

1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

INSURANCE (AGENTS AND BROKERS) BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Treasurer,
the Hon P.J. Keating, MP)

INSURANCE (AGENTS AND BROKERS) BILL 1984

GENERAL OUTLINE AND MAIN PURPOSES OF THE BILL

The Bill contains provisions designed to regulate the activities of life and general insurance brokers and, to an extent, life and general insurance agents and is largely based on recommendations made in the Report of the Law Reform Commission entitled "Insurance Agents and Brokers" issued on 25 January 1980 and tabled in Parliament on 16 September 1980.

The Bill is aimed at regulating this area of the insurance industry with a view to strengthening the financial stability of the industry overall; protecting the insuring public against the negligence or misconduct of an agent or broker; the minimisation of practices harmful to the insuring public; and the maintenance of standards of conduct of, and quality of advice offered by, agents and brokers.

The main provisions of the Bill will:

- establish the responsibilities of insurers for the conduct of their intermediaries;
- determine the arrangements concerning the discharge of financial obligations between an insured and intermediaries;

- deal with questions of misrepresentation by insurance intermediaries;
- require annual registration of brokers and permit suspension or cancellation of registration;
- establish financial controls and requirements for insurance which indemnifies brokers in respect of liabilities arising out of or in the course of their business operations;
- establish measures to minimise the risk of compromise of a broker's impartiality; and
- provide for a number of limits or checks on brokers holding clients' moneys to speed up their remittance to insurers and to ensure that moneys held by brokers and due to insureds are paid expeditiously.

The registration requirements of the Bill and related provisions are to be administered by the Insurance Commissioner with respect to general insurance brokers and the Life Insurance Commissioner with respect to life insurance brokers.

EXPLANATORY NOTES ON INSURANCE (AGENTS AND BROKERS) BILL 1984

PART I - PRELIMINARY

CLAUSE 1 SHORT TITLE

Self explanatory.

CLAUSE 2 COMMENCEMENT

This clause provides for most of the provisions of the Bill to come into operation on Royal Assent and for Part III (related to the registration of insurance brokers) to come into operation by Proclamation. The commencement of clause 10 upon Proclamation will enable a period of time for insurers and insurance intermediaries to make any adjustments in respect of the requirements contained in that clause. The requirements of clauses 12 and 37 are being withheld for the time being as part of the transitional arrangements which are to apply to the registration of insurance brokers.

CLAUSE 3 CROWN TO BE BOUND

Self explanatory.

CLAUSE 4 EXTENSION TO EXTERNAL TERRITORIES

Self explanatory.

CLAUSE 5 EFFECT OF ACT ON OTHER LAWS

This clause provides that the Bill is not intended to affect the operation of any other law except where the Bill either expressly or necessarily provides otherwise.

CLAUSE 6 APPLICATION OF ACT

Subject to clauses 7 and 8, the legislation extends to all insurance contracts and proposed insurance contracts and conduct connected therewith where the proper law of which is the law of a State or Territory to which this Bill will apply including where the contract, or a related contract, specifies that the proper law is some foreign law.

CLAUSE 7 EXCEPTIONS TO APPLICATION OF ACT

The legislation is not to apply to contracts and proposed contracts of reinsurance (as these do not directly affect the relationship between the insured, the intermediary and the insurer) and of health insurance offered by those funds subject to the provisions of the National Health Act.

CLAUSE 8 STATE AND NORTHERN TERRITORY INSURANCE

This clause provides for the legislation not to apply to State insurance or Northern Territory insurance or to joint insurance involving State insurance or Northern Territory insurance and some other insurer.

CLAUSE 9 INTERPRETATION

This clause sets out definitions of a number of words and expressions for the purposes of the Bill.

PART II - GENERAL

CLAUSE 10 INSURANCE INTERMEDIARIES OTHER THAN BROKERS TO OPERATE UNDER WRITTEN AGENCY AGREEMENTS

This clause will require an insurance intermediary (other than an insurance broker) to have a written agency agreement with an insurer before holding himself/herself out as entitled to arrange, or before arranging, insurance with the insurer. Concomitantly, an insurer is required not to cause or permit such an intermediary to hold himself/herself out as entitled to arrange, or to arrange, insurance with the insurer unless a written agency agreement is in force. . Agreements are to be provided by such intermediaries to the relevant Commissioner or the intending insured or insured on request and by insurers to the relevant Commissioner on request.

This provision takes into account the responsibilities placed on insurers under the Bill for the actions of insurance intermediaries (other than insurance brokers) and the need to clearly identify such intermediaries.

CLAUSE 11 LIABILITY OF INSURER FOR AGENTS AND EMPLOYEES

This clause provides that:

- . an insurer is responsible for conduct of its agents or employees which is relied on reasonably and in good faith by an insured or intending insured, even if the agent or employee acts outside the scope of his/her authority or employment;
- . an insurer is responsible for loss or damage resulting from such conduct, although the agent or employee remains liable to the insured or intending insured;
- . an agreement seeking to limit this responsibility is ineffective and it is an offence to make or offer to make such an agreement.

CLAUSE 12 CERTAIN INSURANCE INTERMEDIARIES TO BE AGENTS OF
INSURERS

This clause provides that insurance intermediaries are to be agents of the insurer, not the insured. The only exceptions are insurance intermediaries registered under this Act as brokers in connection with the type of insurance in respect of which they are registered.

CLAUSE 13 REPRESENTATIONS, &C., BY INTERMEDIARIES

This clause provides that it is an offence for an insurance intermediary, or for an agent or employee of an intermediary, wilfully and with intent to deceive to:

- . make false statements intended to be acted upon as to the amount payable under, or the provisions of, a contract or proposed contract of insurance;
- . misrecord or fail to disclose information that is material, or advise an intending insured to misrecord or fail to disclose information that is material, on a proposal form submitted to an insurer or otherwise to the insurer in relation to a proposed contract of insurance;

- . misrecord or fail to disclose information that is material, or advise an insured to misrecord or fail to disclose information that is material, on a claim form submitted to an insurer or otherwise to the insurer in relation to a claim under a contract of insurance.

CLAUSE 14 EFFECT OF PAYMENTS TO INTERMEDIARIES

Sub-clauses 14(1) and (2) provide that an insurer is responsible for moneys payable to the insurer which are received from an insured, or intending insured, by an insurance intermediary.

Sub-clause 14(3) provides that an insurer remains liable to an insured for any moneys payable to the insured by the insurer which were paid to an insurance intermediary.

Sub-clauses 14(4) and (5) provide that an agreement purporting to limit such responsibility or liability is void except to the extent that it enables an intermediary to set off against moneys payable to the insured moneys payable by the insured to the intermediary in respect of premiums.

CLAUSE 15 LIABILITY IN RELATION TO BINDERS

This clause provides that, where an insurance intermediary deals with an insurance contract or claim under a binder, the intermediary shall be deemed to be an agent of the insurer (who becomes responsible for his conduct under clause 11) not of the insured.

CLAUSE 16 DISCLOSURE BY PERSONS ACTING UNDER BINDERS IN RESPECT OF INSURANCE CONTRACTS

This clause provides that an insurance intermediary shall not act under a binder in respect of an insurance contract unless he has first informed the intending insured that he will be acting under the authority of the insurer and will be effecting the contract as agent of the insurer, not of the insured. Where it is not practicable, however, for the intermediary to so inform the intending insured before the contract is effected, he must do so as soon as is reasonably practicable afterwards. Contracts entered into without such information having been given are voidable at the option of the insured subject to certain rights and principles.

CLAUSE 17 DISCLOSURE BY PERSONS ACTING UNDER BINDERS IN
RESPECT OF CLAIMS

This clause provides that an insurance intermediary shall not act under a binder in respect of an insurance claim unless he has first informed the insured that he will be acting under the authority of the insurer and will be settling the claim as agent of the insurer not of the insured.

PART III - REGISTRATION OF INSURANCE BROKERS

CLAUSE 18 INTERPRETATION

This clause provides that, if the Bill is to apply to an external Territory, the commencement of this Part in relation to that Territory shall be interpreted as being at the date on which the Act applies to that Territory or the commencement of this Part whichever is the later.

CLAUSE 19 BROKERS NOT TO CARRY ON BUSINESS UNLESS REGISTERED

This clause provides that a person shall not, after the expiration of 6 months after this Part commences, carry on business as an insurance broker in relation to life insurance business or general insurance business unless he/she is registered in respect of that type of insurance business or both types and unless indemnity insurance in respect of any liabilities prescribed is in force.

CLAUSE 20 APPLICATIONS FOR REGISTRATION

This clause specifies how an application for registration should be made and provides penalties for false or misleading information submitted in connection with an application.

CLAUSE 21 REGISTRATION OF BROKERS

This clause provides that the Insurance Commissioner or the Life Insurance Commissioner shall register an applicant for one year provided specified indemnity insurance is in force, satisfactory audited accounts, where appropriate, have been provided and the registration fee has been paid. Sub-clause (2) provides, however, that the Commissioner may refuse to register an applicant if the Commissioner is aware that the applicant or one of its directors, employees or agents has been convicted of an offence referred to in clause 25.

Sub-clause (3) provides for yearly registration.

Sub-clause (4) provides that registration may be cancelled upon application by a registered insurance broker if the relevant Commissioner is satisfied that the registered broker is no longer carrying on business as an insurance broker.

Sub-clause (5) provides that the relevant Commissioner is to cause notice of registrations and cancellations of registration under the clause to be published in the Gazette.

CLAUSE 22 REGISTERS TO BE KEPT

This clause will require the Insurance Commissioner and the Life Insurance Commissioner to maintain a Register of General Insurance Brokers and a Register of Life Insurance Brokers respectively.

CLAUSE 23 INSPECTION OF REGISTERS, ACCOUNTS AND CONTRACTS

This clause provides that the Registers referred to in clause 22, together with accounts lodged by registered insurance brokers with either Commissioner and any contract of insurance referred to in paragraph 19(1)(b), will be available for public inspection. Such disclosure should assist insurers and insurance consumers generally.

CLAUSE 24 DELAY IN REGISTRATION OR RENEWAL

This clause will allow an insurance broker to continue to carry on business as a broker pending registration where the broker carried on business prior to the commencement of the registration requirements, has lodged an application and has not been refused registration, and

complies with so much of the registration requirements as the relevant Commissioner specifies. This provision also applies to a registered insurance broker seeking a renewal of registration and is aimed at avoiding any unnecessary hardship to an insurance broker pending a decision on application for registration.

CLAUSE 25 SUSPENSION OR CANCELLATION OF REGISTRATION

This clause provides that the relevant Commissioner may suspend, for an appropriate period, or cancel registration (such suspension or cancellation to be published in the Gazette) if the person, or one of its directors, employees or agents is convicted of an offence against a law of any country in respect of conduct of insurance or in respect of dishonest conduct, which offence, in the Commissioner's opinion, renders the person unfit to carry on insurance broking business.

CLAUSE 26 INSURANCE BROKING ACCOUNTS

This clause provides that a registered insurance broker shall pay into an "insurance broking account" maintained with a bank all moneys received from an insured or intending insured for an insurer, or from an insurer for an insured or intending insured. Sub-clause (3) limits the purposes for which moneys may be withdrawn from that account. Sub-clause (4) provides for the investment in

prescribed securities of funds received from an insured or intending insured for general (but not for life) insurance contracts.

Sub-clauses (6) to (8) provide for the broker to make up any loss, and to retain any profit, resulting when such investments are realised and to retain any interest, dividend or other income earned from those investments or from his insurance broking account. Sub-clauses (9) and (10) provide that moneys in the broking account and the securities in which those funds have been invested may not be attached etc., except by the persons on whose behalf they were received but had not been paid.

CLAUSE 27 DUTIES OF BROKERS IN RELATION TO PREMIUMS, &c

This clause provides for a number of limits or checks on a broker holding clients' moneys in relation to the placement of insurance business and generally makes a broker more accountable for timely payment of those moneys to those entitled to receive them.

Sub-clauses (1) and (2) provide for the broker, where he/she has received premium moneys and knows the amount of the premium, to pay the premium to the insurer within a maximum of 90 days, or if that is not practicable as soon as is reasonably practicable thereafter, from the inception of cover or from the first day of the period to which an instalment of premium relates.

Sub-clause (3) provides that where a broker has not received the premium or instalment premium at the expiration of the 90 day period the broker must notify the insurer within 7 days.

Sub-clause (4) provides for the broker, where he/she has received premium moneys but does not know the amount of the premium, to pay to the insurer 75% of the estimated premium in respect of a new contract or 75% of the previous year's premium in respect of a renewal of a contract within the 90 day period referred to above.

Sub-clause (5) provides that, in a case where sub-clause (4) applies, the broker must also notify the insurer within 10 days of the acceptance of the risk that the risk has been accepted but that the amount of the premium is not known.

Sub-clause (6) makes it clear that an insurer may receive the premium at a time earlier than that referred to in the above sub-clauses. It also permits an insurer to authorise a broker to pay statutory charges on the insurer's behalf from premium moneys and allows a broker to exercise any legal rights available to the broker in respect of setting off commissions etc.

Sub-clause (7) reinforces sub-clauses (1) and (4) by taking into account the situation where the contract is accepted by another intermediary on behalf of an insurer. In such cases this sub-clause allows for the premium to be paid to that other intermediary.

Sub-clause (8) is similar in effect to sub-clause (7) but applies to the giving of notices to another intermediary.

Sub-clause (9) provides that, where a broker has recieved moneys from his client and a related contract has not been accepted within 30 days of the receipt of those moneys, the broker has 7 days within which to inform his/her client of that fact.

Sub-clause (10) provides that where a broker receives moneys from an insurer, eg claims moneys, for an insured the broker must pay them to, or on behalf of, the insured within 7 days of their receipt or, if that is not practicable, as soon as is reasonably practicable thereafter.

Sub-clause (11) is similar in effect to sub-clause (6) but applies to claims moneys and setting off fees etc. The payment of statutory charges is not relevant.

Sub-clause (12) prevents an insurer, insured or intending insured from consenting to an arrangement with a broker which would undermine the requirements of the clause.

CLAUSE 28 DISTRIBUTION OF INSURANCE BROKING ACCOUNT MONEYS
ON INSOLVENCY, &c.

This clause sets out how moneys in insurance broking accounts and securities in which those moneys have been invested are to be distributed if a registered insurance broker becomes insolvent.

CLAUSE 29 BROKERS NOT BOUND BY CERTAIN AGREEMENTS, &c.

This clause provides that a registered insurance broker is not bound by any agreement which would prevent him placing his business with any insurer he wishes (except when he is effecting a contract under a binder given by an insurer); and that it is an offence to enter into any such agreement.

CLAUSE 30 MISDESCRIPTION OF BUSINESS

This clause provides that a registered insurance broker shall not describe himself or his business in such a way as to lead persons to consider he is a registered broker in a type of insurance for which he is not registered or that he is an insurer.

CLAUSE 31 BROKERS TO DISCLOSE AGENCY

This clause provides that an insurance broker registered in either life or general insurance must disclose to an intending insured, when acting in respect of the other type of insurance, that he is acting as agent of the insurer in respect of that other type.

PART IV - MISCELLANEOUS

CLAUSE 32 BROKERS TO GIVE CERTAIN INFORMATION

This clause provides for an insurance broker to clearly inform the insured of any fees imposed by the broker distinctly from any premium payable or charges imposed by law in respect of the insurance contract. Any commission or other remuneration received by a broker from an insurer is to be disclosed by the broker to the insured on request. A broker acting under a binder will also be required to disclose any fee imposed by the broker on an insured. In addition, brokers must inform an insured of the name and a place of business of the insurer. In fulfilling these requirements a broker may specify 'Lloyd's' when arranging or effecting a contract of insurance with a Lloyd's underwriter.

CLAUSE 33 INSURANCE INTERMEDIARIES TO GIVE CERTAIN
INFORMATION

This clause will require a multi-agent to inform an intending insured, before arranging or effecting a contract of insurance, of the name and a place of business of the proposed insurer and will require insurance intermediaries generally (other than brokers) to do the same but, if that is not practicable, to do so as soon as it is reasonably practicable after the contract has been arranged or effected. In fulfilling these requirements an insurance intermediary may specify 'Lloyd's' when arranging or effecting a contract of insurance with a Lloyd's underwriter. The provision places the duty of disclosing the information required, as between an intermediary placing business with another intermediary, on the first-mentioned intermediary.

CLAUSE 34 INSURANCE INTERMEDIARY TO NOTIFY INSURED IF
INSURER IS AN UNAUTHORISED FOREIGN INSURER

This clause will require an insurance intermediary, arranging or effecting a contract of general insurance, to give notice in writing to an intending insured that the contract is to be arranged or effected with an unauthorised foreign insurer (as defined) or, if that is not practicable, to give notice in writing to the insured as soon as it is reasonably practicable after the

contract has been arranged or effected. As with clause 33, the provision places the duty of giving notice to the intending insured or insured, as between an intermediary placing business with another intermediary, on the first-mentioned intermediary.

CLAUSE 35 RESTRICTIONS AS TO RECEIPT AND PAYMENT OF
 REMUNERATION

This clause provides that an insurance broker may not receive from, or on behalf of, an insurer remuneration other than that related to particular contracts or settling particular claims or to business not connected with insurance contracts. It also provides that an insurer shall not pay and a broker shall not receive remuneration at a rate that varies in accordance with the level of business placed by the broker with that insurer. These provisions do not apply where the broker is acting under a binder and where he/she has advised the insured accordingly.

CLAUSE 36 INSURANCE CLAIMS MONEYS

This clause provides that in the event of bankruptcy funds paid to any broker under his indemnity insurance policy in respect of any liability to an insurer, an insured or intending insured must be paid to the person to whom the broker is liable under the policy and may not be distributed to other creditors.

CLAUSE 37 CERTAIN MONEYS TO BE TRUST MONEYS

This clause provides that moneys received by persons (other than registered brokers) as agent of an insurer in relation to a contract of insurance are to be subject to a trust in favour of that insurer and are to be paid over as soon as is reasonably practicable. Such moneys are not to be subject to attachment, execution or set-off.

The clause also provides that, where an insurance intermediary (other than a registered broker) receives moneys as agent of an insurer, the intermediary shall give a receipt stating the name and a place of business of the insurer unless the moneys are received in the form of a cheque payable to the insurer. This change will assist in the identification of the responsible insurer, in particular, where an intermediary has an agency agreement with more than one insurer (i.e. a multi-agent).

CLAUSE 38 BROKER TO NOTIFY INSURED OF ASSOCIATION WITH
INSURER

This clause will require an insurance broker to disclose to his/her client, either before a contract of insurance is arranged or effected or, if that is not practicable, as soon as is reasonably practicable after the contract has been arranged or effected, various relationships (as defined in the provision) between the broker and the

insurer. Such relationships may be capable of prejudicing a broker's impartiality or create conflicts of interest to the detriment of his/her client. A transitional period of 6 months from commencement of Part III of the Bill has been included to allow brokers time to make any adjustments in respect of the requirements of the provision.

CLAUSE 39 MISDESCRIPTION BY INSURANCE INTERMEDIARIES

This clause provides that an insurance intermediary shall not misdescribe himself or his business in terms which would lead a person to believe that the intermediary is a broker (where he is not a registered insurance broker) or an insurer.

CLAUSE 40 LIABILITY OF DIRECTORS AND EMPLOYEES

Self explanatory.

CLAUSE 41 HEARING BEFORE MAKING ADVERSE DECISION

This clause provides for a person likely to be adversely affected by a decision of a Commissioner to be given an opportunity to present evidence before such a decision is made and to appeal to the Administrative Appeals Tribunal against any such decision.

CLAUSE 42 APPLICATION FOR REVIEW

This clause provides for appeals to be made to the Administrative Appeals Tribunal against any decision of a Commissioner except a decision to delegate a power under clause 47. Decisions made under a delegation would, of course, be reviewable.

CLAUSE 43 STATEMENT TO ACCOMPANY NOTICE OF DECISION

This clause provides for notification of appeal rights to persons affected by a decision of a Commissioner.

CLAUSE 44 ACCOUNTS AND AUDIT

Self explanatory.

CLAUSE 45 CERTAIN PARTICULARS TO BE INCLUDED IN REPORTS

This clause provides for the Insurance Commissioner and the Life Insurance Commissioner to include in their respective annual reports to the Treasurer references to the workings of this Act in so far as it concerns their administrative functions.

CLAUSE 46 PROSECUTIONS

This clause specifies which offences are indictable, how such offences may be dealt with by a court of summary jurisdiction and how non-indictable offences may be prosecuted.

CLAUSE 47 DELEGATION

This clause enables a Commissioner to delegate his powers under the Act except for the proviso that he cannot delegate his power to delegate.

CLAUSE 48 REGULATIONS

Self explanatory.

