

reform

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Insurance Law Shake-up

"Buy an annuity cheap, and make your life interesting to yourself and everybody else that watches the speculation."

C. Dickens, *Martin Chuzzlewit* (1844).

Insurance was once described as an "ingenious modern game of chance" in which the player "labours under the delusion that he is beating the man who keeps the table". The Australian Law Reform Commission has now had a new look at the dice. Suggestions for major reform of the laws governing Australia's insurance contracts are the result.

The A.L.R.C. Discussion Paper #7, *Insurance Contracts*, contained 80 recommendations for reform of all aspects of insurance law except marine, workers' compensation and compulsory third party insurance. These subjects are excluded from the A.L.R.C. Terms of Reference. The Discussion Paper was the subject of a busy round of public sittings and seminars organised in all State capitals and in Darwin and Canberra during November 1978. Attendance at the public sittings reached a new

record. In Sydney nearly 200 people crowded into the Hearing Room and large numbers came forward to make oral submissions. The numbers attending public sittings in other centres were of the same order, indicating the growing preparedness of the community in Australia to come forward and openly debate defects in the law and options for its improvement.

In addition to the public sittings, the Commissioners have attended major seminars organised by the Australian Insurance Institute in every capital city. Hundreds of executives from all sections of the insurance industry have attended these seminars. At each of them, the Commissioner in charge of the Reference, Mr. D. St.L. Kelly, has outlined the aims of the A.L.R.C. reform proposals and answered questions on them. The participants then divided into small working groups, each of which has concentrated on particular aspects of the 64-page A.L.R.C. Discussion Paper. The result has been a remarkable combination of talent focusing on the improvement of insurance law. No time-honoured principle has been immune from examination.

Insurable interest, *uberrima fides* and the right of subrogation are instances of long-accepted principles submitted to fresh scrutiny.

The A.L.R.C. Discussion Paper emphasises the importance of insurance in the Australian economy. At the end of 1977, the investments of life offices were said to exceed eight billion dollars. The equivalent figure for the general insurance industry was approximately three billion dollars. The A.L.R.C. accepts that reform of the law governing such a vital industry should not be such as to interfere unnecessarily with its important economic role.

Commissioner David Kelly explained to the insurance seminars that one of the major aims was the repatriation of insurance law from English casebooks into an Australian statute. He listed among the factors giving rise to the need for insurance law reform:

- development of insurance law in earlier times when insurers had less information available to them than today;
- the inclusion in some insurance contracts of special terms not specifically discussed with the insured and not reasonably expected by him;
- insufficient recognition of the extent to which consumers rely on insurance agents;
- the provision of policy documents with language intelligible only to the chosen few.

Mr. Kelly said that the ultimate aim of the A.L.R.C. was to ensure that the law of insurance contracts protected the public's expectation that when an insurance contract was purchased, a consumer would be covered against normal losses and liabilities, and that unexpected or irrelevant grounds for refusing to meet a policy could not be unfairly relied upon.

Among the major proposals put forward in the Discussion Paper are:

- consolidation of insurance contracts law in an Australian statute to be passed by the Federal Parliament;
- compulsory provision of "standard cover" to ensure that ordinary policies, e.g. householders policies, contain a minimum protection that cannot be reduced;
- prohibition of exclusions, e.g. sex discrimination, unless supported by statistical or actuarial data;

- establishment of a fund to protect policyholders in the event of insurance company insolvency;
- abolition of right to rely on a breach of the term of the policy if the breach neither caused nor contributed to the loss;
- provision of a fourteen-day cooling-off period in all long-term insurance contracts;
- abolition of "average" by which recovery is reduced if the value insured is understated;
- major limitations on the right of subrogation;
- enactment of the rule that insurance companies are to be responsible for the acts of their employees or agents, particularly in the completion of proposal forms;
- compulsory registration and professional indemnity of all insurance brokers;
- provision for conciliation of insurance contract disputes by the Insurance Commissioner.

The A.L.R.C. Discussion Paper received a good press. The *Sydney Morning Herald* (24 Oct.) admitted that it did not make "light bedside reading". However, it commended as "long overdue" reform of the situation in which the vast majority of purchasers of insurance cannot hope to have a full understanding of their policies. It commended the suggested requirement that the policy should be supplemented by a short comprehensible document cleared by the relevant Insurance Commissioner:

"[I]t is fair to say that the effect of many of the proposals will be to improve the position of people who take out policies, especially in giving them clearer and fuller information."

The *Melbourne Herald* takes up the same theme:

"What makes the major proposals immediately attractive," says the Editor, "is that they see insurance through the eyes of the ordinary person—the one who depends on insurance in times of trouble and finds . . . too often that the trusted cover is defective."

"Top priority" says the *Melbourne Age* ". . . should be given to simplifying policies and making them more accessible".

The *Australian Financial Review* (24 Oct.) singled out the controls on insurance brokers

as the most important proposal. However, the Editor then had something to say about the A.L.R.C. processes of consultation:

"One of the more fascinating aspects of the Fraser style of government has been the use of the Law Reform Commission. Where the Whitlam Government might have charged into a socially innovative area such as national compensation with legislation at the ready, the Fraser Government . . . has tended to the quieter approach of handing such issues over to the Law Reform Commission. Often, the public debate technique in the latter approach can result in more being accomplished. The latest Law Reform Commission Discussion Paper on Insurance concerns an industry where the Whitlam government tried and failed with national compensation and a national superannuation scheme. Although the Discussion Paper is limited to the less controversial area of insurance contracts, the recommendations nevertheless provide the Fraser government with some fundamental decisions on its relations with and controls over private industry."

Whilst commending the recommendations on information to insurance purchasers and regulation of insurance brokers, the recommendations on the establishment of a fund to protect policyholders was considered premature before there was a general "cleaning up" of the *Insurance Act* to provide greater protection to policyholders. Subsequent articles in the *Financial Review* have suggested that a distinction should be drawn between "consumer" insurance contracts and the rest. A similar point has been made at the A.L.R.C. public sittings. The Commissioners are now analysing the suggestions, ideas and criticisms received since the publication of the Discussion Paper. A report with draft legislation is expected some time in 1979. Copies of the Discussion Paper are available free of charge to those who are prepared to comment on it. Address: Box 3708, G.P.O., Sydney, Australia.

Sun Power Law Reform

"The sun shines and warms and lights us and we have no curiosity to know why this is so; but we ask the reason . . . for pain, and hunger and mosquitoes and silly people."

Emerson, *Journals* (1830).

The rapid depletion of the world's fossil fuels and the controversies surrounding alter-

native sources of mankind's energy needs has at last caught the attention of law reformers. A Sub-committee of the Law Reform Committee of South Australia, known as the Committee on Law and Solar Energy, was set up by the Government of that State in September 1976. The Sub-Committee has now issued a Discussion Paper titled *Solar Energy and the Law in South Australia*. The paper addresses the legal problems facing and likely to face the "potential increase in the use of solar energy". The Chairman of the S.A.L.R.C., Mr. Justice Zelling, heads the Committee which comprises Mr. D. Bollen Q.C., an officer of the Department of Mines and Energy, the Dean of Engineering in the University of Adelaide and a Senior Lecturer in Physics at Flinders University. Consultants have been appointed with scientific skills. The Committee is a truly inter-disciplinary exercise.

The Terms of Reference on solar energy require the S.A.L.R.C. to consider

- legal problems facing the increased use of solar energy;
- rights of access to solar radiation;
- building and planning implications;
- consumer protection for energy appliances;
- control of solar radiation.

The Committee has issued 22 tentative conclusions. Amongst these is an opinion that the direct use of the sun could contribute up to 12% of Australia's energy requirements by the year 2000. This could include 70% of energy requirements for water heating and 50-80% of household energy. Various suggestions are made for building design, removal of government taxes on solar equipment and encouragement of research on applications of solar energy. The establishment of an Energy Advisory Service to assist consumers, builders and architects is proposed. Present public authorities (electricity and gas) are urged to play an important part in encouraging the alternative use of solar energy by appropriate tariff structures.

The adaptation of the law of easements to ensure a right of access to the sun is proposed. Although it is relatively simple to define the scope of the unimpeded access necessary to use solar collectors effectively, it is not so simple, says the Committee, to suggest how an individual right to such access can be implemented.