



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 10**

**Motor Vehicle Insurance**

**REPORT**

**DECEMBER 1972**



TO THE HON. T.D. EVANS, M.L.A.  
ATTORNEY GENERAL

## **TERMS OF REFERENCE AND COMMENTS THEREON**

1. As Project No. 10 the Committee was asked -

"to consider the law and practice relating to motor vehicle insurance and whether any alteration to the law is desirable".

2. Insurance against claims arising out of injury to or death of a third party is compulsory and must be effected with the Motor Vehicle Insurance Trust under the *Motor Vehicle (Third Party Insurance) Act 1943-1972*. The Committee assumes that it was not intended that compulsory third party insurance should be the subject of study under its terms of reference.

3. The Committee has also excluded from its consideration the question of the financial stability of motor vehicle insurance companies. This question has given cause for concern, a number of companies having gone into liquidation over recent years. Legislation aimed at ensuring that money is available to meet claims under insurance contracts is contained in the *Commonwealth Insurance Act 1932-1966*, which superseded the *Western Australian Insurance Companies Act 1918-1931*. The Commonwealth Act obliges insurers to deposit money or securities in stated amounts with the Federal Treasurer as security for the meeting of their liabilities to the policy holders. In December 1971 the then Federal Treasurer outlined proposed Commonwealth legislation to tighten financial requirements (Cth Parl. Deb. 1971, H. of R., p.4455). The proposals had been worked out in consultation with representatives of all States. A bill to give effect to these proposals was subsequently introduced into the Federal Parliament but was not proceeded with.

4. Motor vehicle insurance policies with which the Committee is concerned are those covering claims arising out of one or more of the following items -

(i) Loss of or damage to the insured vehicle.

- (ii) Damage to or destruction of property belonging to a third party.
- (iii) Personal injury caused to a third party outside the *Motor Vehicle (Third Party Insurance) Act*. This cover has been of restricted application since 1966, when an amendment to that Act removed all earlier money limits set to the liability of the Motor Vehicle Insurance Trust.
- (iv) Personal injury to the insured.

Most policies cover items (i), (ii) and (iii) and are generally referred to as "comprehensive" policies. Item (iv) is optional, the additional cover being available on payment of a further premium. Policies covering only items (ii) and (iii) are also available. These are called "third party" policies.

5. Complaints by insured motorists over the past few years have been numerous and some of them have been taken up by the press and by local government bodies. This report is based on a study of such of these complaints as have come to the notice of the Committee.

6. The allegations contained in the complaints can be classified as follows -

- (1) The unfairness to the insured of arbitration as a compulsory means of settling differences. The complaints in this area fall into two categories -
  - (a) the insurer can, in the privacy of arbitration proceedings, advance technically valid but morally unjust defences;
  - (b) some arbitration agreements provide for each party to bear his own costs, whether or not he is successful, and this inhibits some insured persons from pressing their claims.
- (2) The unfairness of certain conditions, exclusions and warranties forming part of most policies, and the alleged harshness of insurance companies in enforcing their strict legal rights.

- (3) The small size of the print in some policies.

7. The Committee has issued a working paper dealing with the *Arbitration Act 1895* (Project No. 18). Among other matters, it suggested substantially limiting the circumstances under which a party could enforce an agreement to arbitrate. The Committee's views as expressed in that paper would, if adopted, overcome the causes for complaints under subparagraph (1) of paragraph 6 above.

### **THE LAW IN WESTERN AUSTRALIA**

8. Generally speaking the law in Western Australia relating to motor vehicle insurance contracts is part of the general law of contract. The only statutory provisions that directly affect the common law in this respect are ss.21 and 23 of the *Hire Purchase Act 1959* which deal with the insurance of goods subject to hire purchase agreements: s.21 empowers the court to excuse a failure of the insured to observe a term of the insurance contract if it appears to the court that the insurer is not prejudiced by the failure, and s.23 limits the operation of s.21 to contracts of insurance in which at least part of the premium payable for cover is included in the total amount payable for the goods purchased.

### **THE LAW AND PROPOSALS FOR REFORM IN OTHER PLACES**

9. Victoria is the only State which has legislated in the area with which the Committee is directly concerned in this report. Section 25 of the *Instruments Act 1958* of that State provides that no contract of insurance shall be avoided by reason of an incorrect statement on the faith of which that contract was entered into, unless the statement is either fraudulently untrue or material in relation to the risk of the insurer.

Section 27 of the Victorian Act enables an insured to maintain legal proceedings against the insurer notwithstanding the failure to give notice or to make a claim within the time required, provided that the insurer has not been unduly prejudiced.

Section 28(2) (a) avoids clauses of the *Scott v. Avery* type by providing that arbitration shall not be a condition precedent to the institution of court proceedings and that neither party has the right to apply to the court for a stay of these proceedings. This provision will be discussed in the Committee's report on arbitration.

10. In 1957, the English Law Reform Committee in its *Fifth Report (Conditions and Exceptions in Insurance Policies*, Cmnd. 62, paragraph 14), made the following recommendations -

“... We think that any or all of the provisions could be introduced into the law and that no legal difficulties would arise in their application. -

- (1) that for the purposes of any contract of insurance no fact should be deemed material unless it would have been considered material by a reasonable insured;
- (2) that, notwithstanding any thing contained or incorporated in a contract of insurance, no defence to a claim thereunder should be maintainable by reason of any mis-statement of fact by the insured, where the insured can prove that the statement was true to the best of his knowledge and belief;
- (3) that any person who solicits or negotiates a contract of insurance should be deemed, for the purpose of the formation of the contract, to be the agent of the insurers, and that the knowledge of such person should be deemed to be the knowledge of the insurers".

No legislation has as yet resulted from these recommendations.

11. England and New Zealand have enactments relating to insurance, but these are aimed at ensuring the financial stability of insurance companies.

12. Queensland, by its *Insurance Act* of 1960, established the office of Insurance Commissioner. The Commissioner's powers, however, are confined to financial matter.

13. In May 1972 the Committee issued a working paper, which was forwarded to the -

Chief Justice and Judges of the Supreme Court  
Judges of the District Court  
Law Society

Law School  
Magistrates Institute  
Crown Law Department  
Solicitor General  
State Government Insurance Office  
R.A.C. Insurance Co. Pty. Ltd  
Fire and Accident Underwriters' Association  
Non-Tariff Association of Australia (W.A. Branch)  
Other Law Reform Commissions and Committees with which this Committee is in  
correspondence.

The Committee also had a notice placed in *The West Australian* inviting anyone interested to obtain a copy of the paper.

14. A copy of the paper is attached.

15. Comments on the working paper were received from -

the Hon. Mr. Justice Wallace

Mr. P. Atkins, legal practitioner

Mr. A. Gibson, legal practitioner

Mr. B.G. Tennant, President, Federated Miscellaneous Workers Union

the Law Society

the State Government Insurance Office

the Fire and Accident Underwriters' Association.

All the comments have been taken into consideration, although not all are expressly mentioned below.

16. With the exception of Mr. Atkins, all commentators were generally in favour of the proposals contained in the working paper. Mr. Gibson and the Law Society fully supported them and added some of their own. The State Government Insurance Office and the Fire and Accident Underwriters' Association supported all the proposals but one (see paragraph 48

below). Mr. Tennant's comments were also generally favourable, though he said he would have preferred more extensive reforms.

## **DISCUSSION AND RECOMMENDATIONS**

### **Terms and conditions:**

#### **Payments less than sum assured**

17. There are three types of comprehensive motor vehicle insurance policies in use in Western Australia -

- (a) the "indemnity" policy;
- (b) the "safety record plan" policy; and
- (c) the "valued" policy.

18. In the "indemnity" type policy, the insured is asked to state the sum for which he wishes to insure his vehicle and the premium payable is calculated on that sum. The insurer undertakes to indemnify the insured against loss or damage to the vehicle up to a maximum of the sum insured for, but the sum payable is not to exceed the market value of the vehicle at the time of loss. Thus, particularly in the case of total loss, the insured may well be entitled to less than the sum for which he insured the vehicle.

19. The "safety record plan" policy applies only to private vehicles. The insured is not asked to stipulate any sum as the sum proposed for insurance. Instead, on the proposal form, the sum insured is expressed to be the "market value at time of loss". The premium is calculated in accordance with a formula which takes into account the insured's driving record, the price of the vehicle when new, how prone the model is to accidents and how expensive it is to repair. Policies of this type are offered by members of the Fire and Accident underwriters' Association.

20. The "valued" policy is a policy under which a value is agreed upon for the period of insurance and this becomes the "sum insured". The premium payable is calculated on that

basis. Damage or loss is paid up to the sum insured. The policy expressly declares that the market value of the vehicle shall not be deemed to be less than the sum insured.

21. The complaints in this area came from holders of indemnity type policies whose cars had become total losses. Instead of being paid an amount equal to the sum insured, they have been paid a smaller amount representing the market value of the car at the time of the accident.

22. In the Committee's view, a misunderstanding of the terms of the contract is at the root of dissatisfaction under this head. In its working paper it expressed the view that there was no justification for legislation restricting motor vehicle insurance policies to "valued" policies. It suggested that the solution lay (a) in requiring insurers offering the indemnity type policy to indicate clearly on the proposal form that the declared value would not necessarily represent the market value of the car at the time of loss, and (b) in requiring the insurer to bring this statement expressly to the notice of the applicant.

23. The Law Society agreed with the Committee's suggestion. The State Government Insurance Office also agreed that the types of policies should not be restricted and appeared not to object to what the Committee otherwise proposed. Mr. Tennant doubted whether bringing the statement expressly to the attention of the applicant would be effective.

24. After considering the matter the Committee is still of the opinion that a statutory requirement obliging the insurer to set out clearly in the proposal form the real effect of an indemnity policy would help. It recommends the enactment of appropriate legislation.

### **Terms and conditions:**

#### **The "basis of the contract" clause**

25. The common law duty of disclosure under the doctrine of *uberrima fides* in insurance contracts is confined to facts actually known to the insured *Joel v Law Union and Crown Insurance Co.* [1908] 2 K.B. 863, at p.884). This duty may however be enlarged by the contracting parties themselves. Cheshire and Fifoot, *The Law of Contract* (2nd Aus. ed., p.370) comments -

“... insurers have taken extensive, perhaps indeed unfair, advantage of this contractual freedom. In practice they almost invariably require the assured to agree that the **accuracy** of the information provided by him shall be a condition of the validity of the policy. To this end it is common to insert a term in the proposal form providing that the declarations of the assured shall form the basis of the contract. The legal effect of this term is that if his answer to a direct question is inaccurate, or if he fails to disclose some material fact long forgotten or even some fact that was never within his knowledge, the contract may be avoided despite his integrity and honesty of purpose. Nay more, his incorrect statement about a matter that is nothing more than a matter of opinion is sufficient to avoid the policy.”

26. Policies in common use in Western Australia, by incorporating a "basis of the contract" clause, oblige the insured to warrant the truth of the statements made in the proposal in answer to the insurer's questions, and to agree that the proposal will be the basis of the contract. If an answer is incorrect the insurer may avoid the contract. Complaints were made that some insurance companies made harsh use of their rights under the warranty, relying on unintentional omissions relating to unimportant or long forgotten facts to avoid a contract.

27. The Committee believes that the practice of insurers of drafting insurance contracts in such a way that the insured warrants the truth of every statement he makes, would result in injustice. In its working paper it suggested that, in the absence of a fraudulent intention, an incorrect statement or omission in the applicant's answers should only avoid a contract if the statement or omission was material. This is similar to the requirement in s.25 of the Victorian *Instruments Act* (see paragraph 9 above).

28. The paper further suggested that the practice of enlarging the duty of disclosure (see paragraph 25 above) to facts that the insured did not know and could not have known could also cause injustice and that there was something to be said for implementing the proposals of the English Law Reform Committee in paragraph 14(2) of their *Fifth Report (Conditions and Exceptions in Insurance Policies, Cmnd. 62, 1957)*, namely -

“... that, notwithstanding anything contained or incorporated in a contract of insurance, no defence to a claim thereunder should be maintainable by reason of any misstatement of fact by the insured, where the insured can prove that the statement was true to the best of his knowledge and belief.”

29. With the exception of Mr. Atkins, these suggestions met with general approval.

30. The Law Society in addition urged the adoption of the English Committee's proposal, contained in paragraph 14(1) of their above-quoted report, that "for the purposes of any

contract or insurance no fact should be deemed material unless it would have been considered material by a reasonable insured".

31. Mr. Atkins submitted that it would be undesirable to make materiality a condition of the right to avoid. He said it would be difficult to decide from whose point of view the materiality should be looked at, and what standards should be applied. He considered that the fact that the insurer thinks it necessary to ask specified questions should be sufficient justification to deem the answers to be material. The Committee cannot agree with this contention (and see *Mutual Life Insurance Co of New York v. Ontario Metal Products Co. Ltd* [1925] A.C. 344, at 351, where the question is discussed).

32. Mr. Atkins suggested as an alternative that the insured should be required to warrant only the accuracy of statements about facts which had occurred within the immediately preceding ten years. In the Committee's view this suggestion would not solve the problem.

33. Having reconsidered the matter in the light of the comments received, the Committee adheres to its provisional view that the enactment of legislation giving effect to the proposals outlined in paragraphs 27 and 28 above would give adequate protection to the insured without casting any undue burden on the insurer.

#### **Terms and conditions:**

##### **Warranties, exclusions and conditions**

34. Motor vehicle insurance contracts invariably contain exclusion clauses which limit the liability of the insurer. For example, a common exclusion clause provides that the insurer is not liable for any accident that occurs whilst the motor vehicle is being used in an unsafe condition.

35. In *Bashtannyk v. New India Assurance Co.* [1968] V.R. 573, the court rejected the argument that an exclusion clause of this type should be construed as applicable only where the accident and the unsafe condition are causally linked. It ruled that "such a construction is precluded by the plain grammatical meaning of the words used in the clause".

36. The Committee suggested in paragraph 38 of its working paper that the insurer should not be able to escape liability where the accident was not caused by the unsafe condition. The Law Society said it strongly supported this suggestion. The State Government Insurance Office and the Fire and Accident Underwriters' Association were also in agreement, the Association stating that it intended to amend the form of comprehensive policies used by its members to give effect to this proposal.

37. Mr. Atkins disagreed with the Committee's suggestion. He considered that an insurer should be free to limit his liability provided he designated the relevant restriction as a condition. He put forward a compromise proposal that compliance with the Traffic Code should be treated as *prima facie* evidence that a car is in a safe condition. The Committee however does not think this would be satisfactory. The Code does not cover all the defects that can make a car unsafe and the insurer would be penalised. On the other hand a latent defect could amount to non-compliance with the Code even though the insured was not and could not have been aware of the defect (cf. paragraph 41 below).

38. The Committee accordingly adheres to its provisional view and recommends that legislation be enacted to provide that an insurer cannot avoid payment of compensation for loss, notwithstanding that the vehicle is used in a condition that does not comply with a certain standard, where the condition and the loss are not causally linked.

39. In paragraph 38 of its working paper the Committee also proposed that the insurer should not be able to escape liability in cases where the defect which caused the accident was not and could not reasonably have been detected by the insurer.

40. This suggestion was also supported by the State Government Insurance Office, the Law Society and the Fire and Accident Underwriters' Association.

41. The Committee accordingly recommends that legislation be enacted providing that liability for loss cannot be excluded where the defect was latent and could not have been discovered on reasonable inspection.

## **Terms and conditions:**

### **Loss of no-claim bonus**

42. Complaints under this head fell into two categories -
- (a) those where the complainants took the view that, if they were not at fault in an accident, they should not lose their no-claim bonus, in spite of their having claimed on the ir insurer; and
  - (b) those where the complainants held that there was injustice when a no-claim bonus, lost for a claim made, was not reinstated after all payments made by the insurer under the claim had subsequently been recovered from a third party.

43. A no-claim bonus is, as its name suggests, a discount on premiums, allowable to an insured who has not claimed. By the terms of most motor vehicle insurance contracts, a discount is allowable where the insured has no claim pending and has received no payment under a prior claim during specified periods.

44. Where complaints are due to a misunderstanding of the legal effect of a no-claim bonus clause the Committee considers that they would disappear if applicants were given a clear explanation. Commentators agreed. Accordingly the Committee recommends the enactment of appropriate legislation to provide that insurers bring the effect of the clause expressly to the attention of the applicants.

45. The Committee does not consider it unjust that a no-claim bonus should be lost upon a claim being made and does not favour legislative intervention.

### **Size of print and access by insured to the contract**

46. Study of the size of print used in policies led the Committee to consider also the wider question of access by the insured to the terms of the contract.

47. A motor vehicle insurance contract is made up of the completed proposal form and the policy. In accordance with present practice, the insured completes and signs a proposal and in

due course receives a copy of the policy. He does not receive a copy of the proposal. It is difficult therefore for him to ascertain the exact terms of his contract.

48. In paragraph 33 of its working paper the Committee suggested that an insurer should be required by statute to attach to the policy, when this is delivered to the insured, a copy of the completed proposal form. The Law Society agreed with this suggestion. On the other hand, the State Government Insurance Office and the Fire and Accident Underwriters' Association opposed it because they said it would increase costs and, in any case, little would be achieved since only a very small proportion of policy holders would make use of the copy provided.

49. It appears that the costs involved would not be great. The State Government Insurance Office has indicated that the cost of the additional copy of the proposal would be between five and thirty cents, depending on the method of the reproduction used. In addition there would be some handling costs.

50. The fact that only some policy holders would make use of the copy is, in the Committee's view, an insufficient reason for not providing it.

51. Moreover, some renewals are made (to quote from a renewal notice) "...on the understanding that the warranties, statements and answers made by the insured in the original proposal, and forming the basis of this insurance, continue to be true and accurate, and would be the same if truthfully made today". Others carry no such term, but any warranty or undertaking embodied in the proposal would automatically become a term of the renewed contract. As Lord Wright pointed out in *Provincial Insurance Co. v. Morgan* [1933] A.C. 240 at 252 -

“An assured may easily find himself deprived of the benefits of the policy because he has done something quite innocently but in breach of a condition, ascertainable only by the dovetailing of scattered portions”.

52. The Committee therefore recommends that the insurer be required to attach a copy of the proposal to the policy and that legislation be enacted to provide accordingly. It is to be

noted that such a requirement exists in Ontario (see s.203 of the *Insurance Act*, R.S.O. 1970, c.224).

53. The Law Society also suggested that it be made mandatory that renewal notices carry a warning as to the insured's duty of disclosure. Under the general law, fresh material facts, must be disclosed to the insurer at each renewal (*Re Wilson and Scottish Insurance* [1920] 2 Ch. 28). The Committee agrees with the Law Society's suggestion and recommends that renewal notices carry an appropriate warning.

54. Some insurers include in their proposal forms a summary of what they consider to be the important terms of the policy; others do not. In its working paper (paragraph 45), the Committee tentatively proposed that the terms, conditions and exclusions of a policy should be available to the applicant before he signifies acceptance of them, or, at least, that specified clauses should be adequately summarised on the proposal form, in print of a specified size. In supporting the Committee's proposal, the Law Society suggested that consideration should also be given to the use of a different coloured ink.

55. The Committee recommends that insurers be required to include in the proposal form either-

- (1) the terms of the policy, *in extenso*, or
- (2) a summary of such terms as are specified by regulation.

Regulations should also provide for a minimum size of print and for specified terms to be printed in a different colour, as the Law Society suggests.

### **Other matters**

56. Some matters, within the terms of reference but not discussed in the working paper, were also the subject of comment.

57. The Law Society recommended the adoption of a provision equivalent to s.27 of the *Victorian Institute Act 1958* (see paragraph 9 above) to ensure that failure for any reasonable

cause on the part of an insured to give notice of his claim or start proceedings within the time limits fixed by the contract should not be a bar to maintaining proceedings unless the court considers that the insurer has been so prejudiced by the failure that to allow proceedings would be inequitable. The Committee considers the suggestion of value and recommends that legislation be enacted to give effect to it.

58. Mr. Gibson expressed the view that it would be in the interests of all parties if forms of insurance policies were prescribed by statute. In his view the statutory form of contract under the *Motor Vehicle (Third Party Insurance) Act* has been of great benefit. The Committee however did not canvass views on this aspect in its working paper and is not prepared to make any recommendations on the matter.

59. Mr. Tennant raised the question of compulsory third party property insurance, the proper apportionment of blame at accidents occurring at intersections and the refusal of some insurance companies to provide insurance to vehicle owners north of the 26° parallel. As these matters went beyond the terms of reference the Committee did not consider them and it offers no views on them.

## **SUMMARY OF RECOMMENDATIONS**

60. The Committee recommends that legislation be enacted to give effect to the following-

### **(1) Indemnity policies**

- (a) Indemnity type insurance contracts must clearly indicate on the proposal form that whatever the sum declared by the proposer as the value of the insured vehicle may be, the insured will not be entitled to recover any sum in excess of the market value of the vehicle at the time of the accident (paragraphs 22 and 24).
- (b) The insurer must take adequate steps to bring this fact to the notice of the proposer (paragraphs 22 and 24).

**(2) "Basis of the contract" clause**

- (a) A contract of insurance may not be avoided by reason of an incorrect statement on the faith of which the contract was entered into, unless the statement is either fraudulently untrue or material to the risk of the insurer (paragraphs 27, 33 and 9).
- (b) No defence to a claim under the contract may be maintained by reason only of any mis-statement of fact in the proposal by the insured, if the insured can prove that the statement was true to the best of his knowledge and belief (paragraphs 28 and 33).

**(3) Vehicle used in an unsafe condition**

An insurer may not contract out of liability for loss resulting from the use of a vehicle which is in a condition that does not comply with a certain standard -

- (a) where the condition is not causally linked with the loss (paragraph 38); or
- (b) where the condition, although causally linked with the loss, is such that it was not and could not reasonably have been detected by the insured (paragraph 39).

**(4) Loss of no-claim bonus**

Applicants for insurance must be given an adequate explanation of the effects of a no-claim bonus clause (paragraph 44).

**(5) Access by insured to terms of contract**

- (a) The insurer must attach a copy of the completed proposal form to the policy before the latter is delivered to the insured (paragraphs 48 and 52).
- (b) All renewal notices must carry a warning -
  - (i) that all fresh material facts must be disclosed to the insurer, and

(ii) that failure to do so may entitle the insurer to repudiate liability.  
(Paragraph 53).

- (c) (i) The proposal must include either the terms of the policy *in extenso*, or a summary of such terms as are specified by regulation.
- (ii) The Governor should be empowered to prescribe a minimum size of print, and to specify that some terms be printed in a different colour.  
(Paragraph 55).

**(6) Bar to proceedings**

Failure by an insured to give notice of his claim or to start proceedings within the time specified in the policy is not to be a bar to proceedings unless the court considers that the insurer has been unduly prejudiced. (paragraph 57).

CHAIRMAN

MEMBER

MEMBER

21 December 1972