Australian Law Reform Commission submission to the Department of Treasury
Review of the Insurance Contracts Act 1984 (Cth)


The ALRC would like to highlight our previous work on insurance contracts (completed in 1982), the more recent ALRC review of the Marine Insurance Act 1909 (Cth) (completed in 2001), and the joint inquiry into the protection of human genetic information by the ALRC and the Australian Health Ethics Committee (AHEC) of the National Health and Medical Research Council.

Inquiry into Insurance Contracts

In September 1976, the ALRC was asked to investigate the laws surrounding insurance contracts. The inquiry was conducted in two parts, the first addressing contractual issues and the second covering miscellaneous insurance issues. An Issues Paper (IP 2, 1977) and a Discussion Paper (DP 7, 1979), both entitled Insurance Contracts, were released for public comment. The inquiry was completed with the publication of the final report, Insurance Contracts (ALRC 20, 1982).

ALRC 20 examined the adequacy and appropriateness of the law of insurance contracts, given that it was a mixture of common law principles and a number of imperial, federal and state statutes. In particular, ALRC 20 considered:

- conduct before the contract:
  - the information that the insurers and the prospective insured should provide to one another;
  - what kind of interest can be insured; and
  - the circumstances where an insurer may refuse to insure a person.

- cancellation and renewal of the contract:
  - the consequences of a failure by an insured to comply with the terms of the contract; and
  - the circumstances in which an insurer may cancel a contract.

- where a claim is made:
  - what limits should be placed on the rights of the insurer and the insured; and
  - ways of allowing the insured to protect and enforce their interests.

ALRC 20 contained over 70 recommendations aimed at balancing the economic costs of reform and the importance of ensuring fairness in the relationship between insurer and insured. The principal recommendation was the introduction of a new scheme of uniform national legislation. The report included a draft Insurance Contracts Bill, together with explanatory notes. The ALRC’s recommendations were substantially incorporated into the Insurance Contracts Act 1984.

The ALRC’s review of the Marine Insurance Act 1909 (Cth) (MIA) commenced in January 2000. The terms of reference for this inquiry required the ALRC to review and update the MIA, taking into account, among other things, the desirability of having a regime consistent with international practice in the marine insurance industry, and whether any change might result in a competitive disadvantage for the Australian insurance industry.

A Discussion Paper, *Review of the Marine Insurance Act 1909* (DP 63), was published in July 2000. Four areas came to be of central importance during the course of the review:

- the coverage of the MIA;
- warranties and other statutory provisions with similar effect;
- non-disclosure, misrepresentation and the obligations of utmost good faith; and
- the requirement for an insurable interest.

The final report, *Review of the Marine Insurance Act 1909* (ALRC 91), was tabled in federal Parliament on 22 May 2001. The report included detailed consideration and recommendations in relation to a number of provisions of the *Insurance Contracts Act*. Chapter 3 considers the major threshold issue—whether to retain the MIA, with either minimal or more significant amendment, or to repeal it entirely and include marine insurance within the scope of the ICA.  

The coverage of the MIA is outlined in chapter 8—in particular, whether the MIA or the *Insurance Contracts Act* applies to a particular contract of insurance. The chapter considered ss 9 and 9A of the *Insurance Contracts Act*, and examines the issues raised by pleasure craft, small fishing and other commercial vessels; the carriage of domestic and household goods; cargo insurance; and sea and inland waters. Chapter 8 also included a recommendation that the *Insurance Contracts Act* should be amended to cover contracts of insurance for the transportation by water of goods other than goods being transported for the purposes of a business, trade, profession or occupation carried on or engaged in by the insured. 

Chapter 9 concerned warranties and was the subject of the ALRC’s submission to the Department of Treasury’s Review on 16 October 2003.

Chapter 10 of the report examines the concept of ‘utmost good faith’, and considers the duty of disclosure, the ‘prudent insurer’, remedies for breach of the duty of disclosure, and post-contractual duties of utmost good faith. The chapter includes discussion of ss 12, 13, 14, 21, 21A and 28 of the *Insurance Contracts Act*.

Subrogation is considered in chapter 12. The chapter looks at the control of subrogated proceedings and the recovery of money from third parties, and suggests amendment to s 67 of the *Insurance Contracts Act*. The chapter also includes a recommendation that s 68 of the *Insurance Contracts Act* should be re-enacted in the MIA.

ALRC 91 is currently under consideration by the federal government, and is available online at http://www.austlii.edu.au/au/other/alrc/publications/reports/91/.

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Joint ALRC/AHEC Inquiry into the Protection of Human Genetic Information

The joint inquiry into the protection of human genetic information by the ALRC and the AHEC (‘the inquiry’) commenced in February 2001. The terms of reference directed the ALRC and AHEC to consider, with respect to human genetic information and the samples from which such information may be derived, how best to:

- protect privacy;
- protect against unfair discrimination; and
- ensure the highest ethical standards in research and practice.

The release in November 2001 of the inquiry’s Issues Paper, *Protection of Human Genetic Information* (IP 26), signalled the start of extensive national consultations, which included 15 public meetings conducted in every capital city as well as in major regional centres. The release of a Discussion Paper of the same name (DP 66) followed in August 2002.

The final report—*Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96)—was tabled in federal Parliament in May 2003. The report covers an extensive range of activities in which genetic information currently plays (or potentially may play) an important role—including risk-rated, mutual insurance.

The two-volume, 1200 page report makes 144 recommendations about how Australia should deal with the ethical, legal and social implications of the ‘New Genetics’. The report has been gaining great amounts of attention and high praise over the world, including from government and non-government policymakers in the United States, Canada, the United Kingdom, New Zealand, China, Korea, Japan, the OECD and HUGO.

At the World Genetics Congress held in Melbourne a few months ago, Dr Francis Collins—the head of the Human Genome Project and Director of the US National Human Genome Research Institute—described *Essentially Yours* as ‘a truly phenomenal job … placing Australia ahead of what the rest of the world is doing’.

Specifically in relation to the material on the insurance industry (Part G, chapters 25–28), stakeholders such as the insurance industry have commented that the report is comprehensive and well balanced—one representative stating that the recommendations represent a ‘clear and sensible path for moving forward’. The Investment and Financial Services Association (IFSA), the peak industry body for Australia’s life insurance industry, has stated that ‘generally, the life insurance industry is supportive of the recommendations’.

Leading British medical geneticist Professor Sandy Raeburn, formerly a member of the UK Genetics and Insurance Committee (GAIC) and currently the head of clinical genetic services in Oman, commented:

> the excellent report of the ALRC—for the most clear and least biased description of genetics and insurance ever produced.

Dr Thomas Murray, head of the Hastings Center (for bioethics) in New York and chair of the Human Genome Project’s Ethical, Legal and Social Issues Working Group on Insurance, has written that:

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Despite the difficulties the quest for comprehensiveness must have posed, the ALRC and AHEC have done an extraordinarily fine job of explaining the science, identifying what is important for the people of Australia, and offering sensible advice. … In its thoroughness, its candour, and its analytical depth, *Essentially Yours* sets a standard for advice to the public and policy makers on how to understand and protect genetic information.

In Part G of the final report, it was noted that a number of concerns had been raised in submissions to the Inquiry about the way in which insurers use, or are perceived to use, genetic information in underwriting. In response to those concerns, the Inquiry made a range of recommendations that are directed toward ensuring that the use of genetic information in insurance is fair and transparent, and that insurers are kept to the terms of the exemption granted to them by anti-discrimination laws.

In particular, the Inquiry recommended that the Commonwealth should amend the *Insurance Contracts Act 1984* (Cth) to clarify the nature of the obligation of an insurer to provide written reasons for an unfavourable underwriting decision upon the request of an applicant. Where such a decision is based on genetic information, including family medical history, the insurer should be required to give reasons that are clear and meaningful and that explain the actuarial, statistical or other basis for the decision.

The interest of consumers in obtaining adequate information about adverse underwriting decisions is not, of course, confined to underwriting based on genetic information. The Anti-Discrimination Board of NSW (ADB) made this point in its submission when referring to the findings of its report into Hepatitis C-related discrimination. The ADB expressed support for legislative amendments that would compel insurers to provide consumers with access to adequate information in relation to all unfavourable decisions, a view shared by the Institute of Actuaries of Australia. While there is merit in such an approach, the Inquiry’s recommendations were limited by the terms of reference to circumstances in which an application has been assessed using a person’s genetic information.

*Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96) is currently under consideration by the federal government. It is available online at http://www.alrc.gov.au/inquiries/title/alrc96/index.htm.

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