

1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

INSURANCE LAWS AMENDMENT BILL (No.2) 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,  
the Hon John Dawkins, MP)



## **INSURANCE LAWS AMENDMENT BILL (No.2) 1993**

### **GENERAL OUTLINE AND MAIN PURPOSE OF THE BILL**

This Bill will give effect to measures to substantially increase the effectiveness of the Insurance Contracts Act 1984 generally, and in particular, to increase the level of protection available to purchasers of consumer credit insurance products.

The Trade Practices Commission Report on Consumer Credit Insurance, and the findings of a Government Working Party formed to determine a Government response to the Report, revealed significant problems in the consumer credit insurance market. Among other things, they found that purchasers of consumer credit and other insurance products may not be aware of the costs and benefits of policies they are sold.

The Report of the Government Working Party also noted that the Insurance Contracts Act, which seeks to ensure a fair balance between the interests of insurers and insureds, was self administering, with no power for Government intervention. It concluded that the effectiveness of the Insurance Contracts Act would be improved by its more active administration and enforcement.

To address these issues, this Bill amends the Insurance Contracts Act to:

- . make the Insurance and Superannuation Commissioner responsible for the general administration of the Insurance Contracts Act, and provide for representative action on behalf of insureds by the Commissioner where this is in the public interest;
- . require pre-sale, point-of-sale and post-sale notices to be given by insurers to purchasers of consumer credit insurance products. The Bill also provides that similar notices may be prescribed for other types of insurance. These notices will improve the capacity of purchasers of insurance products to make informed decisions about insurance, particularly where it is sold as a part of a complex package involving other financial transactions;
- . provide a 14 day cooling-off period for purchasers of consumer credit insurance products;
- . amend Section 15 of the Insurance Contracts Act (and also repeal Subsection 87(1E) of the Trade Practices Act) to clarify the right of access of insureds to the protection of the Trade Practices Act in relation to unconscionable conduct.

The Bill also amends the General Insurance Supervisory Levy Act 1989 and the Life Insurance Supervisory Levy Act 1989 to raise the statutory upper limit of levy which may be collected from \$15,000 to \$17,000 for general insurers and from \$28,000 to \$70,000 for life insurers.

The increase in the maximum levy which may be charged allows for recovery from the industries of the cost of administration of the Insurance Contracts Act. In the case of the life insurance levy, the amendment also provides for the increased costs of supervision that will arise from amendments to the Life Insurance Act which were announced by the Government in July 1993 and which are expected to be introduced into the Parliament next year.

#### **FINANCIAL IMPACT STATEMENT**

The measures for added protection for purchasers of insurance products generally, and CCI products in particular, will result in additional supervisory costs being incurred by the ISC.

Resources will be necessary to enable the ISC to monitor the CCI class of business and the Act; to ensure that appropriate publicity and educational measures are provided regarding the operation of the Act; and to enable action to be taken to enforce the Act where this is in the public interest. The ISC estimates that the additional resources needed to give effect to this package of measures will be \$130,000 in 1993/94 (to be absorbed into the current ISC vote) and \$336,000 each following year.

These additional costs will be recovered through increases in the General Insurance Supervisory Levy and the Life Insurance Supervisory Levy.

#### **EXPLANATORY NOTES ON INSURANCE LAWS AMENDMENT BILL (No.2) 1993**

##### **CLAUSE 1 SHORT TITLE**

1. This clause provides the mode of citation of the Bill.

**CLAUSE 2 COMMENCEMENT**

2. Subclause (1) provides for Clauses 1, 2 and 3 of the Bill and items 1, 2, 4, 5, 7, 17, 18 and 19 of the Schedule to commence on Royal Assent. Item 1 relates to the General Insurance Supervisory Levy Act 1989. Items 2, 4, 5, 7 and 17 relate to the general administration of the Insurance Contracts Act 1984. Clause 18 relates to the Life Insurance Supervisory Levy Act 1989 and clause 19 to the Trade Practices Act 1974.

3. Subclauses (2) and (3) provide for the amendments contained in the remaining items to commence on proclamation or 6 months after Royal Assent.

**CLAUSE 3 AMENDMENT OF OTHER ACTS**

4. Self explanatory.

**THE SCHEDULE - AMENDMENTS OF ACTS****GENERAL INSURANCE SUPERVISORY LEVY ACT 1989****ITEM 1 Section 6**

5. This item amends the "statutory upper limit" of the general insurance supervisory levy. The limit is being increased to enable the cost of administering the Insurance Contracts Act to be recovered from the industry.

**INSURANCE CONTRACTS ACT 1984****PART I PRELIMINARY****ITEM 2 SUBSECTION 11(1)**

6. This item provides for the insertion within subsection 11(1) of a definition of "Commissioner", being the Insurance and Superannuation Commissioner or a person acting for the time being as the Insurance and Superannuation Commissioner, as appointed under the Insurance and Superannuation Commissioner Act 1987.

## ITEM 3 SUBSECTION 11(1)

7. This item provides for the insertion within subsection 11(1) of a definition of "consumer credit insurance".

**PART IA ADMINISTRATION**

## ITEM 4

8. This Part sets out the administration of the Insurance Contracts Act 1984 ("the Act"), as proposed sections 11A through 11H.

9. Proposed section 11A provides for the Insurance and Superannuation Commissioner to have responsibility for the general administration of the Act, subject to any directions of the Treasurer.

10. Proposed section 11B sets out the powers of the Commissioner as to the administration of the Act.

11. Proposed section 11C sets out the power of the Commissioner to review insurance documents provided by an insurer:

- . Proposed subsection (1) provides that, upon receipt of a notice in writing from the Commissioner, an insurer is required to provide copies of documents to the Commissioner that are specified in the notice or that relate to insurance cover of a kind specified in the notice, within 30 days of receipt of the notice, or such longer period as is specified in the notice.
- . Proposed subsection (2) requires an insurer, subject to reasonable excuse, to comply with the requirements of a notice under proposed subsection (1), otherwise a penalty is incurred.
- . Proposed subsection (3) prescribes the conditions on which an insurer would be required to give to the Commissioner any document dealing with the insurance cover provided to a particular person.
- . Proposed subsection (4) provides for an insurer to reasonably refuse or fail to comply with the requirements of a notice under proposed subsection (1) if to do so would tend to incriminate the insurer.

12. Proposed section 11D sets out the power of the Commissioner to review administrative arrangements, etc. of an insurer:

- . Proposed subsection (1) provides that, upon receipt of a notice in writing from the Commissioner, an insurer is required to provide particulars, statistics or reference material specified in the notice, within 30 days of receipt of the notice, or such longer period as is specified in the notice.
- . Proposed subsection (2) provides for certification of statistics or documents to be given to the Commissioner by an auditor or director of an insurer.
- . Proposed subsection (3) requires an insurer, subject to reasonable excuse, to comply with the requirements of a notice under subsection (1), otherwise a penalty is incurred.
- . Proposed subsection (4) provides for an insurer to withhold from the Commissioner, any document or information that reveals the identity of a particular insured, or from which the identity of a particular insured can be deduced.
- . Proposed subsection (5) provides for an insurer to reasonably refuse or fail to comply with the requirements of a notice under proposed subsection (1) if to do so would tend to incriminate the insurer.

13. Proposed section 11E provides that the examination of documents by the Commissioner does not imply compliance with the Act by an insurer.

14. Proposed section 11F provides for the protection of information by the Commissioner for purposes of the Act. It sets out the duties of non-disclosure created for the purposes of section 70 of the Crimes Act 1914:

- . Proposed subsection (1) sets out the object of the section, namely to create duties of non-disclosure.
- . Proposed subsection (2) sets out the circumstances where the Commissioner or his staff, acting under or for the purposes of the Act, must not communicate to any person information acquired on the affairs of any other person.
- . Proposed subsection (3) prescribes when proposed subsection (2) is not to apply, that is when a person communicates information in the performance of a duty in connection with the Act.

- . Proposed subsection (4) qualifies proposed subsection (2) such as not to prevent the Commissioner or his authorised staff from communicating information or producing documents to the Minister, a court, or a person when it is in the public interest in the opinion of the Minister.
  - . Proposed subsection (5) provides that past and present Commissioners and their staff are not required to provide information or documentation gained under the Act to a court, except when it is necessary to do so for the purposes of the Act.
  - . Proposed subsection (6) provides for communication of information to other Departments for purposes of provision of advice to Ministers.
  - . Proposed subsection (7) provides for the protection of information obtained by a person as per proposed subsection (6).
  - . Proposed subsection (8) is self-explanatory.
15. Proposed section 11G sets out the conditions under which the Commissioner may delegate to a person, any of the Commissioner's powers under the Act or its regulations.
16. Proposed section 11H provides that the Commissioner is to give an annual report on the working of the Act to the Treasurer for presentation to Parliament, within 3 months after the end of the financial year.

## **PART II THE DUTY OF THE UTMOST GOOD FAITH**

### **ITEM 5 SECTION 15**

17. The amendments to section 15 (and subsection 87(1E) of the Trade Practices Act) reflect the recommendations in the Government Working Party report on consumer credit insurance, that the scope of the section and its relationship with the Trade Practices Act be clarified. This item amends section 15 of the Act to make it clear that other laws which might otherwise provide for judicial review of insurance contracts, and provisions which relieve consumers from certain consequences of making a misrepresentation, do not apply to insurance contracts.

18. The phrase "in respect of harsh, oppressive, unconscionable, unjust, unfair or inequitable contracts" in section 15 could be interpreted as having a potentially wider application than was originally intended. The effect of the amendment is to require examination of the judicial review provision in the other law in order to determine whether the relief provided is directly in respect of harsh, oppressive, unconscionable, unjust, unfair or inequitable contracts. Section 15 will only come into operation when the statute providing the relief uses one or more of these words.

19. For example, section 15 will have *no effect whatsoever* on whether an action is brought under section 52 or section 53 of the Trade Practices Act 1974, as neither section uses one of the operative words of paragraph 15(2)(a). Section 15 would, however, exclude the operation of section 51AB (which provides for relief in respect of unconscionable conduct) to the extent that the contract itself is the subject of the relief. In cases where it is pre-contractual conduct (rather than the contract itself) which is the subject of the action and the relief, section 15 will have no effect.

## **PART V THE CONTRACT**

### ITEM 6 SUBSECTION 40(2)

20. This item provides for the omission and substitution of a penalty amount.

### DIVISION 3 REMEDIES

#### ITEM 7 AFTER SECTION 55

21. This item inserts proposed section 55A into the Act under Part V Division 3. Proposed section 55A sets out the representative actions that, upon application, may be undertaken by the Commissioner, where the Commissioner is of the opinion that it is in the public interest to do so:

- . Proposed subsection (1) provides for representative action by the Commissioner on behalf of an insured.
- . Proposed subsection (2) provides for representative action by the Commissioner on behalf of a number of insureds.
- . Proposed Subsection (3) requires the written consent of the insured, or each of the insureds, that may be represented by the Commissioner under proposed section 55A of the Act.



**PART VII EXPIRATION, RENEWAL AND CANCELLATION**

## ITEM 8 SECTION 64

22. This item adds proposed subsection 64(5) to the Act. This proposed subsection clarifies a reference made in this section of the Act to a contract of life insurance as not to include a reference to a consumer credit insurance contract.

## ITEM 9 AFTER SECTION 64

23. This item inserts in Part VII of the Act, proposed section 64A which notifies a "cooling-off" period in respect of consumer credit insurance:

- . Proposed subsection (1) sets the conditions for cancellation of a contract of consumer credit insurance, that is at any time within 14 days after the insured receives a notice (post sale confirmation letter), referred to in proposed subsection 71A (5) in respect of the contract.
- . Proposed subsection (2) specifies the amount to be repaid to the insured by the insurer, if the insured cancels the contract.
- . Proposed subsection (3) sets the time for receipt of the said notice by the insured, that is at the time it would have been delivered in the ordinary course of post, unless the insured can prove it was not so received through no fault of the insured.

**PART VIII SUBROGATION**

## ITEM 10 SUBSECTION 65(5)

24. This item provides for the omission and substitution of a penalty amount.

**PART IX INFORMATION, NOTICES AND REASONS**

## ITEM 11 AFTER SECTION 71

25. This item inserts proposed section 71A into the Act. Proposed section 71A stipulates the notices to be provided by an insurer concerning certain kinds of insurance:

- . Proposed subsection (1) limits the application of proposed section 71A to consumer credit insurance contracts, or other prescribed contracts.
- . Proposed subsection (2) requires the insurer to ensure that a notice (pre-sale information brochure) is available to a person entering into a contract of insurance identified in proposed subsection (1). The notice is to be set out in a form and explained as prescribed by regulations. A penalty applies for non compliance.
- . Proposed subsection (3) requires the insurer to give a written notice (point of sale notice) as determined by regulations, to a proposed insured immediately before the insured enters into a contract of insurance identified in proposed subsection (1). A penalty applies for non compliance.
- . Proposed subsection (4) sets out how the insurer may comply with proposed subsection (3).
- . Proposed subsection (5) requires the insurer after a contract of insurance identified in proposed subsection (1) is entered into, to provide a further written notice by post to the insured. A penalty applies for non compliance.
- . Proposed subsection (6) provides for compliance with subsections (2) and (3) when a contract of insurance of a kind to which section 71A applies is entered into without any prior dealing between the insurer and the insured and at a place other than the premises of the insurer or of an agent of the insurer.

ITEM 12 SUBSECTION 73(1)

26. This item provides for the omission and substitution of a penalty.

ITEM 13 AFTER SUBSECTION 73(2)

27. This item adds proposed subsection 73(3) to the Act to ensure that, where compliance with proposed section 71A satisfies the notice requirements imposed on agents providing insurance with the supply of other goods and services under section 73, there is no need for the agent to separately comply with section 73.

ITEM 14 SUBSECTION 74(1)

28. This item provides for the omission and insertion of a penalty.

ITEM 15 SUBSECTION 75(1)

29. This item provides for the omission and insertion of a penalty.

ITEM 16 SUBSECTION 75(5)

30. This item provides for the omission and insertion of a penalty.

PART X MISCELLANEOUS

ITEM 17 AFTER SECTION 76

31. This item provides for the insertion of proposed section 76A into the Act which imposes liability on directors and employees etc:

- . Proposed subsection (1) notifies the circumstances for a director of a company, or an employee or agent to be in contravention of the Act and therefore guilty of an offence against the Act, punishable by penalty subject to proposed subsection (2).
- . Proposed subsection (2) prescribes the penalty provisions applying to a director of a company or an individual who is an employee or agent of a company, who is guilty of an offence where the company is in contravention of the Act.
- . Proposed subsection (3) prescribes the penalty provisions applying where a company of corporation would be acting as the agent of the individual and is in contravention of the Act.

**LIFE INSURANCE SUPERVISORY LEVY ACT 1989**

ITEM 18 SECTION 6 (DEFINITION OF "STATUTORY UPPER LIMIT")

32. This item amends the "statutory upper limit" of the life insurance supervisory levy. The limit is being increased to enable the cost of administering the Insurance Contracts Act to be recovered from the industry. The amendment also provides for the increased costs of supervision that will arise from amendments to the Life Insurance Act which were announced by the Government in July 1993 and which are expected to be introduced into the Parliament next year.

**TRADE PRACTICES ACT 1974**

## ITEM 19 SUBSECTION 87(1E)

33. This item provides for the omission of subsection 87(1E) from the Trade Practices Act. This subsection precludes an action under section 87 (which allows a court to make a variety of orders where the TPA has been contravened) from being taken in relation to an insurance contract which is subject to the Insurance Contracts Act. The amendment will allow the Court to make an order under section 87 in relation to unconscionable conduct concerning a contract of insurance where the order made would not operate on the contract itself ie in respect of pre-contractual conduct.

34. Section 87(1E) currently excludes any order made under section 87 in relation to unconscionable conduct even where the order does not operate on the contract. Section 15 of the Insurance Contracts Act 1984 operates to exclude any orders under section 87 where the contract of insurance is the subject of relief. There is therefore no need to require section 87(1E) to exclude such orders. The other remedies available under section 87 such as compensation will be available to the Court in such situations.







