Kirby, Michael '*Insurance Law Reform*', Australian Society of Accountants, Victorian Division, Annual State Congress, 17 November 1982

<sup>13</sup> See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, '*Principles of Insurance Law in Australia and New Zealand*', Butterworths, Sydney, 1991



have survived into the present age. Even in the early 1970's, there was some evidence of a decline. Because the *legal* scales were usually tipped significantly in favour of the insurer,<sup>14</sup> this fact occasionally had devastating effects for an insurance consumer.

If, like me, you can recall the quagmire which was the insurance contract law landscape in 1980, you will remember the nearly impossible task that it was in those days for consumers to make sense of the industry and its rules. It was already a large and diverse industry,<sup>15</sup> representing significant economic resources and influence. It was contracting directly with individuals who often knew little or nothing about the meaning and effect of the agreements that they were entering into.<sup>16</sup> These realities caused widespread misunderstanding.<sup>17</sup>

Although often experienced in purchasing goods and services that were tangible or material, in insurance a customer purchased a set of promises from an insurer which it was hoped never to call on.<sup>18</sup> Commonly, the insured did not even try to understand the terms of the contract unless and until the unfortunate day of necessity arrived. Once that day did arrive, it was a common occurrence that the insured would quickly appreciate that the contract it had purchased (or at least the legal effect of it) was not what it had expected. One person in the legal profession, whose practice primarily involved representing consumers, expressed to me a view that seeing insurers conduct business at that time, was like watching sharks prowl in dirty water.

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<sup>14</sup> See also the comments of Mr John Gayler, Member for Leichhardt, House of Representatives, *Hansard*, 4 June 1984

<sup>15</sup> ALRC 20 at [4]

<sup>16</sup> See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, *'Principles of Insurance Law in Australia and New Zealand'*, Butterworths, Sydney, 1991

<sup>17</sup> ALRC 20 at [19]

<sup>18</sup> ALRC 20 at [19] and [23]

Comments like this reflected the pervasive dissatisfaction that existed among consumers, especially amongst those insureds that had made claims under their contracts only to have them rejected.<sup>19</sup> In fact, it worked both ways. The insurer became a sort of fair game. In Parliament, it was said that “*ripping off insurance companies [was] as Australian as afternoon tea used to be once upon a time. [It was] part of our national life*”.<sup>20</sup>

By the 1970s, the level of complaints against insurers in Australia was increasing, not just in absolute terms, but also in proportion to the total number of complaints made to consumer authorities.<sup>21</sup> This was so although not all consumer dissatisfaction resulted in formal complaints. This may have been because some insureds were convinced, or persuaded, by the insurer, that their claim had no legal basis. Alternatively, some insureds may have failed to pursue their complaint because of their ignorance or uncertainty about the available means of redress. Some insureds simply decided that the unequal battle was not worth the time, risk and cost.<sup>22</sup>

Despite much general dissatisfaction of this kind, the Australian insurance industry in 1978 remained nearly unanimous in the view that, regardless of any problems that ‘may’ have existed at that time, it was not appropriate to undertake, or even attempt, reform.<sup>23</sup> Much like Adam Smith’s ‘invisible hand’ of the market, it was repeatedly asserted that the insurance industry was capable of solving many of the

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<sup>19</sup> ALRC 20 at [17]

<sup>20</sup> Mr John Spender, Member for North Sydney, House of Representatives, *Hansard*, 4 June 1984

<sup>21</sup> ALRC 20 at [17]

<sup>22</sup> ALRC 20 at [17]

<sup>23</sup> ALRC 20 at [20] to [30]

problems and could do so at less cost than legislative change would impose.<sup>24</sup> Insurers typically claimed that reform was not justified. They claimed that it would impede competition and prejudice market efficiency.<sup>25</sup> It might even harm the industry itself.<sup>26</sup> Further, it was suggested that seeking to balance the interests of insurers and insureds could result in fewer claims being rejected, thereby increasing the cost of obtaining insurance.<sup>27</sup> This, so it was said, would result in the honest insured subsidising the dishonest.<sup>28</sup>

Industry resistance was not by any means the sole obstacle to law reform. There was a great deal of hostility at that time both towards the ALRC and to the idea of law reform in general. Sir John Young, then the Chief Justice of Victoria, although a very capable judge, was unwelcoming to institutional law reform.<sup>29</sup> He condemned what he saw as the professional commitment of law reformers to find faults in the legal system, indeed, they were paid to do so. He promoted a view that the wisest and most experienced lawyers knew that it was generally best to leave the law alone, a view that was shared by many people in legal authority at that time.<sup>30</sup>

Still, the ALRC had its reference. The chaotic state of the law on insurance contracts called forth the 'bold spirits' of law reform<sup>31</sup>.

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<sup>24</sup> ALRC 20 at [20]

<sup>25</sup> ALRC 20 at [20]

<sup>26</sup> ALRC 20 at [20]

<sup>27</sup> ALRC 20 at [20]

<sup>28</sup> ALRC 20 at [20]

<sup>29</sup> Young, John, *'The Influence of the Minority'* (1978) 52 *Law Institute Journal* 500

<sup>30</sup> See further, Kirby, Michael, *'More Promises of Law Reform - An Antipodean Reflection'*, Speech to the Law Reform Commission of Ireland, Dublin Castle, Dublin Ireland, 17 July 2007; and Kirby Michael, *'50 Years in the Law: A Critical Self-Assessment'*, based on an address to the legal profession of the Northern Territory in the Supreme Court, Darwin, 16 January 2009 and at the State Supreme Court and Federal Court Judges' Conference, Hobart, 26 January 2009

<sup>31</sup> *Chandler v Crane Christmas Co* [1951] 2 KB 164 at 178 per Lord Denning

Ultimately, this led to the production of several ALRC reports, including ALRC 20 on *Insurance Contracts*. I pay a particular tribute to Professor David St.L. Kelly, then of the University of Adelaide Law School. He became the ALRC Commissioner in charge of the insurance contracts project. He was supported by an outstanding team of commissioners, consultants and staff. One of the staff was the young Michael Ball, graduate of the Adelaide Law School, who, earlier in 2010, was appointed a Judge of the Supreme Court of New South Wales. I also pay tribute to Mr. Ralph Jacobi MP, federal member for Hawker, who helped secure the reference and gave stalwart support to the implementation of its proposals.

## **ALRC 20 ON INSURANCE CONTRACTS**

ALRC 20 arose directly from a reference to the Commission from the Federal Attorney-General, Robert James Ellicott, dated 9 September 1976. The reference required the ALRC to provide a report on the adequacy of the law governing contracts of insurance having regard to the interests of the insurer, the insured and the public. It also required the ALRC to recommend what, if any, legislative or other measures were required to ensure a fair balance between the interests of the insurer and the insured.<sup>32</sup> Although the response to this reference resulted in the production of two ALRC reports namely ALRC 16 (*Insurance Agents and Brokers*)<sup>33</sup> and ALRC 20 (*Insurance Contracts*), it is on the latter that I will focus in this paper.

The ALRC 20 provided a detailed scrutiny of the adequacy and appropriateness of the principles and statutes governing insurance

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<sup>32</sup> See ALRC 20, Terms of Reference at (xv)

<sup>33</sup> ALRC 16 was implemented by the *Insurance (Agents and Brokers) Act 1984* (Cth), which has now been repealed and re-enacted as Chapter 7 of the *Corporations Act 2001* (Cth) under amendments made by the *Financial Services Reform Act 2001* (Cth)

contracts, as they then stood.<sup>34</sup> Although the report involved thoroughgoing investigation of insurance law, that covered virtually every aspect of that discipline,<sup>35</sup> I will concentrate on just a few topics that were – and remain – of great importance. Describing them will, I hope, establish the point that the achievements of the ALRC were considerable and that they have proved enduring.

## ***Fraud***

Before the ICA, an insurer was entitled to avoid a contract of insurance in respect of which an insured had made a fraudulent claim. This was the case even where an insured had suffered a ‘genuine’ loss but had falsely exaggerated the quantum of that loss.<sup>36</sup> Upon such matters the then common law was unwavering. As Justice Willes said in *Britton v The Royal Insurance Co.*<sup>37</sup>

“[t]he law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. ... It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed”.<sup>38</sup>

This avoidance of the insurance contract entitled an insurer to deny a prior claim that had not even been tainted at the time but by a later fraud.<sup>39</sup> This rule enabled insurers to refuse otherwise valid claims. As a matter of public policy, the courts would not aid a fraudulent claimant by looking behind the fraud to see if there was also a ‘valid’ and

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<sup>34</sup> ALRC 20 at (xix)

<sup>35</sup> Merkin, Robert, ‘*Reforming Insurance Law: Is There A Case For Reverse Transportation?*’, A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [2.2]

<sup>36</sup> For a further consideration of this and the common law approach to fraud in insurance contracts, see *To v Australian Associated Motor Insurers Ltd* [2001] VSCA 48 at [13] to [15] per Buchanan JA

<sup>37</sup> (1866) 4 F.& F. 905

<sup>38</sup> (1866) 4 F.& F. 905 at 909

<sup>39</sup> See, for example, *Moraitis v Harvey Trinder (Qld) Pty Ltd* [1969] Qd R 226

severable claim.<sup>40</sup> An insured that made a fraudulent claim surrendered all policy rights, whether past, present or future.

During the course of consultations leading to ALRC 20, insurers strongly argued that their ability to reject fraudulent claims ought be retained. In part, the ALRC shared this view. It recommended that the insurer's right to refuse to pay a claim on the basis of fraud should be maintained.<sup>41</sup> However, the ALRC questioned the legitimacy of allowing insurers to avoid an otherwise valid claim by avoiding the entire insurance contract.<sup>42</sup> One of our concerns was that, allowing fraud in respect of one claim to taint other claims under the same policy would operate unevenly between an insured holding a number of separate policies and one with a composite policy covering numerous risks.<sup>43</sup> The ALRC also questioned whether insurers would, in practice, totally reject a substantial claim merely because the insured had acted fraudulently in relation to a minor part of it.<sup>44</sup>

This led to the recommendation that, if only an insignificant part of the claim were made fraudulently and if non-payment of the remainder of the claim would be harsh and unfair or disproportionate, the court could order the insurer to pay such amount in respect of the claim as the court considered “just and equitable” in the circumstances.<sup>45</sup> Still, in

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<sup>40</sup> *To v Australian Associated Motor Insurers Ltd* [2001] VSCA 48 at [14] per Buchanan J.A

<sup>41</sup> ALRC 20 at [243]. See also section 56(1) of the ICA

<sup>42</sup> ALRC 20 at [243]. See also section 56(3) of the ICA

<sup>43</sup> ALRC 20 at [243]

<sup>44</sup> In ALRC 20, the Commission used the example that a claim for \$3,000 lost baggage would usually be met even if a fraudulent claim that a camera worth \$200 was included in that baggage was rejected. However, this was played down in the Explanatory Memorandum accompanying the Insurance Contracts Bill 1984, which referred to fraud of \$50 in a claim of \$100,000. Yet then, in *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 6 WAR 68 it was held that the exaggeration of a claim of between \$222,589 and \$528,000 by \$27,000 was not large enough to taint the entirety of the claim.

<sup>45</sup> ALRC 20 at [243]. See also section 56(2) of the ICA

exercising its discretion, the court would be obliged to have regard to all relevant factors, including the need to deter fraud.<sup>46</sup>

### ***Non-disclosure***

Insurers often face difficulties when relying upon known facts to calculate the risk, the majority of which are singularly within the knowledge of the insured. This ‘moral hazard’ was the basis upon which the ALRC reconsidered the concept of non-disclosure in respect of insurance contracts.<sup>47</sup>

Lord Mansfield’s reasons in *Carter v Boehm*<sup>48</sup> are often cited as explaining a judicial acceptance of an insurers’ particular vulnerability when entering into insurance contracts:

“[t]he special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance did not exist, and to induce him to estimate the risque, as if it did not exist”.<sup>49</sup>

Still, the truth was (and is) that the breadth and depth of knowledge held by, or available to, underwriters has increased immensely since Lord Mansfield’s time. In that era underwriting was in its infancy.<sup>50</sup> By the time of ALRC 20, insurers had access to considerable statistical data. They also increasingly had available computer programmes that

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<sup>46</sup> ALRC 20 at [243]. See also section 56(3) of the ICA

<sup>47</sup> ALRC 20 at [150] to [199]

<sup>48</sup> (1766) 3 Burr 1905

<sup>49</sup> (1766) 3 Burr 1905 at 1909

<sup>50</sup> ALRC 20 at [175]

would enable them to assess their statistical risk in great detail.<sup>51</sup> Computers allowed insurers to store a substantial volume of information that was consistently reviewed, considered, cross-referenced, updated and analysed by any number of specifically designed computer programmes. ALRC 20 was tabled in the Australian Parliament in the same year that G.W. DeWit published his influential article on the application of 'fuzzy logic' programming to insurance,<sup>52</sup> where evolutionary algorithms and computational 'intelligence' were being used to optimise an insurer's underwriting systems: helping insurers to recognise, assess, account for and eliminate or minimise risk.<sup>53</sup>

Since that time, the impact of technology on insurance underwriting has been astonishing. An underwriter today who spends only a few minutes on an internet search engine will often be presented with more information than once would have been attainable by many underwriters and enquiry agents operating over many years. An insurer might identify a potentially fraudulent claim after reading about it on a web 'blog' or social network. Nevertheless, despite these technological advancements, it remains the fact (as it was when ALRC 20 was published) that the superior knowledge of factors peculiar to the particular risk ordinarily lies with the insured.<sup>54</sup>

Before the ICA, insurers sought to rectify this imbalance by obliging an insured to disclose not only those facts whose relevance to the contract the insured did or should appreciate, but also facts of whose relevance

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<sup>51</sup> ALRC 20 at [175]

<sup>52</sup> DeWit, G W, 'Underwriting and Uncertainty' (1982) 1 *Insurance: Mathematics and Economics* 277

<sup>53</sup> For further consideration of this issue see, for example, Shapiro, Arnold, 'An Overview of Insurance Uses of Fuzzy Logic' (2007) 2 *Computational Intelligence in Economics and Finance* 25

<sup>54</sup> ALRC 20 at [175]



the insured might have been ignorant.<sup>55</sup> This requirement of absolute disclosure imposed obligations on insureds many of whom, even acting in the utmost good faith, were simply not equipped to discharge.

At common law, an insurer could avoid a contract whenever the insured failed to disclose, whether innocently or fraudulently, a fact which was objectively later found to have been material to assessing the risk and which was known to the insured.<sup>56</sup> This was known as the 'prudent insurer' test.<sup>57</sup> Yet there were conflicting radical authorities as to the appropriate test to determine materiality.

Some authorities supported the proposition that the insured's obligation was to disclose *every* fact which the insured knew to be material or which a reasonable person (then called a 'reasonable man') would know to be material.<sup>58</sup> Other authorities rejected this approach in favour of the prudent insurer test.<sup>59</sup> The ALRC concluded that the latter was too strict a duty to impose on an insured.

Although there were commentators who argued that this stricter duty was justified because of an underwriters' need for *full* information for any detailed assessment of a risk,<sup>60</sup> the ALRC considered that this view was at odds with the core requirement of *uberrima fides*. It suggested that an insurer should only be entitled to redress in the event of

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<sup>55</sup> ALRC 20 at [175]

<sup>56</sup> *Joel v Law Union & Crown Insurance Company* [1908] 2 KB 863

<sup>57</sup> See, for example, section 24(2) *Marine Insurance Act 1909* (Cth)

<sup>58</sup> See, for example, *Guardian Assurance v Condogianis* (1919) 26 CLR 231 at 246-7 per Isaacs J; and *Southern Cross Assurance Co. Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR (NSW) 174 at 187 per Jordan CJ and Nicholas J

<sup>59</sup> See, for example, *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] VR 297 per Pape J; and *Western Australian Insurance Co. Ltd v Dayton* (1924) 35 CLR 355 at 379-80 per Isaacs ACJ

<sup>60</sup> ALRC 20 at [175]

deliberate concealment or culpable indifference on the part of the insured.<sup>61</sup>

There was another complication. At the time of writing ALRC 20, the marketing methods increasingly adopted by insurers were actually increasing the incidence of non-disclosure. Proposal forms were often kept to a minimum: for presentational, cost and efficiency reasons. Detail and precision gave way to brevity and extreme minimalism. Direct marketing placed more emphasis on making a sale rather than obtaining relevant information. This risk also continues to increase because, like many goods and services today, insurance may now be purchased on-line (as the ALRC in ALRC 20 predicted it would).<sup>62</sup>

In an attempt to address each of these issues, the ALRC recommended that the duty imposed on an insured should extend only to facts which the insured knew, or which a reasonable person in the insured's circumstances would have known, to be relevant to the insurer's assessment of the risk.<sup>63</sup> Furthermore, an insurer which sought to rely on innocent non-disclosure was obliged to warn the insured of the substance and effect of their duty of disclosure before the contract was entered into.<sup>64</sup>

The ALRC concluded that fairness to both parties would be achieved by taking account of those intrinsic differences between individual insureds

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<sup>61</sup> ALRC 20 at [175], [180] and [183]

<sup>62</sup> See, generally, ALRC 20 at [183]

<sup>63</sup> See, generally, ALRC 20 at [183]

<sup>64</sup> ALRC 20 at [43], [45] and [183]

(such as literacy, knowledge, experience and cultural background).<sup>65</sup> After all, insurers sell insurance services to a very wide market, often with a minimum of formality. Every one of those insureds deserved the same level of protection. As will be explained, this particular aspect of the Commission's recommendation was not picked up in the ICA as enacted.

### ***Good faith***

Prior to the ICA, the law relating to insurance contracts already contained a flexible principle requiring that both parties to an insurance contract were subject to the obligations of *uberrima fides*, (that is, the exercise of the utmost good faith towards the other).

In preparing ALRC 20, the ALRC was mindful that the strict application of this doctrine could sometimes result in an insurer's being entitled to avoid the contract *ab initio*.<sup>66</sup> If that were the case, an insurer could deny a prior claim untainted by a failure to act in the utmost good faith, or require repayment of moneys paid by it in connection with such a claim.<sup>67</sup> For the reasons already outlined, the ALRC considered that such a result would be unacceptable because it would be disproportionate and excessive to the blameworthiness of the relevant conduct.

It was the ALRC's view that a breach of the duty of utmost good faith in connection with a claim should be available only if the breach affected the claim in question so that, for that reason, avoidance of the contract

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<sup>65</sup> ALRC 20 at [180] and [183]

<sup>66</sup> ALRC 20 at [243]

<sup>67</sup> ALRC 20 at [243]

*ab initio* should be permitted.<sup>68</sup> Before ALRC 20, there was some uncertainty as to the extent to which the insurer, as well the insured, was equally required to act in good faith. Was the duty of the insurer to act with the utmost good faith, or simply with commercial good faith? In the view of the ALRC, the answer was clear: the insurer should show the utmost good faith as much as the insured.<sup>69</sup> We were trying to achieve a just balance. The duties owed by both parties to this peculiar form of contract were reciprocal and equal. Accordingly, the ALRC recommended that the existing principle of *uberrima fides* should be extended and clarified. This took the form of restating the principle as a contractual duty between the parties, with neither party being entitled to rely on a contractual provision when to do so would itself involve a breach of that duty.<sup>70</sup>

The ALRC considered that this statement of the rule would provide sufficient inducement to insurers and their advisers to be careful in drafting their policies and to act fairly in relying on their strict terms.<sup>71</sup> Later, I will consider whether, in practice, this objective has been achieved.

### ***Balancing interests***

The ALRC remained focused at all times on securing the views and experience of relevant industry stakeholders, in order to achieve a balanced outcome for those stakeholders and the community.

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<sup>68</sup> ALRC 20 at [243]

<sup>69</sup> ALRC 20 at [51]

<sup>70</sup> ALRC 20 at [51]. See also sections 13 and 14 of the ICA

<sup>71</sup> ALRC 20 at [51]. See also Explanatory Memorandum to the Insurance Contracts Bill 1984 at [35]

To consider the recommendations to be made, the ALRC assembled a large, representative and conscientious team of consultants from all major branches of the insurance industry: an unprecedented aggregation of experience in the operation of insurance in Australia.<sup>72</sup> All of them volunteered their services without reward save that of contributing to an important public objective - of clarifying, simplifying and re-expressing insurance contract law in Australia. There were representatives from the Insurance Commissioner, the Life Insurance Commissioner, the Federal Treasury, the Trade Practices Commission, the Queensland Insurance Commissioner and various industry bodies – both large or small. In addition, the ALRC engaged consultants who put forward the viewpoint of insurance consumers.

The ALRC's initial views on the balance to be struck were stated in a discussion paper in 1979.<sup>73</sup> This was given widespread publicity. It was followed by a series of public hearings and seminars organised by Australian Insurance Institutes in conjunction with the ALRC. At these hearing, community and industry viewpoints were put to the ALRC as well as in seminars and in written submissions. The ALRC also had the benefit of a published submission from the Treasury. That submission was given very careful consideration because of the potential economic implications of changes to insurance contracts law.<sup>74</sup> The cost of reform was a major argument raised by those who were opposed to it. The ALRC obviously needed to keep such criticisms in mind in formulating its final recommendations.

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<sup>72</sup> ALRC 20 at (xx)

<sup>73</sup> ALRC Discussion Paper 7, *Insurance Contracts*

<sup>74</sup> ALRC 20 at (xxi)

Because of the foregoing procedures, the ALRC was well placed to propose an appropriate balance between the interests of the insurer, the insured and the public. Although the word 'balance' (or a derivative of it) appears 31 times in the course of ALRC 20, it is a word of malleable meaning - rather like 'moving forward' or 'paradigm'. In the end each decision had to be assessed against the background of relevant considerations of legal history, authority, policy, principle and economic as well as empirical data, insofar as these were available to the ALRC.

## **LEGISLATION**

The ALRC 20 report was tabled in the Australian Parliament on 14 December 1982. The then ALP Opposition in the Federal Parliament announced that, if elected, it would give 'immediate priority' to the consideration of the ALRC proposals, with a view to the early implementation of the major recommendations.<sup>75</sup>

A federal election took place in March 1983. It resulted in the defeat of the Fraser Government and the return of the Hawke Government. The new Federal Attorney-General, Senator Gareth Evans QC (himself formerly a Commissioner of the ALRC) telephoned me to ask if any proposals had been drafted in the form of legislation that could be considered for immediate introduction to Parliament. This was in the interval before the new Government's own legislation was ready. I recommended the Insurance Contracts Bill, as annexed to ALRC 20.<sup>76</sup> This demonstrated once again the advantage of annexing draft Bills to ALRC reports - as was ALRC practice in those days. Doing this helped

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<sup>75</sup> See the Australian Labor Party Policy Speech dated 16 February 1983 and the Australian Labor Party's Business Regulation Policy Launch Speech dated 24 February 1983

<sup>76</sup> See further, Kirby, Michael, *Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume*, Sydney, 23 February 2005

both to refine our recommendations and to hasten their passage into law.

On 1 December 1983, Senator Evans introduced the Insurance Contracts Bill 1983 (Cth) into the Parliament. The Government allowed the Bill lie on the table for three months to permit further industry and public comment.<sup>77</sup> It then fixed the second reading debate to take place in March 1984. At the Opposition's request, that debate was adjourned until May 1984. In April 1984, representatives of the Attorney-General and the Treasurer met with the Insurance Council of Australia to discuss proposed amendments.

By 30 April 1984, a number of (primarily minor) amendments had been drafted and presented to the Opposition. Further debate then occurred in the Australian Senate on 2 and 7 May 1984, and in the House of Representatives on 29 May and 4 June 1984. *Hansard* records that some Parliamentarians used this opportunity to take issue with the contents of ALRC 20. A few did so, immaterially, because the reforms did not deal with particular areas of insurance law (such as reinsurance, workers' compensation, compulsory third party insurance, aircraft insurance, etc). However, these had been excluded from the reference, in some cases because of a lack of constitutional power. Some critics suggested that the proposed legislation would serve to provide a feast for lawyers.<sup>78</sup>

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<sup>77</sup> See further, Kirby, Michael, 'Australia: Major Reforms of Insurance Law', International Association for Insurance Law Newsletter May June 1984, March 1984

<sup>78</sup> See, for example, the comments of Mr John Spender, Member for North Sydney, and Mr Ian Wilson, Member for Sturt, House of Representatives, *Hansard*, 4 June 1984

The path was made rockier by an attack on the Bill by the Insurance Council of Australia which, in 1983, published a comment entitled '*ALRC Fuelling Dishonesty?*'. This claimed that:

"[t]he ALRC ... proposes changes to insurance contracts which would be in a policy owner's favour to the extent that the validity of the policy would be upheld whether or not there be obvious cases of misrepresentation or non-disclosure. ... What the ALRC is saying in effect is that it doesn't matter if insurance customers provide untruths or withhold essential information when applying for an insurance policy. The attitude seems to be that while fraud is not on, being a 'little bit' fraudulent is".

The ALRC sought to counter this criticism by repeating in the public domain the arguments that had been explained in ALRC 20.<sup>79</sup> Fortunately, these criticisms did not deflect the Government from its purpose which was to implement the ALRC's proposals.

A number of strong supporters of the reforms began to emerge. They explained that the reforms went a long way towards ensuring that the industry and consumers in Australia would secure a more professional and modern relationship by providing a basis for insureds to appeal to the courts to contend that they had been treated unfairly and harshly by the insurer.<sup>80</sup> The mutuality of the obligation to act towards each other in accordance with the principles of the utmost good faith was also recognised. Although some amendments were made to the Insurance Contracts Bill during the course of Parliamentary debates, they were mostly of limited significance.

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<sup>79</sup> See further, Kirby, Michael, '*Insurance Reform: Getting it Right*', The Insurance Institute of Queensland, Luncheon Meeting, 26 July 1983

<sup>80</sup> Mrs Ros Kelly, Member for Canberra, House of Representatives, *Hansard*, 4 June 1984



## **The ‘circumstances of the insured’ or the ‘insured in the circumstances’?**

The ALRC had taken the view that fairness to the insured, in relation to non-disclosure,<sup>81</sup> would best be achieved by taking account of the differing circumstances between individual insureds, such as their position in life, mental condition and ability, education, literacy, knowledge, experience and cultural background.<sup>82</sup> These were described as ‘the circumstances of the insured’.<sup>83</sup> In the result, what was eventually enacted (as section 21(1) of the ICA) provided that an insured had a duty to disclose to the insurer, amongst other things, every matter that was known to the insured, being a matter that ‘a reasonable person in the circumstances’ could be expected to know to be a matter so relevant. This different formulation introduced a criterion of notional objectivity. That was its purpose.

This suggestion resulted in considerable debate in and out of Parliament concerning whether the amended statutory formulation had the effect of excluding from consideration those ‘intrinsic’ factors relating to the insured’s personal comprehension (as suggested by the ALRC), so that the test of ‘deemed knowledge’ was only extended to that of a reasonable person in the light of examinable objective factors such as the nature of the policy and the nature of the pre-contractual negotiations.<sup>84</sup>

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<sup>81</sup> As well as misrepresentation issues: see ALRC 20 at [184] and section 26 of the ICA

<sup>82</sup> ALRC 20 at [183] and [184]

<sup>83</sup> See Clause 22(1)(b) of the Draft Insurance Contracts Bill 1982 in ALRC 20

<sup>84</sup> Merkin, Robert, *‘Reforming Insurance Law: Is There A Case For Reverse Transportation?’*, A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [4.8]

The Explanatory Memorandum issued with the Insurance Contracts Bill 1984 (Cth) attempted to address this issue (somewhat clumsily I would concede), by stating that:

“[section 21] clarifies the existing law by specifying the test of materiality. It also ameliorates the existing law, particularly insofar as the ‘prudent insurer’ test has been applied, for this test takes no account of the insured’s circumstances or the circumstances in which the contract of insurance is negotiated. [Section 21] mitigates the application of the duty by providing that the insured’s duty is only to disclose those facts which he knew or a reasonable person in the circumstances would have known to be relevant to the insurer’s assessment of the risk. As an examination of what a reasonable man would know cannot take place in a vacuum, a court would not be precluded from considering the insured’s position and circumstances in applying the test”.<sup>85</sup>

There was (and still is) a generally held view that, because of the Parliamentary intervention on this issue, the ‘intrinsic’ factors suggested by the ALRC are *not* part of the law and that the only ‘extrinsic’ factors relevant to the determination of reasonableness are objective not subjective in character.<sup>86</sup> As often happens in cases where the legislative policy and drafting are somewhat obscure, the subsequent case law reflects differing judicial views and industry practice concerning what the Parliament intended the relevant law to be.<sup>87</sup>

## **Standard cover**

It is also worth recalling that, in rejecting a general scheme for ‘standard’ or ‘pro forma’ insurance contracts in Australia as proposed by the ALRC (on the grounds that they would be likely to inhibit product

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<sup>85</sup> Explanatory Memorandum to the Insurance Contracts Bill 1984 (Cth) at [62]

<sup>86</sup> See, for example, *Twenty-first Maylux Pty Ltd v Mercantile Mutual Insurance (Aust) Ltd* [1990] VR 919

<sup>87</sup> See, for example, *Delphin v Lumley General Insurance Ltd* (1989) 5 ANZ Ins Cas 60-941, and *Plasteel Windows Aust Pty Ltd v C E Heath Underwriting Agencies Pty Ltd* (1989) 5 ANZ Ins Cas 60-926

development in response to the demands and needs of the public),<sup>88</sup> the result was the loss of the ALRC's proposal that insurers should disclose departures from standard cover in documents or notices that were separate from the primary policy wording.<sup>89</sup> These requirements were termed 'derogation notices'.

By the time the ICA saw the light of day (or at least from its amendment in 1985),<sup>90</sup> a substantial change had been made. Departures from standard cover under prescribed contracts or other usual terms could be introduced provided that the insurer "clearly informed" the insured in writing as to the effect of the provision. That could be done by simply providing a copy of the policy document. This measure represented a watering down of the ALRC proposal. It has been interesting in recent times to compare the proposals for a form of standard cover in policies of superannuation in Australia. The Global Financial Crisis of 2008-2009 has dented somewhat the Australian faith in the capacity of the market in every case to serve the real needs of ordinary players. Likewise, the faith in the willingness, inclination and capacity of ordinary consumers to evaluate small differences that may exist in the contracts that are on offer to them and that are important for their security and wellbeing, has taken a battering. The theory does not always appear to match much real life experience.

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<sup>88</sup> ALRC 20 at [55]

<sup>89</sup> ALRC 20 at [72]

<sup>90</sup> By the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985* (Cth)

## THE 'BIRTH' OF THE ICA

The Insurance Contracts Bill 1984 (Cth), as amended, eventually received the Royal Assent on 25 June 1984 in a form that followed very closely the draft legislation proposed in ALRC 20.<sup>91</sup>

Before the commencement of the ICA, numerous well-attended seminars, workshops and conferences were held. In February 1985, the Business Law Education Centre held a workshop on '*The New Insurance Contracts Act*'. This was led by Michael Gill and Geoff Masel. In May and June 1985, AILA presented a series of lectures on the ICA given by John Brownie QC, an experienced barrister (later a judge). Such was the popularity of this lecture series that it bankrolled many of AILA's later ventures. This is just another way of demonstrating that law reform often makes good economic sense.

The ICA commenced operation on 1 January 1986.<sup>92</sup> That was nine years, three months and 23 days after the ALRC received its reference. But it was more than 85 years after section 51(xiv) of the *Australian Constitution* had envisaged that the Federal Parliament could enact a general law to govern insurance. The journey of law reform is often a slow and painstaking one. In the case of the ICA the involvement of AILA and the insurance industry was to prove critical for the next chapter of the story. In a diverse industry, translating law reform reports, and even enacted legislation, into substantive reforms constituted a major challenge. This too was surmounted and a project of practical change was gradually undertaken.

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<sup>91</sup> *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd* (2003) 214 CLR 514 at [46] per Gummow and Hayne JJ

<sup>92</sup> Gazette 1985, No S487 at 1

## **FURTHER REFORM**

### **Additional amendments**

Since its enactment and proclamation, the ICA has been amended on 22 occasions. The majority of the amendments have been minor in nature. Still, there were two substantive amendments worthy of discussion.

### ***Non-disclosure in relation to eligible contracts***

The *Insurance Laws Amendment Act 1998* (Cth) introduced section 21A into the ICA. That provision relates to disclosure of specified matters in relation to eligible contracts of insurance.<sup>93</sup> This section was in response to an opinion that simply warning insureds of the duty of disclosure was not sufficient to enable them to appreciate its scope and significance. What was required, it was argued, was a provision that placed the onus on insurers to ask specific questions rather than relying upon mere non-disclosure. Failing a request, the duty of disclosure was to be treated as having been waived.

However, section 21A draws a distinction between consumer and commercial insurance. It applies only to an 'eligible' contract of insurance.<sup>94</sup> It follows that, if no specific questions are asked by the insurer, there can be no duty of disclosure at all. Insurers are thereby discouraged from simply asking generalised or open-ended questions requiring disclosure of 'any other matters' that the insured may think relevant to the insurer's decision of whether or not to accept the risk.

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<sup>93</sup> See also regulation 2B of the *Insurance Contracts Regulations 1985* (Cth)

<sup>94</sup> See, generally, the *Insurance Contracts Regulations 1985* (Cth)

This amendment was in the spirit of the ICA. It was designed to improve the flow of communication between insureds and insurers and to acknowledge that some insureds “*lack the knowledge and awareness to fully understand those issues which may be of significance to an insurer*”.<sup>95</sup> A question arises as to why this section was added to the ICA only to safeguard those insureds whose intrinsic circumstances meant that they lacked the requisite knowledge. And why the same consideration of the insured’s circumstances was not accepted more generally as necessary for the purposes of section 21.

### ***Insurable interest***

Section 16 of the ICA abolished the necessity for an insurable interest at the inception of certain contracts of insurance, excluding life insurance. This followed the majority recommendation in ALRC 20.<sup>96</sup> However, life insurance was subsequently brought into line with this reform by the repeal of section 16(2) of the ICA and the insertion of a revised version of section 18 in the ICA.<sup>97</sup> So much followed once it was accepted that the general law of gaming and wagering was sufficient to ensure that the insured had an interest of some kind in the life insured to render the contract a valid one. This belated reform reflected my dissenting opinion in ALRC 20.<sup>98</sup> Naturally, it is always good to see one’s dissents given effect by the Parliament.

In my view, the retention of the requirement of ‘insurable interest’ simply introduced an unnecessary distinction between life and general

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<sup>95</sup> See Explanatory Memorandum to the Insurance Laws Amendment Bill at [117], as well as the Insurance Council of Australia’s ‘*Submission on Second Stage Issues Paper – Review of the Insurance Contracts Act 1984*’, April 2004

<sup>96</sup> ALRC 20 at [145]

<sup>97</sup> See also *The Life Insurance (Consequential Amendments and Repeals) Act 1995* (Cth)

<sup>98</sup> ALRC 20 at [146]

insurance. I acknowledge that this amendment did not meet with universal approval. Recently, the English and the Scottish Law Commissions have stated:

“There is an instinctive dislike of allowing strangers complete freedom to take out a policy on another individual’s life. ... Individuals are uncomfortable at the thought that people who do not wish them well can take out policies on their lives. Taking out an insurance policy on someone’s life could be used as a threat”.<sup>99</sup>

### **Further reform?**

In September 2003, the Minister for Revenue and Assistant Treasurer (Senator Helen Coonan) and the Parliamentary Secretary to the Treasurer (Senator Ian Campbell) jointly announced that the Government would undertake a comprehensive review of the ICA. Mr. Alan Cameron A.M. and Ms. Nancy Milne were appointed to constitute a review panel to conduct the review. The object was to invite recommendations aimed at improving the overall operation of the ICA by correcting any identified deficiencies and clarifying ambiguities in its operation. Ms. Milne has already addressed this issue in relation to proposed amendments to the ICA. I will, therefore, confine my remarks to a tentative assessment, and critique, of the panel’s report.

Generally, all stakeholders consulted by the review panel considered that the ICA had been operating satisfactorily to the benefit both of insurers and insureds.<sup>100</sup> Specifically, the National Insurance Brokers’ Association stated:

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<sup>99</sup> English and Scottish Law Commissions, *‘Issues Paper 4: Insurable Interest’* at [7.39] and [7.40]

<sup>100</sup> Cameron, Alan and Milne, Nancy; *‘Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54’*, June 2004 at (iv)

“By all accounts the [ICA] has worked well since its commencement in 1984 (sic) and while it is appropriate that all legislation be reviewed from time to time, having regard to judicial interpretation as well as developments in products and regulation, only minor modifications would appear necessary in the case of the [ICA]”.<sup>101</sup>

The review was conducted in two stages.

### **Section 54**

A final report on suggesting changes to section 54 of the ICA was provided to the Government on 31 October 2003. That report was released publicly on 18 November 2003. Two important recommendations contained in that report were:

1. That section 54 should not apply in relation to the late notification of circumstances; however, it should apply in relation to the late notification of claims; and
2. That the introduction of a 45 day extended reporting period to moderate the effect of amendments that change the operation of section 54 in relation to ‘claims made’ policies of insurance.

A draft of possible legislative amendments to give effect to these proposals was released for public comment on 8 March 2004. The review panel reported to the Government following the public consultation process on 28 May 2004. At that time, the panel revised its suggestion of a 45 day extended reporting period, reducing it to 28 days. This modification was primarily a response to submissions that insurers would charge higher premiums for any extended reporting period beyond 28 days, and that no more than 30% of all indemnity

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<sup>101</sup> National Insurance Brokers Association, ‘Insurance Contracts Act Issues Other Than Section 54’ at 1



policies fall due on 31 December (during the conventional Australian summer holiday period when the review panel assumed that most indemnity policies would be renewed).

However, the review panel maintained its recommendation that section 54 should not to apply to failures to notify circumstances. This was despite the insurance industry's (largely unsubstantiated) submission that such a recommendation would adversely affect the availability and affordability of indemnity insurance in Australia.<sup>102</sup>

Many industry stakeholders, such as the Insurance Council of Australia,<sup>103</sup> submitted that the decisions in *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd* (Australian Hospital Care)<sup>104</sup> and the earlier decision in *East End Real Estate Pty Ltd v C E Heath Casualty and General Insurance Limited*<sup>105</sup> had introduced elements of uncertainty into Australian 'claims made' and 'claims made and notified' policies. Prior to these decisions, insurers were generally able to treat reported claims (or reported potential claims) in the policy period as constituting their only liabilities for the underwriting year. This enabled them to determine solvency and profitability and to set future premiums with confidence. Following these court decisions, insurers needed to consider reserving (and provisioning) for claims of which the insured was aware (or ought to have been aware) but which had not actually been notified during the policy period. This, it was submitted,

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<sup>102</sup> See, for example, Cameron, Alan and Milne, Nancy, 'Review of the Insurance Contracts Act 1984', Letter to Senator Coonan and Ross Cameron MP dated 28 May 2004 at 2

<sup>103</sup> Insurance Council of Australia, 'Submission in respect of Review of the Insurance Contracts Act 1984 - Issues Paper on Section 54', October 2003

<sup>104</sup> (2001) 204 CLR 641

<sup>105</sup> (1992) 25 NSWLR 400

meant that insurers became obliged to engage in hypothetical and speculative accounting.

By reason of tighter drafting of exclusion clauses and the deletion of 'deeming clauses' (thereby allowing insureds to rely on section 40(3) of the ICA, which does not appear to attract section 54),<sup>106</sup> it appears that the Australian insurance industry has been able to deal adequately with any issues that may once have existed on this score. Combined with the insurers' opposition to the greater price of such certainty in the form of the proposed extended reporting period, this appears to have resulted in no substantive amendments to section 54 being included in the Insurance Contracts Amendment Bill 2010 (Cth).

It is arguable that the review panel was not specifically called upon to consider any reform of section 54, apart from the impact of the section on the cost and availability of professional indemnity and similar types of insurance.<sup>107</sup> As a result, there has not been any substantial consideration of any general reform of section 54, including any attempt to identify the outer limits of the operation of the section.

In my reasons in the High Court of Australia in *Australian Hospital Care*,<sup>108</sup> I said that section 54 would only operate if the act or omission did not alter the substance, effect, core or essence of the policy.<sup>109</sup> Although it is naturally pleasing to know that many eminent lawyers and insurance experts are now citing this portion of my opinion as providing

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<sup>106</sup> See, for example, *Gosford City Council v GIO General Limited* [2002] NSWSC 511 and *Gosford City Council v GIO General Limited* [2003] NSWCA 34 (Gosford City Council)

<sup>107</sup> Review of the Insurance Contracts Act 1984, Terms of Reference

<sup>108</sup> (2001) 204 CLR 641

<sup>109</sup> See also *Kelly v New Zealand Insurance Co Ltd* (1996) 9 ANZ Ins Cas 61-317 and *Greentree v FAI General Insurance Co Ltd* (1998) 44 NSWLR 706

the correct threshold test for the operation of section 54, I have to accept that there was no ultimate judicial consensus on this issue in the High Court decision. I would therefore have preferred to see legislative reform in this issue, although future judicial consideration may provide the clarity that the industry understandably desires. A way forward could be to put into legislative form something like the language I used in the *Australian Hospital Care* decision.

Of course, it is possible that the High Court will one day overrule the *Gosford City Council Case*<sup>110</sup> if it is presented with the opportunity to do so. Should that occur, everyone would be back to square one. This is why legislative clarification should be considered.

### ***Everything but section 54***

As to reviewing the remainder of the ICA, the Government asked the review panel to report by 31 May 2004; however, given the higher-than-expected number of issues raised by stakeholders, that deadline was subsequently extended to the end of June 2004.

In undertaking the re-examination, the review panel sought 'submissions at large' from all relevant stakeholders in order to identify any other issues relating to the operation of the ICA. Following receipt of the submissions and meetings with stakeholders, the panel released an issues paper on 24 March 2004. Comments on that paper were sought and obtained. A paper setting out proposals was then released on 25 May 2004. Comments were again sought and secured, before the review panel issued its final report in June 2004. Although

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<sup>110</sup> [2003] NSWCA 34

numerous recommendations were made by the review panel, I will focus on only a few.

### ***Good faith***

The review panel recommended that a breach of the duty of utmost good faith should become a breach of the ICA, although not one that would, as such, constitute an offence or attract another penalty.<sup>111</sup> It is argued that this change would enable the Australian Securities and Investments Commission (ASIC), amongst other things, to commence representative proceedings in relation to such a breach.<sup>112</sup>

Although it is unclear whether ASIC would actually seek to commence such representative proceedings, the review panel considered that isolated breaches of the duty should not give rise to any risk of a banning order being imposed by ASIC.<sup>113</sup> On the other hand, repeated or very serious breaches of the duty by an insurer might be grounds for ASIC to consider imposing conditions on an insurer's financial services licence or, in extreme cases, to ask an insurer to show cause why its licence should not be revoked.<sup>114</sup>

In substance, I agree with the report of the review panel on this issue. The ICA can be improved by having more active administration and enforcement, rather than expecting it to be self-administering and with

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<sup>111</sup> Cameron, Alan and Milne, Nancy; *Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54*, June 2004 at (xi); Recommendation 1.2 and at 1 [1.2]

<sup>112</sup> Cameron, Alan and Milne, Nancy; *Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54*, June 2004 at 1 [1.3]. See also Part 1A of the ICA, introduced by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth)

<sup>113</sup> Cameron, Alan and Milne, Nancy; *Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54*, June 2004 at 3 [1.9]

<sup>114</sup> Cameron, Alan and Milne, Nancy; *Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54*, June 2004 at 3 [1.9]

little opportunity for regulatory intervention.<sup>115</sup> On the other hand, too much intervention can have an adverse effect on industry efficiency. The challenge is to ensure that a proper balance is struck by the statute and by the relevant regulators.

### ***Non-disclosure***

The review panel also recommended that section 21 of the ICA should be amended to include reference to non-exclusive factors that could be taken into account when determining the application of the duty of disclosure test. These factors might be:

1. The nature and extent of the cover provided by the contract of insurance;
2. The class of persons who would ordinarily be expected to apply for cover of that type; and
3. The circumstances in which the contract of insurance is entered into including the nature and extent of any questions asked by the insurer.<sup>116</sup>

I also support this approach. It gets closer to considering any relevant individual idiosyncrasies of the insured. This reflects the approach that I favoured in ALRC 20. I would have preferred to see the reform go further: enabling a court to take into account the insured's literacy, knowledge, experience and cultural background, where relevant. Unfortunately, that recommendation, although appearing in earlier draft legislation, was substantially weakened in the ensuing Bill, which retained only the first of the stated factors.

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<sup>115</sup> See also the comments in Mann, Peter, (2001) *'Annotated Insurance Contracts Act'*, 3<sup>rd</sup> ed, LawBook Co, Pymont at 26 [11A.20]

<sup>116</sup> Cameron, Alan and Milne, Nancy; *'Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54'*, June 2004 at 32 [4.18]. See also Masel, Geoff, *'Submissions of Phillip (sic) Fox on Issues Paper on second stage of Review of the Insurance Contracts Act'*, 21 April 2004

### ***Standard cover***

The standard cover provisions in the ICA were considered by the review panel. The phrase ‘clearly inform’, used several times in the ICA as well as in ALRC 20, means ‘to make known with some precision’. It was initially held that simply giving a document containing the relevant derogation provisions (among a host of other provisions) could fall short of ‘clearly informing’ insureds of their rights and obligations.<sup>117</sup>

However, given the addition of the words ‘whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise’<sup>118</sup> (as used in sections 35 and 37 of the ICA), it has now been held that an insurer can comply with its obligations to ‘clearly inform’ insureds if it simply provides the insured with an expansive policy document which contains the relevant wording.<sup>119</sup> This is a retrograde step.

Those who act for insurance consumers will affirm that many of them remain confused about their insurance policies. Many, probably most, insureds do not read their policy documents, at least before an event occurs and prior to making a claim. I am aware of at least one case where an insured commenced litigation against an insurer arguing that the insurer had failed (or failed adequately) to inform him that he was not covered for any loss or damage occasioned whilst he was driving the insured vehicle. From the insured’s perspective, the case was clear – ‘I got insurance for my car, I should be covered when I drive it. After

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<sup>117</sup> *Suncorp General Insurance Limited v Chiehk* (1999) 10 ANZ Ins Cas 61-442

<sup>118</sup> *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985* (Cth)

<sup>119</sup> *Hams v CGU Insurance Ltd* (2002) 12 ANZ Ins Cas 61-525 per Einstein J at [242]

all, what else was I going to do with it?'. Although there had been a special exclusion written into the subject policy to reflect the insured's poor driving history, the insured argued that he was not '*clearly informed*' of that exclusion. It was not specifically brought to his attention. The insurer simply allowed it to 'blend into' the policy. Regardless of the merits of the respective arguments, the whole issue could have been avoided simply (and cheaply) had clear, express and effective information been provided by the insurer to the insured. It makes commercial sense to do so. It is also more candid and honest. It allows an insured, at a higher premium, to seek to secure an alternative and relevant policy. And it avoids the uncertainties of later disputes and litigation.

I therefore welcomed the review panel's recommendation to replace the phrase 'clearly inform' in sections 35 and 37 of the ICA with a requirement that the material information be presented in a 'clear, concise and effective manner'. Unfortunately, that recommendation was not taken up in the recent Bill. The insurance industry should improve the ways in which it 'clearly informs' insureds of non-standard policy terms. The lowest common denominator is not the appropriate way to perform this obligation.

Although the 2010 Bill did not propose to limit the documents by which disclosure may occur,<sup>120</sup> All insurers should be encouraged to issue policies along with a supplementary document of no more than one page which clearly, and in plain language, draws to the insured's attention all relevant derogations from standard cover.<sup>121</sup> Not only is it

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<sup>120</sup> See Explanatory Memorandum to the Insurance Contracts Amendment Bill at 35 [4.94]

<sup>121</sup> ALRC 20 at [72]

in the interests of fairness and balance to do so. It would substantially reduce the number of disputes regarding policy terms. This would save time, effort, cost and enhance goodwill.

### **Where to from here?**

The dissolution of the Australian Parliament for the federal election held in August 2010 delayed consideration of the proposed amendments to the ICA. The Insurance Contracts Amendment Bill 2010 (Cth) was first introduced into the House of Representatives on 17 March 2010 and in the Senate on 24 June 2010. It had reached Second Reading Stage in the Senate before it lapsed, on 19 July 2010, when the Parliament was prorogued. The Bill awaits reintroduction. It will be important to consider whether the new Government seeks to revisit any of the proposed amendments, particularly those dealing with section 54 that did not find their way into the original Bill.

## **INTERNATIONAL PERSPECTIVES**

### **Comparison with the United Kingdom**

The English and Scottish Law Commissions are in the middle of their own inquiry into the reform of the United Kingdom law on insurance contracts. Those Commissions have paid close attention to the ICA, as well as the contents of ALRC 20. These documents address many of the issues that the two Commissions are considering in the British context. The UK Commissions remain ‘particularly interested’ to see what additional legislative reforms may arise in Australia the near future.<sup>122</sup>

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<sup>122</sup> See <[http://www.lawcom.gov.uk/insurance\\_contract\\_previous.htm](http://www.lawcom.gov.uk/insurance_contract_previous.htm)>, retrieved 7 September 2010



The UK Commissions have made substantial progress in reviewing and considering the present state of their insurance contract law. Since January 2006, they have together published eight issues papers, inviting submissions on such joint issues as insurable interest, misrepresentation and non-disclosure. In January 2008, the UK Commissions published Issues Paper 4. This raised the question whether there was still a need for the specific doctrine of 'insurable interest'. That Issues Paper proposed reforms substantially consistent with those outlined by the ALRC, which the Commissions considered both 'instructive',<sup>123</sup> and at times 'bold'.<sup>124</sup> The UK Commissions will be developing their proposals in due course. It will be interesting to see whether they adopt the so-called 'bold' Australian approach. If there was boldness, it was largely because of the chaotic state of the law at the time of ALRC 20 and the failure to address the needs of reform and to provide proportionate remedies despite many earlier criticisms.

In July 2010, the UK Commissions published Issues Paper 7, dealing with the law of fraudulent claims and in particular the remedies that should be available to the insurer if an insured makes a claim in any way fraudulent. The Commissions acknowledged that the English law on this point is presently 'confused'<sup>125</sup> and 'convoluted'.<sup>126</sup> Under section 17 of the *Marine Insurance Act 1906* (UK), if an insured acts fraudulently, the insurer may deny the entire insurance contract and demand the repayment of any moneys paid on earlier claims.

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<sup>123</sup> English and Scottish Law Commissions, '*Issues Paper 4: Insurable Interest*' at [7.59]

<sup>124</sup> English and Scottish Law Commissions, '*Issues Paper 4: Insurable Interest*' at [7.39]

<sup>125</sup> English and Scottish Law Commissions, '*Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*' at [S.8], [S.16], [1.10] and [2.22]

<sup>126</sup> English and Scottish Law Commissions, '*Issues Paper 7: The Insured's Post-Contract Duty of Good Faith*' at [S.16], [1.10], [2.17] and [4.76]

In practice, the English courts have been reluctant to allow this to happen.<sup>127</sup> Occasionally, however, they have held that a fraudulent claimant should forfeit its entire claim, even any part that might properly be regarded as severable and legitimate.<sup>128</sup> The UK Commissions have considered the Australian provisions.

However, in a rather traditional approach, they have tentatively concluded that forfeiture of the *entire* claim was the correct remedy.<sup>129</sup> In such a practical area of commercial and consumer law, it is disappointing that the UK Commissions have not taken the course of procuring empirical data on the operation of the Australian reforms. And gathered the opinions and experience of the Australian insurance industry and consumers operating under the more nuanced and proportionate ICA regime.

In another move, similar to the Australian experience, the UK Commissions published a Final Report and Draft Bill on 15 December 2009, recommending new legislation covering the issue of what a prospective insured should be obliged to disclose to the insurer before taking out insurance. The current law in the United Kingdom applies the 'prudent insurer' test. The insurer is entitled to look to the insured to tell it everything that the insurer needs to know.<sup>130</sup> The UK Commissions considered that this expression of the duty should be abolished. Instead, in line with the Australian reforms in respect of eligible contracts, insurers should be required to ask specific questions

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<sup>127</sup> English and Scottish Law Commissions, *'Issues Paper 7: The Insured's Post-Contract Duty of Good Faith'* at [7.34]. See, for example, *Fagnoli v G A Bonus plc* [1997] CLC 653 per Lord Penrose at 678

<sup>128</sup> English and Scottish Law Commissions, *'Issues Paper 7: The Insured's Post-Contract Duty of Good Faith'* at [S.7]. See also *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209, by Millett LJ at 214

<sup>129</sup> English and Scottish Law Commissions, *'Issues Paper 7: The Insured's Post-Contract Duty of Good Faith'* at [1.19] and [4.82]

<sup>130</sup> English and Scottish Law Commissions, *'Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation'*, December 2009 at [2.5], [2.6] and [2.10]. See also section 18(2) *Marine Insurance Act 1906*

to which they seek specific answers. To do otherwise, the Commissions conclude, would be to impose a duty on insureds that most of them would be unable to fulfil and unaware that they were expected to. Few would have actually read, and fewer still understood, how the underwriting process works.<sup>131</sup>

In *Lambert v Co-operative Insurance Society Ltd*,<sup>132</sup> Mr Justice Mackenna held that the defendant insurer was entitled to avoid the subject policy because Mrs Lambert had not mentioned her husband's previous criminal convictions when insuring her family's jewellery. This was although the insurer did not ask about them. His Lordship commented that:

“Mrs Lambert is unlikely to have thought that it was necessary to disclose the distressing fact of her husband's recent conviction when she was renewing the policy on her little store of jewellery. She is not an underwriter and has presumably no experience in these matters ... [T]he defendant company would act decently if, having established the point of principle, they were to pay her. It might be thought a heartless thing if they did not, but that is their business, not mine”.<sup>133</sup>

Whether this judicial hint was later taken up is undisclosed. Some insurers would pay. Some would not.<sup>134</sup> The proposed abolition of the ‘prudent insurer’ test by the UK legislature is to be welcomed, along with the other endeavours by which the UK Commissions seek to align themselves with ‘the Australian way’.

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<sup>131</sup> English and Scottish Law Commissions, ‘*Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation*’, December 2009 at [2.10] and [2.11]

<sup>132</sup> [1975] 2 Lloyd's Rep 485

<sup>133</sup> [1975] 2 Lloyd's Rep 485 at 491

<sup>134</sup> Although the Commissions did note that, when consulted, few insurers attempted to defend the stated duty of disclosure and, generally, it was agreed that insurers should ask questions if they wanted to know information: English and Scottish Law Commissions, ‘*Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation*’, December 2009 at [2.15]

London remains an epicentre of the global insurance market. It is time for Australians to repay the huge debt they owe to English law by occasional contributions of law reform ideas in the United Kingdom.<sup>135</sup> The ICA preserves the main essential features of the English law of insurance but with suitable Australian changes to remove disproportionate rules and to adapt the law to the modern circumstances. These include large scale consumer insurance serving a mass market of (unusually) inexperienced customers, often today purchasing their insurance in a few seconds online.

## Comparison with New Zealand

New Zealand has also been undertaking projects of insurance law reform. It has been described as 'piecemeal'.<sup>136</sup> Substantially, it has focused on the areas of non-disclosure and misrepresentation.

In May 1998, the New Zealand Law Commission released a report: *Some Insurance Law Problems*.<sup>137</sup> This report considered a number of questions relevant to insurance contract law. It proposed an Insurance Law Reform Amendment Act. However, on the issue of non-disclosure, it rejected the Australian approach. It proposed the retention of the traditional duty of disclosure, albeit in a modified form.<sup>138</sup> This was despite a call for reform, along the lines of the Australian amendments, by a number of New Zealand judges.<sup>139</sup>

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<sup>135</sup> See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, (1991) *Principles of Insurance Law in Australia and New Zealand*, Butterworths, Sydney, at (viii)

<sup>136</sup> Merkin, Robert, *Reforming Insurance Law: Is There A Case For Reverse Transportation?*, A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [4.63]

<sup>137</sup> New Zealand Law Commission, *Report 46: Some Insurance Law Problems*, May 1998

<sup>138</sup> New Zealand Law Commission, *Report 46: Some Insurance Law Problems*, May 1998 at [9] to [32]

<sup>139</sup> See *State Insurance v McHale* [1992] 2 NZLR 399 per Cooke P at 404 and per Richardson and Hardie JJ at 415; and *Quinby Enterprises Ltd (in liq) v General Accident Ltd* [1995] 1 NZLR 736 per Barker J at 740

The 1998 New Zealand report, in my respectful view, bore evidence of the tendency of some sections of the legal profession in New Zealand (and Australia for that matter) to regard themselves as the last true outposts of the traditional doctrines of English law.

Happily, the New Zealand Law Commission's proposals were not implemented. Now a later report, published in November 2004, titled *Life Insurance*<sup>140</sup> has shifted ground to reflect the Australian position. In this report, reflecting changed personnel, the New Zealand Law Commission acknowledged the merit of the Australian approach. It said that it would be useful to review the matter once the Australian Treasury had published its then anticipated response to the review panel on the ICA.<sup>141</sup> In May 2005, following the publication of the Cameron Milne Report (outlined above), the New Zealand Ministry of Economic Development launched a review of financial services regulation, including in relation to insurance law.<sup>142</sup>

Following this further report, the New Zealand Ministry of Economic Development expressed itself satisfied that the New Zealand Law Commission's earlier reservations about expanding the remedies available for non-disclosure were misplaced and that the Australian experience had showed that, in practice, such assessments were not difficult for insurers to make.<sup>143</sup> The New Zealand Government has agreed that it was time to consider these issues with a view to the introduction of reforming legislation. It intends to develop a proposal for

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<sup>140</sup> New Zealand Law Commission 'Report 87: Life Insurance', November 2004.

<sup>141</sup> New Zealand Law Commission 'Report 87: Life Insurance', November 2004 at [8.6] and [8.40]

<sup>142</sup> New Zealand Ministry of Economic Development, 'Review of Financial Products and Providers: Insurance', September 2006

<sup>143</sup> New Zealand Ministry of Economic Development, 'Review of Financial Products and Providers: Insurance', September 2006 at [296]. See also Merkin, Robert, 'Reforming Insurance Law: Is There A Case For Reverse Transportation?', A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [4.66]

this work to be considered for inclusion on its work programme, subject to more urgent priorities.<sup>144</sup>

The New Zealand insurance industry and legal profession now await the statutory reforms that are to emerge from this painfully slow process of consideration. The influence of ALRC 20 on the final product seems likely to be significant. As well as the issues of basic principle at stake, there are strong arguments for endeavouring to achieve substantially similar legal and commercial regimes, operating throughout the Trans-Tasman economic region.

## **FINAL REFLECTION AND ASSESSMENT**

From this short review, it is obvious that the United Kingdom and New Zealand are strongly influenced by the Australian reforms and are, to a large extent, following the Australian lead. In some respects they are still a couple of decades behind Australia. However, given that only 30 years ago, our law was modelled largely on that of the United Kingdom, it is not surprising that such a large reforming enterprise should take time to be implemented elsewhere. Insurance is a very large and important industry. It serves millions of insureds in Australia and employs many thousands. It operates in a global market where the state of the applicable law is important for the availability and terms of reinsurance and for international investment and participation. On the whole the local and global market have adjusted well to the reasoned reforms that the ICA has introduced in Australia.

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<sup>144</sup> New Zealand Government, *'Government Response to Law Commission Report on Life Insurance'* at [13]

Nevertheless, the ICA still has its critics. It has been the subject of a very detailed review over the past seven years. Correctly, the review panel acknowledged that the ICA was generally '*operating satisfactorily and to the benefit of both insurers and insureds*'.<sup>145</sup> I believe that this assessment was correct. Five years ago I said, in words that are still applicable:

“[t]he notion of ever going back to the chaos and uncertainty of the previous law is unthinkable. Patching and updating are doubtless necessary, as the [Review] Committee has proposed. But one of the great virtues of having this single federal Act on insurance contract law is that it makes it easier to teach lawyers and claims managers the basic principles of insurance law. That is itself a contribution to fairness and balance. It is also a contribution to knowledge of rights and duties and to economic efficiency in the operation of a vital national industry”.<sup>146</sup>

The ICA has been described as one of the most significant and comprehensive pieces of consumer protection legislation ever enacted in Australia. However, the ICA does not, as such, legislate only with respect to 'consumers'. In fact, the ICA mentions the word 'consumer' on only three occasions: twice in relation to the definition of 'consumer credit insurance' and once when considering the powers of ASIC. All three of these references were added to the ICA after its initial commencement.

By defining a 'consumer', so-called 'consumer protection' legislation often limits (sometimes inappropriately) those persons who are entitled to relief by reference to general legal principles. The word 'consumer' has been defined in different ways at least 34 times in legislation enacted throughout Australia. These definitions are not always

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<sup>145</sup> Cameron, Alan and Milne, Nancy; '*Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54*', June 2004 at (iv)

<sup>146</sup> Kirby, Michael, '*Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume*', Sydney, 23 February 2005

consistent, reflecting the special ambiguity of numerous vulnerable groups in different legislative settings. A particular definition of 'consumer' may have had the effect of denying appropriate rights and remedies to persons who were properly entitled to them. In my view, the Australian experience has justified the ALRC approach. The result has been a wide-ranging measure of reform that has been of benefit to all relevant 'consumers' of insurance, without limiting the remedies to 'consumers', defined as a specially vulnerable category of insureds.

During my service on the High Court of Australia, I participated in nine decisions concerned with the meaning and operation of the ICA.<sup>147</sup> Construing its comparatively clear and conceptual provisions was a more pleasant task than, say, construing income tax legislation or the complex statutes on superannuation.<sup>148</sup> The business of the law today, including in the High Court of Australia, mainly involves statutory interpretation. Most of the decisions on the ICA fell out in ways that upheld the basic objectives of the ALRC report. I pay a tribute to my colleagues in the ALRC who played a part in the original draft of the Bill for an ICA appended to ALRC 20. One of the chief of these was Mr John Q Ewens QC, long time First Parliamentary Counsel of the Commonwealth. He served on the ALRC and afforded us the unrivalled experience he had gained in the clear drafting of federal legislation. Much of the credit for the provisions of the ICA belongs to him; but credit also belongs to Stephen Mason, then an officer of the ALRC and a trained legislative draftsman.

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<sup>147</sup> *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *Moltoni Corp Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149; *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* (2003) 214 CLR 514; *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 214 CLR 604; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; *Rich v CGU Insurance Ltd*; *Silbermann v CGU Insurance Ltd* (2005) 214 ALR 370; *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 and *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103

<sup>148</sup> See further, Kirby, Michael, 'Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume', Sydney, 23 February 2005



The Australian insurance industry is highly competitive. It is a large and diverse industry. It is vitally important to the Australian community and economy.<sup>149</sup> Yet, its size and diversity inevitably mean that not everyone regards the ICA as a fine example of legislative perfection. Judicial disparagement was not unknown amongst the traditionalists, especially in the early days of the ICA.<sup>150</sup> As a judge I heard submissions by advocates wishing to take the ICA in directions that I had never anticipated at its birth. Not a few of them hankered after the chaos of the pre-ICA law. However, once legislation is enacted it takes on its own life. The subjective wishes and expectations of its authors cannot control the meaning given to it by its courts.

The ALRC project allowed independent lawyers, in consultation with experts from differing perspectives, to assess the suitability of the legal foundations for the law of insurance contracts. Although expert unanimity in such a major project of law reform is nearly impossible to achieve, we can, I think, be generally satisfied that the ALRC's recommendations were based on an unrivalled examination of the operations of (and an intense consultation with participants in) the insurance industry and the legal specialists who advise it.

The vigour and strength of the law reform process in Australia is demonstrated by the many times that judges, the industry, academics and others revisit the relevant ALRC reports, seeking to understand the purpose and direction of resulting legislative provisions. Whilst I believe that this is generally representative of the growing acceptance throughout the legal profession of the authority and utility of the ALRC

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<sup>149</sup> ALRC 20 at [4]

<sup>150</sup> See, for example, *Advance (NSW) Insurance Agencies Pty Ltd & Anor v Matthews & Anor* (1988) 12 NSWLR 252; and *Advance (NSW) Insurance Agencies Pty Ltd & Anor v Matthews & Anor* (1989) 166 CLR 606

reports, it is pleasing to see that ALRC 20 in particular is cited countless times by all of the industry-standard texts in Australia, written, or edited, by experts of high reputation including David Kelly, Michael Ball, Michael Gill, Peter Mann, Robert Merkin and Andrew Sharpe.

ALRC 20 is also cited in many judicial opinions that seek to understand the reasoning behind, and the purposes of, the ICA. Of the nine High Court decisions that I delivered on the ICA, the text of ALRC 20 was considered in most of them. The practice of having to resort to the ALRC report has continued in the High Court since my departure.<sup>151</sup>

We must continue to ensure that there is fairness to the insurance industry and to its investors, whilst respecting the interests of all relevant stakeholders. The industry will not thrive if it is suspected that high premiums are paid while liability is frequently and unfairly denied. The sharing of risks is the original brilliant idea of insurance.<sup>152</sup> The ICA lays down a modern template for a just assignment of insured risks. The fact that it is now providing an example and a model for law reforms being proposed in the United Kingdom and New Zealand is proof that, in the essential balances that were struck, the Australian law reformers, and legislators, reached wise and proportionate conclusions.

To those, in the legal profession, the judiciary and the insurance industry who wanted nothing much changed in the Australian law of insurance contracts, we always had before us the words of Lord Denning, written 60 years ago:

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<sup>151</sup> *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd & Ors* (2009) 240 CLR 391 at 398 per French CJ, Gummow and Crennan JJ

<sup>152</sup> See further, Kirby, Michael, 'Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume', Sydney, 23 February 2005

“[i]f we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both”.<sup>153</sup>

I always cherished my early associations with Australian insurance law and the insurance industry. I did so as an articled clerk, as a young legal practitioner, as a law reformer and as an appellate judge. It is an area of the law with a very interesting history. It involves an industry of great national importance. It now boasts a substantial national reforming statute. And it has witnessed a constant flow of challenging, puzzling and remunerative cases. What more can one ask for in the law?

I pay respects to the AILA and to the many friends I secured in the practice of insurance law, including the late Hugh Rowell, honoured in this memorial lecture. The journey of law reform continues. But the chaos is over. The injustice and disproportion are reduced. In Australia, the rule of law means more than the law of rules.<sup>154</sup> It means the law of just rules that adapt and change to the needs of new times and new circumstances. The Australian insurance industry now does this. And so does the reformed Australian law on insurance contracts.

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<sup>153</sup> *Packer v Packer* [1953] 2 All ER 127 at 129 per Lord Denning

<sup>154</sup> M.D.Kirby, 'The rule of law beyond the law of rules' (2010) 33 *Australian Bar Review* 1.