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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

INSURANCE CONTRACTS BILL 1983

(Amendments and new clause  
to be moved on behalf of the Government)

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,  
Senator the Honourable Gareth Evans)

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EXPLANATORY MEMORANDUM

Amendment No. (1) : Report to be an aid to interpretation (Clause 3)

Amendment : Clause 3 will be omitted from the Bill.

2. Rationale: The use of extrinsic material in the interpretation of Commonwealth legislation is dealt with in clause 15 AB of the Acts Interpretation Amendment Bill 1984 presently before the Senate. Clause 15 AB will enable a court, in interpreting the Insurance Contracts Bill, to have regard to the Law Reform Commission's Report on Insurance Contracts (ALRC 20) on which the Bill is largely based. In order to achieve consistency in the rules of interpretation, clause 3 should be omitted.

Amendment No. (2) : Effect of Act on other laws (Clause 8)

3. Amendment : The application of the law merchant will be preserved unless the Bill, either expressly or by necessary implication, affects its operation.

4. Rationale : As drafted, clause 8 preserves the application of common law and equity, as well as State and Commonwealth legislation, unless the Bill, either expressly or by necessary implication, affects their operation. Some principles of insurance law, however, are based on the law

merchant. In broad terms, the law merchant comprises a number of usages which have been adopted by merchants internationally and which have acquired such a degree of acceptance in the mercantile world at large that the courts will take judicial notice of them. It is desirable that the operation of the law merchant should be preserved expressly. The amendment is consistent with section 5 of the Bills of Exchange Act 1909 and section 4 of the Marine Insurance Act 1909.

Amendment No. (3) : Exceptions to application of Act (Clause 10)

5. Amendment : Friendly Societies and the Export Finance and Insurance Corporation will be excluded from the application of the Bill.

6. Rationale : Friendly Societies should be excluded from the application of the Bill because :

- . they are non-profit making organizations which offer insurance for their own members only - the benefits of that insurance are determined by the Society's rules. Often policy documents, even if available, are not issued.
- . the State legislatures have passed specific legislation to regulate friendly societies and this is inconsistent with the Bill in a number of respects e.g.,
  - (i) the maximum amount of benefits payable to a member of the Society is set under State legislation - this may be inconsistent with the standard cover provisions of the Bill; and

(ii) State legislation specifically provides that arbitration is to be used to determine disputes - this is inconsistent with clause 44 which provides that provisions requiring disputes to be referred to arbitration or limiting the insured's rights to proceed under the contract by first requiring him to submit a dispute to arbitration will be void.

- . they are presently excluded from the operation of the Life Insurance Act 1945 and the Insurance Act 1973;

7. The Export Finance and Insurance Corporation (EFIC) should be excluded from the application of the Bill because :

- . EFIC's business has involved export credit and investment insurance and does not embrace th life and general insurance which was examined by the Law Reform Commission;
- . EFIC is not generally in competition with private insurers in Australia as :
  - (i) its business is confined to export credit and investment insurance;
  - (ii) although EFIC is no longer prevented from entering a contract of insurance in respect of risks normally insured with commercial insurers (section 7, Export Finance and Insurance Corporation Amendment Act 1983), the Minister for Trade has noted that "whilst the Government is anxious to preserve EFIC's traditional role, it does not see any need to extend EFIC's facilities into other areas of insurance as long as the private sector is effectively meeting the need of exporters". (Second Reading Speech on EFIC Amendment Bill 1983, House of Representatives Hansard, 9 November 183, page 2463).

Amendment No. (4) : Exceptions to application of Act (Clause 10)

8. Amendment : Sub-clause 10(2) will provide that the Bill does not apply to Northern Territory insurance.

Rationale : Northern Territory insurance should be treated in the same manner as State insurance.

Amendment No. (5) : Contracts of insurance (Clause 11)

9. Amendment : The words "by way" will be omitted in sub-claus 11(2).

10. Rationale : The effect of the amendment will be to exclude schemes such as mutual aid and extended warranty schemes which it is not intended should be subject to the legislation. Such schemes do not amount to the carrying on of insurance but may be considered as being "by way of insurance" under clause 11 as presently drafted.

Amendment No. (6) : Interpretation (Clause 12)

11. Amendment : A "broker's placing slip" will be defined in clause 12 as a document which is evidence of a contract of insurance under which the person is the insured and which bears a notation by an insurer setting out the extent of the insurance cover he agrees to provide under the contract.

12. Rationale : This amendment relates to amendment No. (8) which amends the definition of a "policy document" to include a broker's placing slip. As presently drafted, that definition refers only to a document prepared by the insurer and does not include a document which has been prepared by a broker but which is equally "evidence of the contract".

Amendment No. (7) : Interpretation (Clause 12)

13. Amendment : Clause 12 will be amended to insert the following definitions:-

- . "friendly society" to mean a society registered under a State Act or a law of a Territory providing for the registration of friendly and benefit societies; and
- . "guardian" to mean, in relation to a person who has not attained the age of 18 years, a person who acts in the place of a parent of the person but does not include a person who so acts only for limited or particular purposes or periods.

14. Rationale : The proposed definition of a "friendly society" complements the amendment to clause 10 excluding friendly societies from the application of the legislation.

15. The proposed definition of "guardian" will ensure that only those persons properly standing in the place of a parent to a child will, under clause 20, have an insurable interest in that child's life. Clause 20 sought to achieve this by providing that a "parent" or a "guardian" should have an insurable interest. The inclusion of a definition of the term "guardian", is intended to ensure that the term will not be interpreted more widely than intended.

Amendment No. (8) : Interpretation (Clause 12)

16. Amendment : The definition of a "policy document" in clause 12 will be replaced. The new definition will provide that a "policy document" refers to a document prepared by the insurer as evidence of the contract or a broker's placing slip that constitutes evidence of the contract. In the case of interim cover, the cover note will constitute the policy document.

17. Rationale : The revised definition of a "policy document" takes account of a broker's placing slip which is prepared, not by an insurer but by an insurance broker, and which is evidence of a contract of insurance.

Amendment No. (9) : Interpretation (Clause 12)

18. Amendment : The word "writing" will be defined in clause 12 to mean writing in the English language or in such other language agreed between the insurer and the insured.

19. Rationale : A number of provisions of the Bill require the insurer to inform the insured clearly in writing of certain matters e.g. of the insured's duty of disclosure (clause 22) and of the effect of certain provisions of the contract (e.g. clauses 36, 38 and 45). The amendment will make it clear that the requirement for a notice to be in writing does not require notice in any other language than English. Should the parties agree, the insurer may give the notice to the insured in another language.

Amendment No. (10) : Interpretation (Clause 12)

20. Amendment : The term "entering into a contract of insurance" will be clarified by providing that it includes a reference to an agreement between the parties to a contract of insurance to renew, extend, vary or reinstate that contract.

21. Rationale : The effect of the amendment will be to make it clear that any obligations which the Bill imposes on the insurer and insured "before the contract is entered into" will apply where they renew, extend, vary or reinstate an existing contract and thereby make a new contract.

Amendment (No. (11) : Parties not to rely on provisions except in the utmost good faith (Clause 15)

22. Amendment : Clause 15 will be amended to provide that, in deciding whether an insurer which relies on a provision of a contract is acting in the utmost good faith (as required by clause 14), the court must have regard to any notification of the provision the insurer gave to the insured. That notification may have been given in accordance with the insurer's obligation to notify the insured of unusual terms in accordance with clause 38 or otherwise.

23. Rationale : Whether or not a term of the contract has been specifically brought to the insured's attention is relevant in determining whether the insurer has acted in good faith if he subsequently relies upon it to the detriment of the insured. A court should therefore be required to take account of the insurer's efforts in this regard.

Amendment No. (12) : Certain other laws not to apply (Clause 16)

24. Amendment : The effect of this amendment will be to exclude the application of any Commonwealth legislation providing relief of the sort referred to in clause 16.

25. Rationale : In view of the Bill's clear statement of the duty of good faith, a general power to review its terms is unnecessary. It is appropriate therefore, that Commonwealth legislation, as well as State and Territory legislation, providing for review of contractual terms should not apply to contracts of insurance subject to the Bill.



Amendment No. (13) : Certain other laws not to apply (Clause 16)

26. Amendment : Existing sub-clause 16(2) will be replaced. The new sub-clause 16(2) will make it clear that State and Territory legislation and other Commonwealth legislation providing relief for the consequences of misrepresentation will not apply to contracts of insurance subject to the Bill.

27. Rationale : As clause 16 is presently drafted, it only excludes the operation of other legislation which provides for the review of contractual terms. The amendment to clause 16 makes it clear that any other legislation providing relief for misrepresentation will also not apply in respect of contracts subject to the Bill e.g. section 7, Misrepresentation Act 1971-72 (S.A.), section 18 A Insurance (Amendment) Act 1983 (N.S.W.), section 25 Instruments Act (Victoria).

Amendment No. (14) : The insured's duty of disclosure (Clause 22)

28. Amendment : The effect of the amendment to clause 22 will be that an insured's duty of disclosure will be to disclose those matters which he knows to be relevant to an insurer in his decision whether to accept the risk, as well as those facts which a reasonable person, in the circumstances, could be expected to know to be matters so relevant. (Clause 22 presently requires him to disclose those matters which he knows and which a person in his circumstances could reasonably be expected to know).

29. Rationale : The amendment is intended to clarify the test specified in clause 22 to determine what is reasonable for the insured to know to be a matter relevant to the

insurer's decision to accept the risk and, if so, on what terms. This would not preclude a court's considering the insured's position and circumstances in applying the test.

Amendment No. (15) : Insurer to inform of duty of disclosure (Clause 23)

30. Amendment : Clause 23 will be amended to provide that the regulations may prescribe a form of writing to be used in informing an insured of his duty of disclosure under clause 22. If the form is so prescribed, an insurer may, at his option, use that form in complying with his duty, under clause 23, to notify the insured.

31. Rationale : The regulation-making power is desirable should it become apparent that guidance is required as to what amounts to "clearly informing" the insured of the duty of disclosure. This is so particularly in view of the ramifications of the insurer's failure to inform the insured clearly of the extent of the duty of disclosure (i.e. inability to obtain any redress should the insured fail to comply with the duty of disclosure).

Amendment No. (16) : Ambiguous questions (Clause 24)

32. Amendment : By virtue of the amendment, clause 24 will incorporate a reference to what "a reasonable person, in the circumstances, would have understood" a question in relation to a proposed contract to mean, rather than, as at present, what it would have been "reasonable for a person in the circumstances of the insured" to have understood.

33. Rationale : The amendment is consistent with the test to be included in clauses 22, 24, 27, 36 and 47.

Amendment No. (17) : Certain statements not misrepresentations  
(Clause 27)

34. Amendment : By virtue of the amendment, sub-clause 27(1) will incorporate a reference to whether it was a "belief that a reasonable person, in the circumstances, would have held," in relation to a statement made in connection with a proposed contract of insurance rather than, as at present, a "belief that it was reasonable for a person in his circumstances to hold".

35. Rationale : The amendment is consistent with the test to be included in clauses 22, 24, 27(2), 36 and 47.

Amendment No. (18) : Certain statements not misrepresentations  
(Clause 27)

36. Amendment : By virtue of the amendment, sub-clause 27(2) will incorporate a reference to whether a "reasonable person, in the circumstances, could be expected to have known" the matter to be so relevant to the insurer in deciding whether to accept a risk and if so on what terms, rather than, as presently drafted, "a person in the circumstances of the insured could reasonably be expected to have known".

37. Rationale : The amendment is consistent with the test to be included in clauses 22, 24, 27(1), 36 and 47.

Amendment No. (19) : General insurance (Clause 29)

38. Amendment : Clause 29 will be amended to make it clear that the only situation in which the insurer will have no remedy for the insured's breach of the duty of disclosure or his misrepresentation will be where he would, in any event,

have entered into the contract on the same terms and conditions and for the same premium as he in fact entered it.

39. Rationale : It is already implicit in clause 29 that the insurer is only denied a remedy where he would have entered precisely the same contract as he in fact entered. The amendment makes it explicit.

Amendment No. (20) : Misstatements of age (Clause 31)

40. Amendment : The effect of the amendment to clause 31 will be to give the insurer 2 options should the insured overstate his age in respect to a contract of life insurance:

- . it will, as already provided in clause 31, be able to increase the sum insured in accordance with the formula set out in clause 31; or
- . repay to the insured the amount of the premiums the insured has overpaid by virtue of the overstatement of his age, together with interest from the date the contract was entered into. The rate of interest will be prescribed by regulation.

41. Rationale : Except to the extent that no interest is payable should the insurer choose to repay the overpaid premiums, both options are presently available to the insurer under section 83 of the Life Insurance Act 1945 (Commonwealth). This amendment will retain those existing options, but remove the existing inequity by providing that interest is also payable.

Amendment No. (21) : Court may disregard avoidance in certain circumstances (Clause 32)

42. Amendment : Clause 32 will be replaced by a new provision which will define with greater specificity the court's power to disregard the avoidance of a contract for fraudulent non-disclosure or misrepresentation.

43. A court will have power to:

- . disregard avoidance of a contract of insurance as a result of a fraudulent non-disclosure or misrepresentation when it would be harsh and unfair not to do so; and
- . allow the insured to recover the whole, or such part as the court thinks just and equitable in the circumstances, of the amount that he would have recovered had the contract not been avoided.

These powers may only be exercised where the court finds that, in respect of the loss that is the subject of the proceedings before the court, the insurer has not been prejudiced by the failure or misrepresentation or, if prejudiced, the prejudice is minimal or insignificant. In exercising its power, the court must have regard to the need to deter fraudulent conduct in relation to insurance. It must also balance the culpability of the insured in his fraudulent conduct against the loss he would suffer if the court were not to disregard the avoidance.

44. Rationale : The existing provision would enable recovery under a claim where the insured had acted fraudulently in complying with the duty of disclosure or making a misrepresentation in relation to the contract if the court considered it harsh and unfair not to do so. In exercising this power, the court is directed to have regard to

the need to deter fraudulent conduct as well as any other relevant matter. However, to ensure maximum discouragement of fraud, an even more stringent test is now proposed. Clause 32 will only operate where the insurer had not been prejudiced by the fraud or had been prejudiced only to a minimal or insignificant extent. In addition, a court will be required to weigh up the extent of the insured's culpability in acting fraudulently compared with the loss that would be suffered if the avoidance were not disregarded.

45. Notwithstanding this stringent test, the courts will have a discretion which can be exercised in appropriate cases where the existing common law rules do not give sufficient flexibility to enable the "punishment" to fit the "fraudulent action" (for example, where the fraud was of minor or no relevance to the insurer as in a case where an insured fraudulently failed to disclose a speeding fine and subsequently claimed for damage caused to his motor vehicle while it was parked).

Amendment No. (22) : Misrepresentation by member of scheme  
(Clause 33)

45. Amendment : The effect of the amendment is to provide that the provisions of the Bill relating to non-disclosure extend to non-disclosure in relation to blanket superannuation contracts as well as to other contracts of insurance.

46. Rationale : As drafted, clause 33 already provides that the provisions of the Bill relating to misrepresentation will extend to a misrepresentation made to the insurer under a blanket superannuation contract of insurance in respect of a proposed member of that scheme as though the contract were an individual contract in respect of that proposed member entered into at the time he became a member of the scheme. The amendment will ensure that the non-disclosure provisions of

the Bill extend to blanket superannuation contracts in the same manner.

47. Rationale : Misrepresentation and non-disclosure by a proposed member of a blanket superannuation scheme should be treated in the same manner.

Amendment No. (23) : Notification of certain provisions  
(Clause 36)

48. Amendment : The amendment will ensure that what the insured could reasonably be expected to have known was provided by the contract of insurance is judged by reference to what "a reasonable person, in the circumstances, could be expected to have known" rather than, as the clause is presently drafted, by what "a person in the circumstances of the insured could reasonably be expected to have known".

49. Rationale : This amendment is consistent with those to clauses 22, 24, 27 and 47.

Amendment No. (24) : Interpretation of regulations (Clause 37)

50. Amendment : The amendment substitutes the word "event" for "risk".

51. Rationale : The amendment takes account of the need to refer to events rather than "risks" in the standard cover regulations.

Amendment No. (25) : Unusual terms (Clause 38)

52. Amendment : The effect of the amendment will be that an insurer may give the insured a copy of the policy document or of the provision containing an unusual term before the loss occurred should it wish to rely on the unusual term in the

contract. Clause 38 already enables the insurer to rely on such terms if he clearly informs the insured in writing of their effect.

53. Rationale : The amendment, in effect, clarifies the requirement for notification to be given to the insured of unusual provisions in an insurance contract if the insurer wishes to rely upon those provisions, by providing that the insurer may give a copy of a policy document (which sets out the terms of the contract) or of the unusual provisions themselves. It therefore removes any question that clause 38 requires the insurer to prepare additional documentation. The insurer retains the right to give the insured a separate notice clearly informing the insured of the effect of such provisions.

Amendment No. (26) : Interim contracts of insurance (Clause 39)

54. Amendment : This is a drafting amendment to substitute the word "earliest" for "earlier".

55. Rationale : The amendment is consequential upon amendment No. (27).

Amendment No. (27) : Interim contracts of insurance (Clause 39)

56. Amendment : Clause 39 will be amended to insert a third factor in determining the time for which the insurer remains liable under an interim contract of insurance after an insured has submitted a proposal to the insurer for a contract to replace an interim contract which has not yet expired. As amended, the insurer will remain liable under the interim cover until the earliest of the following events:

the insured enters into another contract intended to replace the interim contract;



the interim contract is cancelled; or

the insured withdraws the proposal.

57. Rationale : As drafted, clause 39 fails to take account of the situation in which the insured does not wish to proceed with the replacement contract and withdraws his proposal.

Amendment No. (28) : Interim contracts of insurance (Clause 39)

58. Amendment : Clauses 36(2), 38, 41, 45 and 68(1), all of which require the insurer to give the insured certain information before the contract is entered into, will not apply in relation to interim contracts of insurance.

59. Rationale : While an insurer will still be required to inform the insured of his duty of disclosure before the contract is entered into (clause 23), requirements that the insurer provide information of the sort required by clauses 36(2), 38, 41, 45 and 68(1) could add substantially to an insurer's administrative costs and, consequently, lead to increased costs for insureds. In view of the large number of cover notes issued by an insurer, particularly in the domestic market, there will also be difficulties for an insurer in proving that he has given the information orally. This could lead to withdrawal of cover notes which would deprive insureds of important and timely short term cover.

Amendment No. (29) : Instalment contracts of general insurance (Clause 40)

60. Amendment : Subject to the remaining provisions of clause 40, an insurer will not be able to rely on a provision of a contract limiting the insurer's liability because of the insured's failure to pay a premium until at least one instalment has remained unpaid for at least 14 days (rather than for one month as clause 40 presently provides).

61. Rationale : The period of 14 days, rather than a month, is considered sufficient period of grace for payment of an overdue instalment of a premium.

Amendment No. (30) : Certain contracts of liability insurance (Clause 41)

62. Amendment : Clause 41 applies to certain contracts of liability insurance. Where such a contract does not provide cover for events occurring before the contract was entered into, the effect of the amendment will be that the insurer must notify the insured of that fact. The insured will not be required, as clause 41 presently requires, to advise the insured in writing that such cover may be available under another contract either with it or another insurer.

63. Rationale : The existing requirement under clause 41 is inappropriate and, possibly, unduly onerous. The insured is adequately protected if the fact that the contract does not extend to prior events is brought to his attention. He may then approach the insurers to obtain more extensive cover if he so wishes.

Amendment No. (31) : Maximum cover for premium (Clause 43)

64. Amendment : The amendment makes it clear that the insurer is only obliged to give greater cover in accordance with clause 43 if the contract is not only in the same terms (apart from the sum insured) but in respect of the same subject matter and risk as the contract the insurer actually entered with the insured.

65. Rationale : The amendment makes explicit what is already implicit in clause 43.

Amendment No. (32) : Average provisions (Clause 45)

66. Amendment : The effect of the amendment will be that, in relation to residential property, the operation of average provisions will only be ameliorated where the property insured is used primarily and principally for residential purposes for the insured, for persons with whom the insured has a family or a personal relationship or for both the insured and such persons. This limits the operation of clause 45 which would otherwise apply where the property insured was, for example, a block of flats which he leases to tenants on a commercial basis.

67. Rationale : In clearly limiting the effect of the ameliorating provisions of clause 45, the amendment is reflecting the underlying intention of clause 45 to protect non-commercial users of residential buildings.

Amendment Nos. (33), (34) and (35) : Average provisions (Clause 45)

68. Amendment : The effect of the amendments will be that an average provision (if included in a contract of insurance) will only come into operation where the sum insured is less than 80% (rather than 70% as clause 45 presently provides) of the value of the property at the time the contract was entered into. The figure of 80% (rather than 70%) will also be used in the formula provided in clause 45 to calculate the amount by which the insurer may reduce the insured's claim where an average provision does operate.

69. Rationale : In practice, most insurers do not rely upon average provisions (if any) in a contract unless the sum insured is less than 80% of the value of the property. This practice should be reflected in the Bill. The insured will be allowed a 20% margin for error in valuing his property and will not be affected by subsequent inflation. (Under clause 45 that valuation is taken at the time the contract was entered rather than, as is usual under average provisions, at the time when loss occurred).

Amendment No. (36) : Pre-existing conditions (clause 47)

70. Amendment : The amendment separates the substance of clause 47 into two separate clauses. Clause 47 will now deal with a claim under a contract of insurance where the claim is made in respect of a loss that occurred as a result, in whole or in part, of a defect or imperfection in a thing. Clause 47A will apply where the loss has occurred as a result, in whole or in part, of a sickness or disability of the insured.

71. There are two changes of substance effected by the amendment. The first enables regulations to be made to declare that new clause 47 does not apply to certain classes of contracts. The second ensures that the test whether the insured ought to have been aware of the defect or the pre-existing sickness or disability is based on the concept of a reasonable person in the circumstances.

72. Rationale : The power to exclude certain classes of contract by regulation will ensure that an insurer may, in the case of certain prescribed classes of commercial insurance, avoid liability for existing defects. It may be quite reasonable in certain cases for an insurer to be able to do this under the contract, e.g., latent defects in components used by a building contractor. In such cases, the insured may have remedies against the supplier of the goods and be in a position to pursue those claims. The second amendment is consistent with the amendments made to clauses 22, 24, 27 and 36.

Amendment No. (37) : "Contracting out" prohibited (clause 52)

73. Amendment : The amendment will tighten the operation of clause 52 to ensure that the operation of the Bill cannot be excluded or modified to the prejudice of a person other than the insurer. Clause 52, as presently drafted, renders void any term of the contract having this effect. Clause 65 as amended will now expressly extend to a provision of the contract which is not set out in the contract but is incorporated by another provision of the contract, as well as to the actual provisions of the contract.

74. Rationale : The Bill is intended to ensure that a fair balance is struck between the interests of insurers, insureds and certain third parties and to ensure that the provisions in such contracts operate fairly. Some clauses of the Bill do, subject to the observation of certain formalities, permit a contract to modify certain provisions of the Bill (e.g. clause 62 relating to the cancellation of instalment contracts of general insurance). The balance achieved by the Bill would be upset if the insurer could "contract out" and so modify or exclude the effect of its provisions. The amendment ensures that the insurer cannot "contract out" either directly or indirectly. Clause 52, as amended, will be consistent with section 68 of the Trade Practices Act 1974.

Amendment No. (38) : Variation of contracts of insurance  
(Clause 53)

75. Amendment : This amendment provides that certain contracts may, by regulation, be excluded from the operation of clause 53.

76. Rationale : In certain classes of contract it may be appropriate that the insurer should be able to alter the terms of the contract as appropriate. In the case of a contract of commercial insurance a change in the subject matter or the purposes for which it is used may substantially alter the risk and justify variation of the premium or of the terms, e.g., where a warehouse is changed to a manufacturing workshop.

Amendment No. (39) : Fraudulent claims (Clause 56)

77. Amendment : The amendment will define with greater specificity the court's power to order an insurer to pay, in respect of a fraudulent claim, an amount that it considers just and equitable in the circumstances. The court may exercise its power if only a minimal or insignificant part of the claim is made fraudulently or non-payment of the remainder

of the claim would be harsh and unfair. In exercising the power, the court must have regard to the need to deter fraudulent conduct as well as any other relevant matter.

78. Rationale : This amendment restricts the circumstances in which relief can be provided where a claim under an insurance contract has been made in part on a fraudulent basis. It will ensure that a court can only require payment in full or in part of a claim tainted by fraud where only a small part of the claim was so affected. This will, however, enable a court to declare in appropriate cases that the "punishment" of having the whole of a claim disallowed can be adjusted where this would be unduly harsh. For example, it may be unfair for an insured to have the whole of a legitimate claim for the loss of contents worth \$100,000 disallowed because he fraudulently claimed for the loss of a non-existent watch worth \$50. The amendment to clause 56 is consistent with the inclusion of a more stringent test in clause 32 relating to a contract avoided because of fraudulent misrepresentation or non-disclosure.

Amendment No. (40) : Insurer to notify of expiration of contracts of general insurance (Clause 58)

79. Amendment : The insurer will be required to notify the insured of the expiration of a contract of general insurance 14 days (rather than 21 days as clause 58 presently provides) before the expiration of the contract.

80. Rationale : It is general practice in the insurance industry to give 14 days' notice. Any greater notice is considered to be unsatisfactory as it is generally forgotten by the majority of insureds.

Amendment No. (41) : "Free-look" period : life insurance  
(Clause 64)

81. Amendment : Blanket superannuation contracts of insurance will be excluded from the operation of clause 64.

82. Rationale : This amendment accords with a recommendation made by the Law Reform Commission in its Report on Insurance Contracts (ALRC 20). It is inappropriate for the "free-look" provisions in clause 64 to apply to insurance arranged in connection with a blanket superannuation contract. Such contracts involve a contract between the trustee of the superannuation deed and the life insurer rather than between the member of the scheme and the insurer.

Amendment No. (42) : "Free-look" period : life insurance  
(Clause 64)

83. Amendment : The insured will be deemed to have received the policy document at the time at which it would have been delivered in the ordinary course of post unless the insured proves that, through no fault of his own, he did not receive it.

84. Rationale : Clause 64 presently provides that the insured will have 14 days from the time he receives the life policy to cancel the contract. There may, however, be doubt as to when the insured actually "receives" the policy document. The amendment will clarify this provision and both the insurer and the insured will be in a position to ascertain when the "free-look" period begins and concludes.

Amendment No. (43) : Subrogation to rights against family, &c.  
(Clause 65)

85. Amendment : This is a drafting amendment to ensure that sub-clause (1) is read subject to sub-clause (1A).

Amendment No. (44) : Subrogation to rights against family, &c.  
(Clause 65)

86. Amendment : Clause 65 will not apply where the conduct of the third party that gave rise to the loss occurred in the course of or arose out of his employment by the insured or amounted to serious or wilful misconduct.

87. Rationale : As drafted, clause 65 could encourage collusion between an insured and a third party so that the insured can collect under the policy and the third party cannot be proceeded against. The amendment will ensure that the insurer will retain his right of subrogation where the third party's actions amounted to serious or wilful misconduct. Clause 65 will then be consistent with clause 66.

88. As drafted, there may be doubt whether clause 65 (which applies to members of the insured's family) or clause 66 (which applies to the insured's employees) would apply where the third party is an employee who is a member of the insured's family. The amendment makes it clear that, in that case, clause 66 applies.

Amendment No. (45) : Rights with respect to moneys recovered  
under subrogation (Clause 67)

89. Amendment : The amendment will clarify the amount of money which an insured may recover from the insurer where the insurer has recovered an amount in exercising his rights of subrogation. Unless the contract expressly provides otherwise, the insured may not recover from the insurer an



amount that, when added to the amount recovered under the contract, exceeds the amount of the insured's loss. Nor may the insured recover from the insurer a sum greater than the difference between the sum recovered by the insurer by virtue of exercising its right of subrogation and the sum it has paid to the insured under the contract. In calculating the amount it has recovered by virtue of subrogation, the insurer is entitled to deduct the legal and administrative costs it has incurred in connection with the recovery of the amount.

90. Rationale : The amendment clarifies the existing clause 67. It also recognises that the insurer should not have to bear the administrative and legal costs involved in recovery action where that action leads to the insured recovering an amount in addition to that which he has received under the contract of insurance towards covering his loss.

Amendment No. (46) : Rights with respect to moneys recovered under subrogation (Clause 67)

91. Amendment : This amendment will allow the insurer to deduct from the amount recovered from the third party any legal and administrative costs he has incurred in exercising his right of subrogation.

92. Rationale : When the insurer has incurred such costs, it is just and equitable that it should be able to deduct them before the payment of any remaining amount to the insured.

Amendment No. (47) : Giving of information to insureds (Clause 69)

93. Amendment : The effect of this amendment is to extend the operation of clause 69 to cover provisions of the Bill requiring or permitting information to be given to the insured before a loss occurred. As presently drafted, clause 69 applies only where the information is required or permitted to be given before the contract is entered into.

94. Rationale : The amendment relates specifically to clause 38 which requires the insurer to give the insured certain information "before the loss occurred". In extending clause 69 to cover clause 38, the amendment recognises the practical difficulties which may face an insurer attempting to give the insured the appropriate notice while recognising that the insured requires the information.

Amendment Nos. (48) - (52) - Giving of information to insureds (Clause 69)

95. Amendment : As presently drafted, the effect of clause 69 is that an insurer who is permitted to give a notice to the insurer orally, must also give written notice "as soon as it is reasonably practicable to do so". Amendment No. (48) clarifies the insurer's obligation by providing that the insurer must give the written notice within 14 days after the day on which the contract was entered into or the loss occurred, as the case may be. Amendment Nos. (49) - (52) are consequential upon this amendment.

96. Rationale : The amendment will clarify the insurer's duty to send a written notice by fixing the time within which it must be sent. It will remove doubts which clause 69, as presently drafted, causes by its more flexible provision that the written notice must be given "as soon as it is reasonably practicable to do so". At the same time the amended time limit of 14 days should provide sufficient flexibility for the insurer.

Amendment No. (53) - Giving of information to insureds (Clause 69)

97. Amendment : This amendment is consequential upon amendment No. (47) which extends the operation of clause 69 to cover provisions of the Bill requiring or permitting information to be given to the insured before a loss occurred.

Amendment No. (54) : Agency (Clause 71)

98. Amendment : This amendment takes account of those provisions of the Bill permitting or requiring the insurer to give a copy of a document to the insured. It will ensure that the operation of the agency principles set out in clause 71 in relation to the giving of a notice, a statement or information will apply equally to the giving of a document.

99. Rationale : The amendment follows the amendment to clause 38 under which a copy of the policy document or a provision of the contract may be given to the insured.

Amendment No. (55) : Agency (Clause 71)

100. Amendment : The amendment is a drafting amendment and removes inconsistency between sub-clauses 69(2) and 69(3) as drafted.

101. The effect of clause 71, which sets out the principles of agency which will apply in relation to the provision of information under the Bill, will be:

- (1) Where the contract of insurance is arranged for the insured by an insurance broker who is not also acting as an agent for the insurer in entering into the contract of insurance (i.e. who is not acting under a "binder" as defined in clause 12) any provision requiring that the insured be given information will not apply (clause 71(1)).
- (2) Where the contract of insurance is arranged for the insured by a person who acts as his agent but who is not an insurance intermediary, that information, if given to that person, will be deemed to have been given to the insured (sub-clause 71(2)). Any insurance intermediary, other than a broker not

acting as a binder is deemed, in relation to the provision of information under the Bill, to be the agent of the insurer and not of the insured (sub-clause 71(3)).

102. Rationale : The amendment removes an inconsistency from clause 71 as drafted.

Amendment No. (56) : Agency (Clause 71)

103. Amendment : This amendment is consequential upon Amendment No. (54) to clause 71.

Amendment No. (57) : Insurance arranged in connection with supply of goods and services (clause 73)

104. Amendment : A reference to the supply of services in clause 73 will include a reference to the provision of credit.

105. Rationale : Clause 73 applies to a supplier of goods or services who also proposes to arrange a contract of insurance in connection with the supply of those goods and services. Before the contract of insurance is entered, the insurer is required to give the insured certain information about that contract. In doing so, clause 73 accords in principle with similar provisions under State consumer protection legislation e.g. Consumer Transactions Act 1972 (S.A.). State legislation, however, extends to contracts of insurance arranged in conjunction with the provision of credit and the Bill should be amended not only for consistency but also to ensure that the Bill does not provide less adequate protection to the insured than existing legislation.

Amendment No. (58) : Reasons for cancellation, & c. to be given (Clause 75)

106. Amendment : Where the insured's state of health was a reason in refusing a proposal for a contract of general insurance, cancelling the contract, failing to renew it or offering insurance cover on terms less advantageous than the terms it would otherwise offer, the amendment will give the options he already has under clause 75 in relation to a contract of life insurance. That is to say, the insurer will be obliged to give his reasons but will have the option of giving those reasons either to the insured or to a medical practitioner nominated by the life insured.

107. Rationale : The amendment recognises that, just as in the case of life insurance, there may be occasions in respect of a contract of general insurance when the insured requires some protection from the harmful consequences which could flow from his being given information about his health directly.

Amendment No. (59) : Contribution between insurers (Clause 76)

108. Amendment : The amendment will ensure that Northern Territory insurance is taken into account in the same manner as State insurance.

109. Rationale : This amendment is consequential upon Amendment No. (4) which amends clause 10 to exclude Northern Territory (as well as State insurance) from the application of the Bill.





