THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON LAWS ON INSURANCE
(TOPIC 9)

TERMS OF REFERENCE

On 15 January 1982 the Honourable Attorney General and the Honourable Chief Justice referred to this Commission for consideration a topic in the following terms :-

> *"* *Laws on Insurance :*
>
> *(1)* *The present law permits an insurer to avoid his liability under the Policy if :*
>
> *(a)* *the insured, at the inception of the policy, failed to disclose or otherwise misrepresented a material fact; or*
>
> *(b)* *was in breach of the conditions of the policy*
>
> *without regard to whether the particular non-disclosure, misrepresentation or breach of condition played any part in the causation of, or had any relevance to, the accident in respect of which the claim is made.*
>
> *Should such law, and any other law related thereto, be changed, and if so in what way?*
>
> *(2)* *Whether any, and if so what, change is required in the laws governing the manner in which contracts of insurance are made (in particular the communication of the terms thereof to prospective policyholders) and including the activities of intermediaries such as brokers and agents, and whether there should be any regulation, and if so in what form, of such intermediaries."*

We have considered the topic and now present our report.

Now therefore do we the following members of the Law Reform Commission of Hong Kong present our report on Laws on Insurance

Hon Michael Thomas CMG QC
(Attorney General)

Hon Sir Denys Roberts KBE
(Chief Justice)

Mr J J O'Grady
(Law Draftsman)

Mr Robert Allcock

Mr Graham Cheng JP

Hon Mr Justice Fuad

Hon HU Fa-kuang OBE JP

Dr the Hon Henrietta Ip

Mr Martin Lee QC JP

Mr T S Lo CBE JP

Miss Christine Loh

Mr Brian McElney JP

Mr Arjan H Sakhrani QC JP

Dr Byron S J Weng

Professor Peter Willoughby JP

Dr Ambrose King
(Member 1980-85)

Mr David K P Li JP
(Member 1982-85)

15 January 1986

REPORT BY

THE LAW REFORM COMMISSION
ON LAWS OF INSURANCE

CONTENTS

INTRODUCTION

Terms of Reference

1. On 15 January 1982 the Honourable the Chief Justice and the Honourable the Attorney General signed a Notice of Reference to the Law Reform Commission of Hong Kong and referred to the Commission for its consideration the matter contained therein.

2. The scope of the Commission's terms of reference does not include those areas covered by the Insurance Companies Ordinance, Cap. 41 which seeks to provide an extension of the control exercised by Government over those undertaking insurance business. The Ordinance repeals existing Ordinances relating to insurance but in effect carries forward existing authorisations of insurance companies. Supervision of insurance companies is extended to all classes of insurance and a variety of specific requirements are made in respect of, inter alia, accounts, authorisation, long term business, powers of intervention and insolvency and winding up.

Sub-committee membership

3. A sub-committee under the Chairmanship of Professor Peter Willoughby was appointed by the Commission on 22nd January 1982 to consider these questions and to report back to the Commission. The Hon Mr Justice Barker agreed to serve as Deputy Chairman on the sub-committee. The full membership of the sub-committee is to be found at Annexure 1, including members who were co-opted by the sub-committee.

Method of working

4. The first meeting of the sub-committee was held on 23 February 1982 and between then and the conclusion of the sub-committee's deliberations on 16th April 1984 meetings were held at frequent intervals.

5. A considerable quantity of materials was accumulated by the sub-committee in the course of its deliberations, ranging from case studies provided by the Consumer Council to reports issued by other law reform agencies. A list of those materials is to be found at Annexure 2.

6. From its first appointment, the emphasis of the sub-committee was to canvass as wide a range of opinions as possible. This emphasis is clearly seen in the range of fields from which the members of the sub-committee were drawn and in the programme of public consultation which was undertaken.

7. Two press releases were issued by the sub-committee. The first of these, on 17 May 1982, announced the formation of the sub-committee and

requested submissions from interested parties. The statement was published by 2 English and 10 Chinese newspapers on 18th May and the Hong Kong Standard on that day carried a report on the response of insurance associations to the press release.

8. A further press release was issued to the media on 19 November 1982, announcing the imminent intention of the sub-committee to move on to consideration of the question of brokers and intermediaries and seeking relevant submissions. This second statement appeared in 3 Chinese evening papers on 19 November and 4 Chinese papers on 20 November.

9. On 31 May 1982 submissions were specifically invited from some 28 representative bodies and on the same date letters were sent to over 500 solicitors individually requesting them to provide the sub-committee with information and argument for and against reform. Annexure 3 lists the representative bodies to whom the first of these 2 letters was sent. A letter was subsequently sent to the Law Society of Hong Kong on 20 July 1982, seeking to encourage the Society's members to make submissions to the sub-committee.

10. It was felt by the sub-committee that it would be helpful to examine the actual policies used by insurance companies in Hong Kong and to that end on 16 July 1982 letters were sent to each of the 101 companies in Hong Kong authorised to write motor vehicle insurance, requesting copies of the policy forms used. A very high response was achieved and around 70 companies supplied forms.

11. The sub-committee's report was submitted to the Commission at a meeting on 6th July 1984. It was decided that the report should be circulated on a restricted basis to selected organisations and individuals with expertise in insurance to obtain their views on the sub-committee's recommendations. The views which were received were carefully considered by the Commission at a number of meetings and this final report has been completed in the light of those responses.

12. It was decided at an early stage of the sub-committee's deliberations that examination of the 2 questions contained in the Notice of Reference should, as far as possible, be kept separate and this separation has been retained in the Commission's own Report. Accordingly, our Report falls into 2 main parts, the first of which deals with the question of non-disclosure, misrepresentation and breach of conditions and the second of which turns to the question of intermediaries and the formation of the insurance contract. In the course of completing this Report, however, we have sometimes found that the areas of interest have merged and, for instance, we refer to proposal forms in both sections of our Report. A summary of the recommendations of the entire Report can be found in Chapter VII. At Annexures 5 and 6 are two draft Bills which reflect the recommendations we have made in our Report.

Acknowledgements

13. We wish to place on record our gratitude to all those individuals and organisations who have assisted the sub-committee and the Commission in its deliberations. The Commission is particularly indebted to the members of the sub-committee who worked with such diligence and enthusiasm over the 2 years during which the sub-committee regularly held its meetings. We would also wish to express our gratitude to the secretaries of the sub-committee, Mr. Thomas Kwan and Mr. Stuart Stoker, who were largely responsible for drafting this report in response to the Commission's instructions.

PART I

Chapter I

THE SCOPE OF THE PROBLEM

1.01 The first question posed by the Notice Reference concerns itself with 3 issues : non-disclosure, misrepresentation and breach of the conditions of the policy. Breach of the conditions of the policy may itself of be divided into 2 further areas, those of warranties and basis of contract clauses. Accordingly, we approach the first part of the Notice of Reference by dealing with each of these 4 heads in turn. We begin by outlining the meaning of each term before turning to a more detailed examination of the difficulties involved.

1.02 By non-disclosure we mean a failure by the insured to reveal to the insurer a material fact. For instance, it would be non-disclosure for an insured to fail to reveal a previous conviction for a motoring offence when applying for motor insurance.

1.03 When we refer to misrepresentation we are concerned only with innocent misrepresentation, which arises when the insured positively mis-states the position to the insurer but without fraudulent intent. It would be misrepresentation for an insured to state that he had fully recovered from a disclosed illness when, unknown to him, he had not.

1.04 Warranties as used in insurance law are terms of the contract of insurance with which the insured must comply strictly and any breach, however trivial, will enable the insurer to repudiate the policy. The insured might warrant that premises would be kept securely locked when not occupied. They are not locked and are struck by lightning. The insurer may repudiate.

1.05 A basis of contract clause is a statement in an insurance policy which makes the proposal the basis of the contract. The insurer may then repudiate for any inaccurate answer given in the proposal, regardless of its materiality. For example, if there is a basis of contract clause and the insured inaccurately records his age in the proposal the insurer may repudiate.

NON-DISCLOSURE

The basic rule

1.06 A contract of insurance is a contract uberrimae fidei. That is to say, it is a contract in which each party must display "the utmost good faith". It is this common law principle at the foundation of insurance law which has led to the requirement on the prospective insured to disclose all material facts. It matters not that the insurer did not ask the insured for the particular information in a proposal form or otherwise . if the facts are material they must be disclosed to the insurer with or without the insured's attention having been directed to them by specific questions by the insurer.

1.07 The underlying reasoning behind this approach is clearly seen in the judgment of Lord Mansfield in Carter v. Boehm (1766) 3 Burr 1905 at page 1909 where it was said :

> *"The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risque run is really different from the risque understood and intended to be run at the time of the agreement"*

1.08 On a strict interpretation of the law, insurers are entitled to refuse to make payment in respect of an insurance policy where the insured has failed to disclose any facts "material to an insurer's appraisal of the risk which are known or deemed to be known to the assured, but not known or deemed to be known to the insurer" (MacGillivary & Parkington, "Insurance Law", 7th Edition, para 617).

Lambert's Case

1.09 The question of what is "material" to a contract of insurance was considered by the English Court of Appeal in Lambert v. Co-operative insurance Society Ltd. ([1975] 2 Lloyd's Rep. 485) and the Court concluded that a fact was material if it would influence the mind of a "prudent insurer". The case concerned an insurance policy taken out by a Mrs. Lambert to cover her own and her husband's jewellery. Mrs. Lambert's husband had been convicted of a criminal offence before the contract of insurance was made but this fact was not disclosed to the insurer. Mr. Lambert was subsequently convicted again of offences of dishonesty but Mrs Lambert did not disclose any of the convictions on renewal of the policy. No question regarding

convictions was directed to Mrs Lambert by the insurer at either the inception or the renewal of the policy.

1.10 Reference was made to the provisions of the Marine Insurance Act 1906 which states at section 18(1) :-

> *"The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract".*

Sub-section (2) provides that :-

> *"Every circumstance is material which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk".*

1.11 Mr Justice McKenna considered that there was "no obvious reason why there should be a rule in marine insurance different from the rules in other forms of insurance and, in my opinion, there is no difference" (at page 487). Earlier in his judgement (at page 487), Mr Justice McKenna had examined the duty of disclosure and had said:-

> *"Everyone agrees that the assured is under a duty of disclosure and that the duty is the same when he is applying for a renewal as it is when he is applying for the original policy. The extent of that duty is the matter in controversy. There are, at least in theory, four possible rules or tests which I shall state. (1) The duty is to disclose such facts only as the particular assured believes to be material. (2) It is to disclose such facts as a reasonable man would believe to be material. (3) It is to disclose such facts as the particular insurer would regard as material. (4) It is to disclose such facts as a reasonable or prudent insurer might have treated as material".*

The court concluded that the proper test of materiality was that enunciated by Mr Justice McKenna as his fourth example. Lord Justice Cairns remarked that he saw "no reason why the rule should be different for fire or burglary or all risks insurance from that which has been laid down by statute for marine insurance" and "in providing by statute that the test should be that of the insurer in marine insurance cases., I think that Parliament was doing no more than inserting in its code of marine insurance law what it regarded as the general rule of all insurance law" (at pages 492 and 493).

Scotland - a different view?

1.12 It is interesting to note that it is arguable that the position in Scotland, at least as far as life assurance is concerned, differs from that in England and Wales. The Scottish approach has been to the effect that in life assurance the test of materiality is to ask whether a reasonable man in the position of the assured with knowledge of the facts in dispute ought to have realised that they were material to the risk. This approach was clearly enunciated by Lord President Inglis in Life Association of Scotland v. Foster (1873) 11M 351. That case concerned an assured who had at the date of her proposal a slight swelling in her groin which, because it caused her no pain or disquiet, she did not disclose but which to a medical man would have presaged serious medical complications. Lord President Inglis examined the duty of disclosure and continued :-

> *"My opinion is, upon a consideration of the whole circumstance disclosed in the evidence, that the swelling which is proved to have existed at the date of the contract of insurance has not been shown to be such a fact as a reasonable and cautious person unskilled in medical science and with no special knowledge of the law and practice of insurance would believe to be of any materiality or in any way calculated to influence the insurers in considering and deciding upon the risk."*

"Prudent Insurer" and "Reasonable Insured"

1.13 Be that as it may, the law in England and in Hong Kong since Lambert v. Co-operative Insurance Society Ltd. has clearly looked to the "prudent insurer" rather than the "reasonable insured" as its lodestar. It is this reference to the mind of the insurer rather than that of the insured when considering materiality which has caused concern. An insured may innocently fail to disclose a fact which he considers immaterial to the risk insured but which would have persuaded the insurer to re-assess the premium or conditions of the policy. Should a claim thereafter be made the insurer is entitled to refuse payment, even if the undisclosed fact bore no causal connection to the claim.

1.14 MacGilliverary & Parkington take the view that to ascribe the maxim uberrima fides to an insurance contract in such circumstances is to an extent misleading "since an assured might believe in all honesty that he was complying with the duty of good faith, and yet fail to discharge the duty of disclosure" ("Insurance Law", page 639). While being in no doubt what the law was, the Court in Lambert's case nevertheless expressed dissatisfaction at its effects. Mr Justice McKenna remarked at page 491 that "the present case shows the unsatisfactory state of the law. Mrs Lambert is unlikely to have thought that it was necessary to disclose the distressing fact of her husband's recent conviction when she was renewing the policy on her little store of jewellery. She is not an underwriter and has presumably no experience in these matters".

The United Kingdom Statements of Practice

1.15 The hardship to policyholders to which the present law can give rise was recognised by the United Kingdom insurance industry when in 1977 it promulgated the Statements of Practice. These were subsequently amended in 1981 and the current versions are to be found at Annexure 4. Separate statements were issued in respect of Long–Term Insurance, Industrial Assurance and Non-Life Insurance. The Statement of Non-Life Insurance Practice seeks in part to cover the situation described at paragraph 1.13 above by providing that :-

> *"Except where fraud, deception or negligence is involved, an insurer will not unreasonably repudiate liability to indemnify a policyholder*
>
> *i) on the grounds of non-disclosure or misrepresentation of a material fact where knowledge of the fact would not materially have influenced the insurer's judgment in the acceptance or assessment of the insurance;*
>
> *ii) on the grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach."*

1.16 The Statements have no force of law and are merely advisory. However, a statement issued by the Department of Trade at the time of the publication of the amended Statements of Insurance Practice indicated that the Statements had "in general been closely followed". The Statements do not apply to Hong Kong but the indications are that the insurance industry in Hong Kong would readily subscribe to similar formal statements in consultation with the Insurance Authority and we are of the view that such statements would form a useful supplement to the law.

The extent of the problem in Hong Kong

1.17 Evidence obtained from the Fire, Marine and Accident Insurance Associations suggests that the problem caused by non-disclosure in terms of the number of cases involved is not a significant one in Hong Kong. Further, there is evidence to suggest that insurance companies in Hong Kong do not always depend on a strict interpretation of their rights in order to avoid liability. It is equally clear, however, that the present position in Hong Kong offers scope for less scrupulous insurance companies to avoid liability by relying on failure by the insured to disclose material facts not causally connected with the loss. The likelihood of unintended non-disclosure in Hong Kong is increased by the fact that many insureds may have only a rudimentary grasp of English. It may be argued in such circumstances that a review of the legal

situation in advance of a significant problem is to be preferred to ex post facto action.

MISREPRESENTATION

The basic rule

1.18 To be distinguished from the case where the would-be insured fails to disclose a material fact is the situation where he mis-states the position to the insurer. We are concerned here only with innocent misrepresentation and not misrepresentation amounting to fraud.

1.19 For the insurer to be able to avoid the policy, it is necessary that the misrepresentation was material to his undertaking of the risk and for this purpose the meaning of "material" is the same as it is in relation to non-disclosure. Furthermore, the misrepresentation must be a statement of fact and not merely of opinion; it must be untrue or inaccurate; it must be a statement as to a present fact, and not as to matters occurring in the future; and it must have induced the insurer to enter into the contract in question.

1.20 The foregoing must be qualified by the fact that a statement of opinion will nevertheless be sufficient to found a claim by an insurer that the policy should be avoided if it can be shown that the insured did not honestly hold the opinion at the time that he held himself out as subscribing to it. Similarly, a statement as to future intention may constitute a misrepresentation enabling the insurer to avoid the policy if the insured misrepresented his actual state of mind at the time of the statement.

The extent of the problem in Hong Kong

1.21 We have received no evidence to suggest that there has been a significant number of cases where mis-representation has led to avoidance of insurance policies by insurers in Hong Kong. We nevertheless reiterate our reasoning at para. 1.17 in respect of non-disclosure for believing that reform is nonetheless desirable.

WARRANTIES

The basic rule

1.22 The term "warranty" in insurance law denotes a term of the contract of insurance with which there must be strict compliance and upon any breach of which, however trivial, the insurer may repudiate the policy. Upon such breach, the insurer is entitled to repudiate the entire contract from the date of the breach regardless of the materiality of the term, the state of mind of the insured or of any connection between the breach and the loss.

Circumstances may readily be conceived where the incident giving rise to the claim bears no causal connection with the particular breach of warranty for which the insurer seeks to avoid liability. It has been argued (notably in the English Law Commission Report discussed later) that it is unjust that an insurer should be entitled to reject a claim for breach of warranty, no matter how irrelevant the breach may be to the loss.

1.23 The basis of contract clause (which we examine at paras. 1.26 to 1.30) incorporates into the policy a number of warranties. While the warranties created by a basis of contract clause relate to past or present facts, warranties may also be created which relate to the future. These are generally referred to as "promissory warranties". For example, an insurer may insert a clause in a policy providing for the insurance of premises that those premises shall not be used for the storage of inflammable materials. If a claim is made following damage to the premises and it is discovered that the insured has stored inflammable materials there, the insurer is entitled to avoid the policy, even though the breach of warranty was in no way responsible for the damage giving rise to the claim.

1.24 Where a breach of a warranty of past or present fact is concerned, the breach occurs at the inception of the policy and the insurer is therefore entitled to reject all claims under the policy. However, where a promissory warranty is in issue, the insurer is only entitled to reject claims which have arisen after the breach, which may well be after the policy has been in force for some time. The insurer remains liable for claims arising before the breach and it may be that the insured is entitled to a proportionate refund of premium , though this will often be governed by an express contractual provision.

The extent of the problem in Hong Kong

1.25 The problem posed by the use of warranties appears to represent in Hong Kong a more significant one than that of non-disclosure but the numbers are not substantial. Nevertheless, to reiterate the reasoning outlined in relation to non-disclosure and mis-representations, the present law provides scope for injustice and preventive measures may well be appropriate, particularly in view of the difficulties of language in Hong Kong to which we have already referred.

BASIS OF CONTRACT CLAUSES

The basic rule

1.26 In order to avoid the problems which may be caused by misrepresentation, insurers sometimes resort to what is termed a "basis of contract clause". This consists of a statement in the policy that the proposal shall be the basis of the contract. The inclusion of such a clause enables the insurer to avoid the policy for any inaccurate answer given in the proposal,

regardless of its materiality, since the truth of the answers has become a condition of liability of the insurers.

1.27 The attraction of such clauses for some insurers is obvious. Their use has been widely criticised and the English Law Commission concluded that "'basis of the contract' clauses constitute a major mischief in the present law" (Law Commission No. 104, "Report on Insurance Law – Non-Disclosure and Breach of Warranty", para 7.5).

1.28 The effect of such a basis of contract clause is not only that an insurer may repudiate for non-fraudulent immaterial misrepresentations but also for statements which, although true to the best of the insured's knowledge and belief, are in fact inaccurate. The inherent difficulties for an insured can be readily appreciated where questions relating to his health form a part of the proposal.

The extent of the problem in Hong Kong

1.29 We see no reason to suppose that the difficulties posed by the use of basis of contract clauses which the Law Commission identified in England do not apply equally in Hong Kong. The desirability of reform is apparent. It has been brought to our attention that some life insurance policies issued in Hong Kong purport to contain a basis of contract clause which provides that the insurer may not rely on matter not contained in the application to deny the claim. This does not seem to us to be a basis of contract clause as we understand it and we do not find it in any way exceptionable.

1.30 The difficulties which may be caused by basis of contract clauses are likely to be exacerbated in Hong Kong by the predominant use of English in the formation of insurance contracts and the danger that those seeking insurance cover may therefore not fully understand the commitment which they are making.

Chapter II

POSSIBLE SOLUTIONS - APPROACHES OF OTHER JURISDICTIONS

2.01 The problems we have outlined in the previous Chapter have not been confined to one jurisdiction. They have been widely recognised and attempts have been made to rectify them by a number of law reform bodies in other jurisdictions. In this chapter we examine some of these approaches with a view to ascertaining if any would be suitable for implementation in Hong Kong.

THE ENGLISH LAW COMMISSION

2.02 In October 1980 the Law Commission in England presented their Report on Non-Disclosure and Breach of Warranty (Law Com. No. 104 "Insurance Law - Report on Non Disclosure and Breach of Warranty"). The members of the Commission who studied this area of the law, headed by Lord Justice (then Mr Justice) Kerr, drew on a wealth of experience and considered an extensive body of evidence when compiling the Report. The law relating to insurance in Hong Kong follows that of England and the recommendations as to reform produced by the English Law Commission therefore merit careful consideration. For that reason, we consider it appropriate to examine in some detail the contents of the Commission's Report and to assess whether its proposals might prove suitable for implementation in Hong Kong.

2.03 The Commission received and considered evidence, both written and oral, not only from England but also from abroad. It came from the legal profession, academic sources, the insurance industry and consumer interests. The Report does not deal with Marine, Aviation, and Transportation insurance, nor re-insurance, since it was thought that these aspects of Insurance Law were generally satisfactory, especially in view of the fact that the vast majority of insureds would be commercial organisations which, it could be assumed, would be substantially on equal terms with insurers when it came to the intricacies of insurance law.

Non-disclosure

2.04 The Marine Insurance Act 1906, to which we have already referred at para. 1.10, codified the common law in relation to marine insurance, and provided by section 18 that the assured must disclose to the insurer every circumstance which would influence a prudent insurer in fixing the premium or determining whether he will take the risk. These provisions

are reproduced in Hong Kong in the Marine Insurance Ordinance (Cap. 329) at section 18.

Lambert's Case

2.05 In the case of Lambert v. Co-operative Insurance Society Ltd. (discussed at paras. 1.09 to 1.11 above) in England the Court of Appeal held that the provisions of the Marine Insurance Act applied equally to non marine insurance. In Hong Kong it would appear that section 18 of the Insurance Ordinance has the same general effect. This principle, the Commission concluded, could and does work hardship. Many laymen do not, in the absence of a proposal form, realise that there is a duty of disclosure at all, and few would appreciate what would influence the mind of a prudent insurer. Moreover, where an insurance policy is effected by means of a proposal form, the fact that an insured answers accurately, truthfully and fully every question posed does not relieve him of the duty of giving other material information, which he did not realise the insurers required to know. The Commissioners concluded that :-

> *"the very fact that specific questions are invariably asked in proposal forms, which is their essential purpose, may have the effect of creating a trap for the insured under the present law" (para. 4.56 of the English Law Commission Report).*

2.06 Whenever an insurance policy is renewed, the insured has a duty once more to disclose material facts - even though the insurers may well not have informed or reminded him of his obligation. In Lambert v. Co-operative Insurance it was observed that the insured's duty of disclosure at renewal "is the same …… as it is when he is applying for the original policy" (at page 487).

The Statements of Insurance Practice

2.07 It was argued before the Commission that the Statements of Insurance Practice (to which we have referred at paragraphs 1.15 and 1.16 above) are to the effect that insurers will not "unreasonably" repudiate liability or reject a claim for non-disclosure. The Commissioners pointed out, however, that this leaves insurers as the sole judges of whether repudiation or rejection is unreasonable in any given situation, a position which the Commissioners regarded as totally unsatisfactory. Indeed, the liquidator of an insurance company would be bound to disregard the provisions of the Statements of Insurance Practice. The Commissioners' criticism finds support in McGilliverary & Parkington's work, "Insurance Law" (7th Edition at paragraph 705) where the authors state : "we do not regard these statements of self-regulatory practice as a substitute for reform of the law. The insurers are themselves judges of whether it is reasonable to reject a claim and the statements lack the force of law".

"Prudent Insurer" and "Reasonable Insured" – The Commission's recommendations

2.08 Some consumer interests recommended the total abolition of the duty of disclosure but the Commission took the view that the duty of disclosure should be retained but that it should be modified to provide that a fact should be disclosed to the insurers by an applicant if :

> "*(a) it is material [to the risk] in the sense that it would influence a prudent insurer in deciding whether to offer cover against the proposed risk and, if so, at what premium and on what terms; and*
> *(b) it is either known to the applicant or it is one which he can be assumed to know; for this purpose he should be assumed to know a material fact if it would have been ascertainable by reasonable enquiry and if a reasonable man applying for the insurance in question would have ascertained it; and*
> *(c) it is one which a reasonable man in the position of the applicant would disclose to his insurers, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought" (paragraph 10.9 of the English Law Commission Report).*

It will be observed from (c) that the test shifts from what would influence the mind of a prudent insurer to that which a reasonable insured would disclose.

Proposal Forms

2.09 As mentioned earlier, one of the major difficulties of the duty of full disclosure arises from policies that are concluded on the basis of proposal forms. Laymen are unlikely to realise that there is a residual duty to disclose facts not asked for in the proposal form. The Commission therefore recommended that an applicant for insurance should be considered to have discharged his duty in relation to the answers to specific questions if, after making such enquiries as are reasonable having regard to the subject matter of the question and to the nature and extent of the cover which is sought, he answers the questions to the best of his knowledge and belief. The duty to volunteer information in addition to answering the questions in the proposal form should be retained and would be the same as the duty of disclosure where no proposal form was used. However, the Commission considered that all proposal forms should contain clear and explicit warnings as to the duty incumbent on the insured to volunteer such additional information, together with a warning as to the standard of answer required by questions in the proposal form. The Commission further recommended that the insured should be supplied with a copy of the completed proposal form at the time of its completion, incorporating clear advice to the insured of the importance of retaining his copy of the form. They further recommended that if any of these proposed warnings had not been given, the insurers should not be allowed to

rely on a defence of non-disclosure except where the court is satisfied that the failure to comply with the requirements of warning the insured did not cause him any prejudice with regard to his obligation to disclose the material fact in question.

Renewals

2.10 Turning to the question of renewals, the Law Commission were of the view that the duty of disclosure on renewal should be retained and the same standard should apply as at the original application. Thus, when answering questions in a renewal notice the insured should be required to answer "to the best of his knowledge and belief after making such enquiries as are reasonable having regard to the subject-matter of the question and the nature and extent of the insurance cover to be renewed" (para 10.18). Similar recommendations regarding warning notices and the effect of failing to issue such warnings were made in relation to renewals as have already been outlined in respect of the original proposal.

Three solutions rejected

2.11 Three other solutions to the problems of non-disclosure were canvassed by the Commission and each was rejected. First, the Commission considered whether there should be a connection between the non-disclosure and the loss before insurers should be able to rely on non-disclosure. This has been described as the "nexus test" and at first sight may appear to be just but there are cases, it was concluded, where the nexus test would be inappropriate. While it may cause hardship if a claim is refused for a failure to disclose a fact unconnected with the loss, there is equal unfairness on insurers if they are held to a policy which they would never have accepted, or accepted on different conditions, such as at a higher premium, had they been in possession of the full facts.

2.12 The Commission also considered the adoption of the principle of proportionality which is followed in, inter alia, Sweden and France. The principle operates to provide that where there has been a breach of the duty of disclosure by the insured and a claim arises before the contract has been terminated, the insurer shall be liable to provide only such cover as is in accordance with the ratio between the premium paid and the premium that the policyholder should have paid if he had declared the risk correctly.

2.13 As with the "nexus test", the principle appears attractive at first sight but there are underlying problems which prompted the Commission to reject it. The principal objections are that it fails to provide solutions in cases where the insurer would have declined the risk altogether had he been fully appraised of the facts; where he would have imposed additional warranties on the insured; where he would have narrowed the risk by the incorporation of exclusion clauses; and where he would have imposed an "excess". Further, the difficulties of calculating a notional premium are self-evident.

2.14 Finally, the Commission considered whether matters might be dealt with through judicial discretion. The courts could be given a general discretion to adjust the rights of the parties where rejection of a claim would otherwise be permitted but would result in a clear injustice to the insured. This approach, too, was considered unsuitable both because of the difficulty of providing guidelines to the judiciary for the exercise of that discretion and because of an anticipated increase in litigation and uncertainty in the law.

Misrepresentation

2.15 The Commission recommended that the insurer should not be entitled to rely on the making of a non-fraudulent misrepresentation as such but should be confined to remedies (if any) available for non-disclosure where :-

(a) the insured had made an actionable misrepresentation which was in breach of either the existing duty of disclosure or of the proposed duty of disclosure; or

(b) the insured had made an actionable misrepresentation through having given an inaccurate answer in response to a question in a proposal form which would be regarded under the Commission's proposals as having fulfilled the duty of disclosure.

Where a breach of warranty is involved which consists wholly or in part of a non-fraudulent misrepresentation, the insurer should not be entitled to rely on the misrepresentation but should be restricted to remedies for breach of warranty.

Warranties

2.16 As explained earlier (at para. 1.22), the word 'warranty' is used in insurance law to denote a term of the contract of insurance which must be strictly complied with and upon any breach of which, however trivial, the insurer is entitled to repudiate the contract. A warranty may be created by -

(a) the use of the word "warranty";
(b) an express provision for strict compliance and the right to repudiate for breach;
(c) the use of some phrase such as "condition precedent" from which a Court may infer a warranty; or
(d) the use of a 'basis of contract clause'.

2.17 The Law Commission concluded at paragraph 6.8 of its Report that there were 4 major defects in the existing law of warranties. First, the Commission considered it was wrong "that an insurer should be entitled to demand strict compliance with a warranty which is not material to the risk and

to repudiate for a breach of it"; second, it was wrong that insurers could "reject a claim for any breach of even a material warranty, no matter how irrelevant the breach may be to the loss"; third, since warranties are of such importance to the insured, they should be contained in a written document to which he may refer; and fourth, the problems already outlined relating to the use of basis of contract clauses.

The Statements of Practice

2.18 Insurers again represented to the Commission that reform of the law was unnecessary in view of the Statements of Insurance Practice (referred to at paragraphs 1.15 and 1.16 above) to the effect that, except where fraud, deception or negligence was involved or suspected an insurer would not unreasonably repudiate liability. The Commission observed at paragraph 6.10 of their Report, that, "we would again draw attention to the fact that this provision in effect confers a discretion on insurers to repudiate a policy on technical grounds if they suspect fraud but are unable to prove it". The insurers would become the sole judges of whether repudiation or rejection is unreasonable in each case, a situation the Commission considered unsatisfactory.

The Commission's Recommendations

2.19 The Commission therefore recommended that :-

(i) A term of a contract of insurance should only be capable of constituting a warranty if it is material to the risk. There should be a presumption that a provision in a contract of insurance which possesses the attributes of a warranty at common law is material to the risk. The insured should be able to rebut this presumption by showing that the provision in question relates to a matter which is not material to the risk (paragraph 10.34 of the English Law Commission Report);

(ii) In order to create an effective warranty the insurer should be obliged to furnish the insured with a written document containing the warranty within a reasonable time of the insured having given the warranty in question. If the insurer fails to comply with this formal requirement he should be precluded from relying on a breach of the warranty in question in order to repudiate the policy or reject a claim. However, if a loss should occur before a reasonable time has elapsed for the provision by the insurer of such a document, then the insurer should be entitled to rely on an oral warranty (paragraph 10.35); and

(iii) Where the insured is in breach of warranty the insurer should prima facie be entitled to reject claims in respect of all losses

which occur after the date of breach. If the insured can show either :

(a) that the broken warranty was intended to safeguard against the risk that a particular type of loss would occur and the loss which in fact occurs is of a different type; or

(b) that even though the loss was of a type which the broken warranty was intended to safeguard against, the insured's breach could not have increased the risk that the loss would occur in the way in which it did in fact occur;

then the insured should be entitled to recover. Nevertheless, in such cases the insurer should remain entitled to repudiate the policy in the future on account of the breach of warranty (paragraph 10.36).

Basis of Contract Clauses

2.20 The difficulties posed by the use of basis of contract clauses have already been explained (see paras. 1.27 to 1.30 above) and their use has been widely criticised. In Joel v. Law Union and Crown Insurance Co. [1908] 2 K.B. 863. Fletcher Moulton L.J. said :

> *"the desire to make themselves (i.e. Insurance Companies) doubly secure has made them depart widely from this position by requiring the assured to agree that the accuracy, as well as the bona fides, of his answers to various questions put to him by them or on their behalf shall be a condition of the validity of the policy. I wish I could adequately warn the public against such practices on the part of the insurance offices".*

The Commission's Recommendations

2.21 The Commission endorsed these criticisms as well founded and recommended -

(a) that any "basis of the contract" clause should be ineffective to the extent that it purports to convert into a warranty any statement by the insured as to the existence of past or present facts, whether the insured's statement is contained in a proposal form or elsewhere; and

(b) that no provision in a proposal form whereby the insured promises that a state of affairs exists or has existed should be capable of constituting a warranty (paragraph 7.8).

THE AUSTRALIAN LAW REFORM COMMISSION

2.22 In September 1976 the Australian Attorney General referred to the Australian Law Reform Commission for comprehensive examination the subject of insurance contracts. In December 1982 the Commission produced its report, parts of which were concerned with areas covered by our own study.

Non-disclosure

2.23 In respect of non-disclosure, the Australian Report concluded that the existing duty of disclosure should be modified so that "an insurer who wishes to rely on innocent non-disclosure should warn the insured of his duty of disclosure before the contract is entered into. The duty should itself extend to facts which the insured knew, or which a reasonable person in the insured's circumstances would have known, to be relevant to the insured's assessment of the risk" (Australian Law Reform Commission Report No. 20, "Insurance Contracts", para 183). The Commission considered, unlike the Law Commission in England, that individual characteristics of the insured should be taken into account in applying the standards of the new rule and "literacy, knowledge, experience and cultural background are all vitally important factors affecting the behaviour which can reasonably be expected of insureds, both by insurers and by the legal system which regulates the insurance relationship" (para 183).

Misrepresentation

2.24 The existing rule on misrepresentation that an insured is under a duty not to make misrepresentations to the insurer about facts which a prudent insurer would regard as relevant to the assessment of the risk should be amended, the Australian Commission concluded. The emphasis should change from the "prudent insurer" to the "reasonable insured" by providing that "an insurer should be entitled to redress for misrepresentation of a fact which the insured knew, or which a reasonable person in his circumstances ought to have known, to be relevant to the insurer's assessment of the risk" and in construing the meaning of any question in a proposal form "it should be determined by reference to the meaning which would be put upon it by a reasonable man in the insured's circumstances" (para 184). The insurer should be held to have waived the duty of disclosure where he fails to pursue unanswered, or manifestly inadequately answered, questions in a proposal form.

Warranties

2.25 As a general rule, the Commission considered that a representation as to the existence of a fact should be read as a representation that that fact exists to the best of the insured's knowledge and reasonable belief. Some absolute warranties of existing fact might be rephrased as

exclusions from cover and to avoid this the Commission concluded that where an exclusion is based on the state or condition of the subject-matter of the insurance, the insurer should not be able to rely on that exclusion if the insured proves that, at the time the contract was entered into, he did not know, and a reasonable man in his circumstances would not have known, of the existence of the relevant state or condition.

The Commission's Recommendations

2.26 The Australian Commission's Report took a new approach to the question of remedies and decided that the insurer's right to avoid a contract from its inception for innocent non-disclosure or misrepresentation should be abolished and a right to damages should be substituted. The insurer should be able to cancel the contract prospectively and should be entitled to deduct from the claim an amount that fairly reflects the loss it has suffered as a consequence of the insured's breach of duty. The amount of damages should be calculated so that it "would place the insurer in the position in which it would have been if the misrepresentation or breach of the duty of disclosure had not occurred" (para 27).

2.27 Where the misrepresentation or non-disclosure is fraudulent, the right to avoid the contract from its inception should be retained but the court should have a discretion to award damages instead. This discretion would be exercised so that the court could "disregard the avoidance and adjust the rights of the parties in cases where the loss of the insured's claim would be seriously disproportionate to the harm which the insured's conduct has caused or might have caused. In adjusting the rights of the parties, the court should be required to have regard to all relevant facts, including the need to deter fraud" (para 30).

THE NEW SOUTH WALES LAW REFORM COMMISSION

The Insurance Act 1902

2.28 A different approach from that proposed by the Australian Law Reform Commission can be found in New South Wales where the Insurance Act 1902 provides by section 18 that :-

> *"(1) In any proceedings taken in a court in respect of a difference or dispute arising out of a contract of insurance, if it appears to the court that a failure by the insured to observe or perform a term or condition of the contract of insurance may reasonably be excused on the ground that the insurer was not prejudiced by the failure, the court may order that the failure be excused.*
>
> *(2) Where an order of the nature referred to in subsection (1) has been made, the rights and liabilities of all persons in respect*

of the contract of insurance concerned shall be determined as if the failure the subject of the order had not occurred."

This provision passes discretion to the court to excuse a breach of the contract of insurance by the insured where the breach was not a causative factor in the loss.

2.29 In February 1983, the New South Wales Law Reform Commission issued a report in which the working of s.18 of the Insurance Act 1902 was examined ("Insurance Contracts – Non-disclosure and Misrepresentation"). The New South Wales Commission identified 2 deficiencies in the application of s.18. The first of these was that the section was held not to apply to a breach by the insured of the common law duty of disclosure but only to "a failure … to observe or perform a condition of the contract of insurance". This view was expounded in Kolokythas and Anor. v. The Federation Insurance Limited [1980] 2 NSWLR 663 in a case involving fire insurance. Cover was taken out for 4 lock-up shops, in respect of 2 of which planning consents expired 4 days before the date of the proposal. No reference was made to the planning consents in the proposal but at the time the proposal was made it had become unlawful to carry on the business being undertaken in the 2 shops where consents had expired.

2.30 A subsequent claim under the policy was refused and the court held that the common law duty on the insured to disclose all material facts was one separate from the provisions and requirements of the insurance contract. This was so even where a declaration regarding disclosure was made part of the contract of insurance. The duty could not therefore be considered a "term or condition of the contract of insurance" for the purposes of section 18. Since section 18 was confined to "a term or condition of the contract of insurance", the court had no power to give relief for a failure to discharge the duty of disclosure. The expiry of the planning consents was held by the court to be a material fact following the hearing of evidence that the absence of planning permission could provide a strong temptation to cause a deliberate loss.

2.31 The second deficiency in section 18 is its possible inapplicability to "basis of contract" clauses. The NSW Commission took the view that "the power of the court under section 18 to excuse a failure by the insured 'to observe or perform a term or condition of the contract of insurance' does not extend to a 'basis of contract clause'. This is because an incorrect answer in a proposal, which is subject to a basis of contract clause, probably cannot be described as constituting a failure by the insured 'to observe or perform' a term or condition of the contract. The error is more accurately regarded as a failure by the insured correctly to complete a proposal, which is made the basis of the contract, than a breach of a term or condition" (NSW Report, para 2.11).

2.32 A further difficulty with section 18 may be the fact that the court may only excuse the failure by the insured where the insurer has suffered no prejudice. This prejudice need not be substantial and there may be cases

where the suffering suffered by the insured outweighs any prejudice caused to the insurer but the court is nevertheless powerless to intervene under section 18.

The Consumer Credit Act 1981

2.33 In an attempt to overcome these limitations of section 18 of the Insurance Act 1902, the New South Wales Law Reform Commission considered whether provisions similar to section 137 of the Consumer Credit Act might be extended to cover all insurance contracts. Section 137 provides that a contract of insurance within its reach is not void or unenforceable :

> *"(a) by reason only of a false or misleading statement made in or in connection with the contract or a proposal, offer or document that led to the entering into, reinstating or renewing of the contract unless the statement was material to the insurer in relation to the contract of insurance and*
>
> *(i) the statement was fraudulent; or*
>
> *(ii) the insured knew or ought reasonably to have known that the statement was material to the insurer in relation to the contract of insurance; or*
>
> *(b) by reason only of an omission of matter from the contract or a proposal, offer or document that led to the entering into, reinstating or renewing of the contract unless the matter omitted was material to the insurer in relation to the contract of insurance and -*
>
> *(i) the omission was deliberate; or*
>
> *(ii) the insured knew or ought reasonably to have known that matter material to the insurer in relation to the contract of insurance had been omitted."*

2.34 The effect of section 137 is that before an insurer can rely on material non-disclosure to refuse liability for a claim, he must show that the non-disclosure was of matter material to him in relation to the contract in question and that the non-disclosure was deliberate or that the insured must have known or ought reasonably to have known that the matter omitted was material to the insurer in relation to the contract. As far as misrepresentation is concerned, the insurer cannot rely on this to avoid liability unless the misrepresentation is fraudulent or the insured knew or ought reasonably to have known that the statement was material in relation to the particular contract of insurance in question.

2.35 The difficulties posed by warranties and basis of contract clauses are faced by section 138 of the Consumer Credit Act 1981 which provides that where by or under the provisions of a contract of insurance within its reach :

> *"(a) the circumstances in which the insurer is bound to indemnify the insured are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of particular events or on the existence of particular circumstances; and*
>
> *(b) the liability of the insurer has been so defined because the happening of those events or the existence of those circumstances was in the view of the insurer likely to increase the risk of loss occurring*
>
> the insured shall not be disentitled to be indemnified by the insurer by reason only of those provisions of the contract of insurance if, on the balance of probability (the onus of proof being upon the insured) the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of those events or the existence of those circumstances."

This section leaves insurers free to invoke exemption and limitation clauses (which may be the result of warranties and basis of contract clauses) where the loss is caused by the breach but not otherwise.

The Commission's Recommendations

2.36 The Commission concluded that legislation should be enacted similar to sections 137 and 138 of the Consumer Credit Act 1981 to apply to all insurance contracts except certain specified classes. The Commission considered the fears of the insurance industry that such an enactment would encourage fraudulent claims but pointed out that there was nothing in the terms of section 137 of the Consumer Credit Act 1981 which would assist a person who has withheld material information deliberately or who knows or ought to know that the information is material to the insurer. The Commission went on to say (at paragraph 7.14 of the NSW Report) that :-

> *"it is true that our recommendations, if implemented, will deprive insurers of the opportunity in some cases to raise the defence of non-disclosure. It is also true that reputable insurers may choose to raise an essentially technical defence where they suspect (but perhaps cannot prove) that an insured person has acted dishonestly..... But in our view it should be a court and not the insurer that determines the truth of allegations of fraud."*

2.37 The Commission considered whether the reference in section 137 of the 1981 Act to facts which "the insured knew or ought reasonably to

have known" was the most appropriate formula and decided that justice would be better served by the use of a test which enabled the courts to take into account considerations personal to the individual insured. The Commission proposed that the test should be changed to refer to facts which "the insured knew or a reasonable man in his circumstances ought to have known" and argued that insurers would not be disadvantaged by such an approach. It was pointed out by the Commission (at paragraph 7.30 of the NSW Report) that "an insured who, for example, is a knowledgeable lawyer, or a large public company, will be expected to 'know' much more than a modestly educated individual with poor command of the English language". Indeed, to adopt an objective "reasonable insured" test would be to unduly advantage the knowledgeable lawyer and the public company.

NEW ZEALAND

2.38 In New Zealand, section 11 of the Insurance Law Reform Act 1977 states that :-

> *"Where (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and*
>
> *(b) In the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring:-*
>
> *the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances."*

This section is not so wide in its application as s.18 of the New South Wales legislation as the New Zealand statute deals only with non-causative exemptions or exclusions while the New South Wales provisions give the court power to excuse the breach of any term of the contract of insurance where the insurer has not suffered thereby. The New Zealand Statute's wording is similar to that of section 138 of the New South Wales Consumer Credit Act 1981.

2.39 The Contracts and Commercial Law Reform Committee in New Zealand considered the introduction of legislation similar to Section 18 of the New South Wales provisions in a Report issued in May 1983. The Committee revealed that while "some insurers took exception to the introduction of a provision similar to the New South Wales section ... in our view none of the objections raised any matter of real substance .... We consider that reputable insurers have nothing to fear from the introduction of a provision similar to the New South Wales section, and it was interesting to us to learn that the State Insurance Office had no objection to the proposal, it having already established a similar policy" (para 10.2, "Aspects of Insurance Law (2)").

Chapter III

OUR APPROACH TO REFORM AND OUR RECOMMENDATIONS

Our approach to reform

3.01 Having examined the present state of the law in Hong Kong relating to non-disclosure, misrepresentation and breach of conditions of the contract, and having had the benefit of studying Reports on the subject in a number of jurisdictions, we are satisfied that the law as presently stated offers scope for unfairness to insureds and, while the actual number of cases of such unfairness referred to us is small, the Commission believe that reform is appropriate. In approaching the question of reform, the Commission has been conscious of the international nature of the insurance industry and the difficulties which might well be caused by the adoption in Hong Kong of measures out of step with insurance practice elsewhere. Further, the Commission consider that in general terms the person the law should seek to protect is the individual in his private capacity least able to protect himself. Of particular concern in Hong Kong is the fact that many people are not fully conversant with the English language and may be misled by inaccurate translation. The Commission felt that major commercial undertakings could reasonably be assumed to be familiar with the requirements of insurance and to have ready access to professional advice.

Scope of application - Categories of insured

3.02 The sub-committee was divided in its approach to this aspect of its task. Taking account of the desire to protect the individual in his private capacity and to avoid reform which may remove Hong Kong from the mainstream of international insurance, some members proposed that reforms should apply only to individuals rather than to commercial undertakings. Such an approach was favoured by the insurance industry both here and in other jurisdictions for, while the industry had no objection to providing greater protection to individuals, it saw no reason for extending that protection to commercial bodies. Other members of the sub-committee understood the concern of the insurance industry but did not think it right to draw an arbitrary line between individuals and commercial bodies. They argued that it would be difficult to justify an approach which provided protection to a lawyer who takes out household insurance cover in respect of his house to cover risks such as fire, storm, damage and theft while denying that protection for a semi-literate

small businessman taking out similar cover in respect of his business premises.

3.03 Each argument has its supporters elsewhere. The English Law Commission specifically rejected the suggestion that their proposals should apply only to private individuals while the United Kingdom Department of Trade and Industry considered that reform should be largely confined to areas affecting the individual. We take the view, however that the recommendations which follow should be applied to all insureds, whether individuals or commercial bodies. The essence of our recommendations is that, where a dispute arises, the court may take account of the particular circumstances of the insured. Clearly, more rigorous standards will be applied where the policy-holder is a corporate body which might be expected to be familiar with the intricacies of insurance. In this way, we do not think that insurers will be put at a disadvantage by the application of our recommendations to all insureds.

Scope of application - categories of insurance

3.04 We are conscious of the difficulties which may be caused for the insurance market in Hong Kong if the law is reformed in such a way that Hong Kong's approach no longer conforms to international practice. For that reason, we consider that the recommendations in this report should be restricted to insurance which is essentially domestic. Reinsurance is frequently conducted in the international market and it is not intended that this area of insurance should be within the scope of this report. Similarly, marine and aviation insurance are aspects of insurance with well-settled practices and any amendment of the existing law would cause difficulties for the Hong Kong insurance market in its international relations. Accordingly, we have concluded that the proposals contained in this report should not apply to reinsurance, marine insurance or aviation insurance.

3.05 The intention is to restrict the scope of our recommendations to insurance which is essentially of a domestic nature. One possible approach would be to confine the application of the reforms to policyholders resident in Hong Kong. This would act to the detriment, however, of a policyholder resident overseas insuring his Hong Kong property with a Hong Kong insurer. An alternative approach would be to apply the reforms to all insurance contracts of which the "proper law" was Hong Kong. If such a measure were introduced, the amended law would in most cases be applied in the circumstances of the overseas resident we have just described, since both the property insured and the insurer are Hong Kong based.

3.06 There is, however, a difficulty with the "proper law" approach. It is well-settled law that the parties to a contract are entitled to agree what is to be the proper law of the contract. Where the proper law has been expressly stated in the contract, that intention of the parties will be effectuated by the court provided it is bona fide and legal. Lord Wright put it this way in Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277 at page 290 :-

"It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."

It is possible, therefore, that insurers might seek to avoid the more stringent requirements of the amended law by including in the insurance contract a clause stipulating that the proper law of the contract would be that of a jurisdiction other than Hong Kong. Unless that clause fell within the proviso enunciated by Lord Wright as being illegal or contrary to public policy, the court would be obliged to apply the law specified in the contract. There appears to be no reported English decision in which the court has refused to give effect to an express choice of law clause in reliance on Lord Wright's proviso, although there is an Australian case not concerned with insurance where this has happened (Golden Acres Ltd v Queensland Estates Pty Ltd (1969) Qd. R. 378).

3.07 In order to prevent insurers avoiding the application of the amended law to their insurance contracts by incorporating a spurious proper law clause, the Commission examined the possibility of legislative provision on this aspect of the problem. Our attention was drawn to the Unfair Contract Terms Act 1977 in the United Kingdom. Section 27(2) states :-

"This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both) -

(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or on his behalf."

We find this approach attractive but foresee difficulties in relation to insurance if a provision such as section 27(2)(b) were incorporated into Hong Kong's legislation. The effect would be that where, for example, someone resident in Hong Kong took out insurance on his property in Canada with a Canadian Insurance Company, the law of the contract would be Hong Kong's, even though both insurer and insured wished it to be Canada's. We consider that

the introduction of a provision similar to section 27(2)(a) of the Unfair Contract Terms Act 1972 is desirable, however. We therefore recommend that our proposals should apply to all insurance contracts the proper law of which is that of Hong Kong (other than those categories of insurance excluded in paragraph 3.04). The Court should be empowered to disregard any contract term which purports to apply the law of a jurisdiction other than Hong Kong if it appears to the court that that term was included wholly or mainly for the purpose of avoiding the application of the proposed amendments to the law contained in this Report.

3.08 We considered at length whether our proposals should apply to all insurance contracts from a specified date or merely to contracts taken out or renewed after that date. If the former course were adopted, it might be thought unfair to insurers who had entered into contracts of insurance in good faith under different conditions. Equally, if the second course were followed, holders of policies of long-standing (such as life insurance) which were not subject to renewal would not gain the benefit of the amended law. However, we understand that it is general insurance practice in Hong Kong not to avoid liability under a policy by relying on a failure of the insured to disclose a fact at the policy's inception where the policy has been in force for some years and no loss has been suffered as a result of that non-disclosure. In some cases, a policy may lapse because of a failure of the insured to pay his premium on time. He may subsequently apply to have the policy reinstated. We consider that where a policy is reinstated it should be treated in a similar manner to a renewal. Accordingly, after careful consideration, we recommend that our proposals should apply to all contracts taken out, reinstated, or renewed after the date of implementation of these proposals. The insurer will, of course, be able to refuse the risk or amend the conditions of the policy at renewal.

Statements of Practice or Legislation?

3.09 It was maintained by the insurance industry in England that such defects as had been identified could be adequately cured by the adoption of a non-statutory Code of Practice and an undertaking not to repudiate liability "unreasonably". This approach was, however, specifically rejected by the English Law Commission and we are persuaded that it should also be rejected in Hong Kong.

3.10 The Statements of Insurance Practice adopted by the insurance industry in England are set out at Annexure 4. The first statement, which relates to non-life insurance taken out by persons resident in the U.K and insured in their private capacity, states at paragraph 2(b) that the insurer will not "unreasonably" repudiate liability for non-disclosure or misrepresentation "except where fraud, deception or negligence is involved". The wording is unsatisfactory on two counts. First, the measure of reasonableness is left to the insurer himself to decide and, second, the Statement leaves it open to the insurer to repudiate the contract where fraud, deception or negligence is suspected rather than proved. Similar criticism may be levelled at the Statement of Insurance Practice which relates to long-term insurance effected

by individuals. Its wording varies in that paragraph 1(a) provides that "fraud or deception will, and negligence or non-disclosure or misrepresentation of a material fact may. result in adjustment or constitute grounds for rejection".

3.11 The insured must rely on the insurer's good faith in his interpretation of the Statements for he can have no redress for a failure to observe their requirements. As the English Law Commission observed :-

> *"The Statements of Insurance Practice are themselves evidence that the law is unsatisfactory and needs to be changed. As we have pointed out, the Statements lack the force of law so that an insured would have no legal remedy if an insurer fails to act in accordance with them. Indeed, the liquidator of an insurance company would be bound to disregard them. We consider that the further protection which the insured needs should be provided by legislation" (para 3.28 of the Law Commission Report).*

That view was echoed in Lambert's case at page 492 when Lawton L.J. said, "Such injustices as there are must now be dealt with by Parliament, if they are to be got rid of at all". In the circumstances, we do not believe that a code of practice provides adequate safeguards for insured persons and we recommend that our proposals should be incorporated into legislation. That is not to say, however, that we think Statements of Practice are undesirable. On the contrary, we believe that the insurance industry should be encouraged to supplement the law by self-regulation, including statements such as those which have clearly been of benefit in England and we so recommend.

Non-disclosure - The "Prudent Insurer" and the "Reasonable Insured"

3.12 The central concept of the English Law Commission's proposals for reform of the duty of disclosure is the change in emphasis from the "prudent insurer" to the "reasonable assured" when testing materiality. The Commission recommended that a fact should be disclosed to the insurer if :

> *"(i) it is material to the risk;*
>
> *(ii) it is either known to the applicant or is one which he can be assumed to know;*
>
> *(iii) it is one which a reasonable man in the position of the applicant would disclose to his insurers, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought" (paragraph 4.47 of the English Law Commission Report).*

3.13 The English Law Commission state at paragraph 4.51 of their Report that "we would not wish the court to take account of the individual

applicant's idiosyncracies, ignorance, stupidity or illiteracy in determining whether a reasonable man in his position would disclose a known material fact" but it is difficult to find anything in the wording of the quotation in paragraph 3.12 above which would preclude such an approach. In contrast, the Australian Law Reform Commission specifically recommends that the individual characteristics of the insured should be taken into account (see para. 2.23 above) and the New South Wales Law Reform Commission has likewise recommended that the particular circumstances of the insured should be considered (see para. 2.37 above).

3.14 The definition of "reasonable insured" and its relevance to materiality were considered by the United Kingdom Department of Trade and Industry in a consultative document issued in August 1983. In the test of materiality, the consultative document departs from the English Law Commission's approach and the Department of Trade And Industry envisages that a fact will be material if :-

> *"it is one which a reasonable man would disclose to his insurers having regard to the nature of the insurance cover which is sought and to the circumstances in which it is sought if those circumstances were such as to have made it evident to the insured that the duty of disclosure was likely to be affected…. It is intended that the reasonable man should not be deemed to have a standard of knowledge or intelligence higher than that of the vast majority of proposers. It is also intended that he should be deemed to be honest, careful and acting in the utmost good faith".*

3.15 The words "in the position of the proposer" which were part of the English Law Commission's definition are significantly omitted from this latest version by the United Kingdom Department of Trade and Industry. The Department points out that :-

> *"this concept could encourage arguments that the standard of disclosure was affected by the totality of the circumstances bearing on that particular proposer e.g. his upbringing or mental state."*

3.16 We have outlined at paragraphs 2.36 to 2.37 above the approach adopted by the New South Wales Law Reform Commission and described how that Commission considered that the particular circumstances of the insured should be taken into account when deciding whether or not non-disclosure should render a contract of insurance void or unenforceable. As we have indicated at paragraph 3.13, while the English Law Commission maintain that their recommendations regarding the duty of disclosure do not allow the court to take account of the individual insured's idiosyncracies we are not persuaded that that is necessarily the case. It may be that there is little real difference between the proposals put forward by the English Commission and those of the Commissions in Australia.

3.17 We believe that the approach adopted in New South Wales is one well suited to Hong Kong conditions, providing as it does a means for the court to take into account the linguistic, educational and social attributes of the individual insured. We further believe that by providing the courts with a degree of flexibility in this way there is a greater likelihood of fairness to both insurers and insureds. To that end, we recommend that a contract of insurance within the categories described at paragraph 3.07 above should not be rendered voidable or unenforceable by reason of non-disclosure of a fact unless that fact was material to the particular contract of insurance and the insured knew, or a reasonable man in his circumstances ought to have known, that the fact not disclosed was material to the insurer in relation to the particular contract of insurance. This follows closely the wording of the New South Wales Consumer Credit Act 1981 (see para. 2.33 above) but we have referred to a contract being rendered "voidable" rather than "void" since that more accurately reflects our understanding of the existing legal position. We have also deleted the reference to deliberate omissions in section 137(b)(i). It seemed to us that the remaining provisions of section 137(b) were sufficient to enable a policy to be avoided where there had been a deliberate omission and that the words we have deleted were unnecessary.

3.18 We considered to what extent the duty of disclosure should extend beyond the material facts actually known by the insured. The present law in non-marine insurance is unclear on this point. In marine insurance s.18(1) of the Marine Insurance Ordinance, Cap. 329 (which is in identical terms to section 18(1) of the UK Marine Insurance Act 1906) states:-

> *"Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract."*

Reference to "the ordinary course of business" would be inappropriate in relation to non-marine insurance contracts taken out by individuals but we consider it would be unreasonable to allow an insured to fail to disclose a material fact which he did not know but could have ascertained with reasonable inquiry. We note the view of the English Law Commission that an assured "should be assumed to know a material fact if it would have been ascertainable by reasonable enquiry and if a reasonable man applying for the insurance in question would have ascertained it" (para. 4.50 of the Law Commission's Report). We consider that this is a reasonable provision and accordingly recommend that the insured should be assumed to know of any fact which could have been ascertained by reasonable inquiry and would have been so ascertained by a reasonable man proposing to enter into the contract of insurance in question. The effect of our recommendations in this paragraph and paragraph 3.17 is that an insurer will not be able to avoid an insurance contract for non-disclosure of a material fact which the insured knew or ought to have known was material unless the fact not disclosed was

known by the insured or could have been ascertained by reasonable inquiry by the insured and would have been ascertained by a reasonable man proposing to enter into the particular insurance contract.

3.19 It is intended, therefore, that the test of materiality should remain unaltered and depend on matter considered material by the "prudent insurer" but that the court should have power to disregard non-disclosure of such material facts where the circumstances of the particular insured make such a ruling appropriate. As was pointed out at paragraph 2.37 above, we do not believe that such a measure places insurers at a disadvantage for the court is unlikely to disregard a fact thought material by the insurers where the insured is a commercial body or well-educated individual. The court's intervention is likely only in those cases involving individuals with little education and an inadequate grasp of the issues involved in insurance. We have referred already to the difficulties inherent in Hong Kong where a significant proportion of the population speak little English and we believe that our recommendation should provide greater protection for such persons.

Misrepresentation

3.20 We see no reason to distinguish our approach in regard to misrepresentation from that adopted in relation to non-disclosure and we consider that the particular circumstances of the insured should be taken into account. We believe, however, that specific reference should be made to fraudulent misrepresentation. Without such provision, an insurer would be unable to avoid a policy where there had been deliberate misrepresentation of a material fact unless it could be shown that the insured knew, or a reasonable man in his position ought to have known, that the statement was material. We think that fraudulent misrepresentation of a material fact should allow the insurer to avoid the policy. Accordingly, we recommend that no contract of insurance within the categories outlined at paragraph 3.07 should be rendered voidable or unenforceable by reason of misrepresentation unless the misrepresentation was material to the insurer in relation to the particular contract of insurance and

(a) the misrepresentation was fraudulent; or

(b) the insured knew, or a reasonable man in his circumstances ought to have known, that the statement was material to the insurer in relation to the particular contract of insurance.

As with our recommendations on non-disclosure, we have followed the wording of the New South Wales Consumer Credit Act 1981 and the approach adopted by the New South Wales Law Reform Commission, with the reference to a contract being rendered "voidable" rather than "void".

3.21 As with non-disclosure, the introduction of the concept of the reasonable man in the circumstances of the insured enables the court to disregard misrepresentation where this is appropriate in the light of the

insured's particular circumstances. We do not consider that this proposal places insurers at any more of a disadvantage than our recommendation regarding non-disclosure (see paragraph 3.18 above) and we do not foresee the court disregarding misrepresentation in any but a limited number of cases where the insured was clearly unable to grasp the intricacies of insurance requirements.

Warranties and basis of contract clauses

3.22 The approach we have adopted in relation to non-disclosure and misrepresentation allows a degree of flexibility which will enable the particular circumstances of each case to be considered. We think it equally desirable that this flexibility should be extended to the question of warranties. If the breach of a warranty has resulted in loss then it is reasonable that the insurer should be entitled to refuse to indemnify. If however, the loss is not related to the breach we consider that the whole circumstances of the case should be capable of examination by the Court in deciding whether or not the insurer is entitled to avoid the policy. Taking note of the provisions of the New South Wales Insurance Act 1902, we recommend that where any proceedings are taken in a court in respect of a difference or dispute arising out of a contract of insurance, the court should be empowered to disregard a failure by the insured to observe or perform a term or condition of the contract of insurance if it is just and equitable in all the circumstances so to do and if the insurer has not been materially prejudiced by the failure. The factors which the court should take into account in the exercise of its power to disregard irregularities should include consideration of whether or not the insurer would have accepted the risk, and on what conditions, had he been fully apprised of the facts. We intend also that the circumstances and character of the insured should again be relevant.

3.23 We have outlined in Chapters I and II the potential difficulties for insureds posed by "basis of contract clauses" and we consider it undesirable that an insurer should, by use of such a clause, be able to avoid a policy where the insured has innocently mis-stated a fact which bears no causal relation to the loss subsequently sustained. An insurer may protect himself with the provision of specific warranties (which will be governed by our recommendation at paragraph 3.22) but we think "the basis of contract clause" unfairly favours the insurer. We note the views of the New South Wales Law Reform Commission that the wording of section 18 of the Insurance Act 1902 (on which our recommendation at paragraph 3.22 is loosely based) would not cover a failure by the insured to satisfy warranties imposed by a "basis of contract clause". Some additional provision is necessary and we therefore recommend that any "basis of contract clause" should be ineffective to the extent that it purports to convert into a warranty any statement by the insured as to the existence of past or present facts, whether contained in the proposal form or elsewhere. This recommendation is deliberately restricted to warranties as to past or present facts.

Undertakings as to future conduct provide safeguards for insurers which are clearly necessary and are not objectionable.

3.24 We believe that taking these central recommendations in conjunction with the less fundamental amendments we shall now propose, this legislative change should ensure that insured persons are protected from unscrupulous insurers interpreting their rights under the common law too strictly. We do not believe that reputable insurers will be disadvantaged by these reforms.

Proposal Forms

3.25 In an endeavour to prevent innocent non-disclosure in the interests of both insurers and insured, we recommend that legislation be enacted to require all proposal forms to bear a boldly printed warning in both English and Chinese to the effect that a failure to disclose all facts which the insurer may think relevant to his assessment of the risk may lead to avoidance of the policy. This warning should advise that in the case of doubt, the insured should reveal the fact and seek the insurer's advice. Since the duty of disclosure also arises at the time of renewal (see para. 2.06 supra) we recommend that a printed warning in both English and Chinese should appear on all renewal notices, stressing the need to reveal all changes in circumstances since the time of the original proposal. To ensure compliance by insurers with these proposals, we further recommend that if there is a failure to comply with the requirements concerning warning notices on proposal forms and renewal notices, the insurer shall not be entitled to rely in any proceedings in court arising out of the policy on any failure by the insured to disclose any material fact unless the court is satisfied that the insured has not been prejudiced by the insurer's failure to comply. This follows the approach adopted by the English law Commission to which we have referred at paragraphs 2.09 and 2.10.

3.26 An alternative to the approach we have adopted would be to refuse to allow an insurer to rely on any non-disclosure where the proposal form did not direct a specific question to the matter not disclosed. We have considered this possibility but concluded that it would tend to encourage proposal forms of increasing length and complexity which would be in the best interests of neither the public nor the industry. However, where a proposal form is used, we believe that insureds should as a matter of good insurance practice receive a copy of their completed proposal form at the time the policy is granted wherever practicable. It seems to us unreasonable that at renewal an insured should be required to recall details of information given some time previously and to notify the insurer of any change without first having been supplied with a copy of the original proposal form.

3.27 In view of Hong Kong's particular problems with regard to language, we acknowledge the desirability of providing proposal forms and insurance policy documents in both English and Chinese. However, many of the technical terms used in insurance contracts are not readily susceptible to

precise translation into Chinese. Furthermore, full translation of all insurance documents would entail increased expense (which would no doubt be passed on to the consumer in increased premiums) and necessitate the production of more unwieldy insurance documents. We have concluded that it would be impractical to recommend that full translation of proposal forms and policy documents should be mandatory but we see no reason why a Chinese summary of the cover provided should not be provided in every case and we so recommend. We consider that further translation than this is desirable and we believe that our recommendations will encourage an increase in the provision of documentation in the Chinese language. We envisage that under our recommendations, when considering whether to exercise its discretion to excuse non-disclosure or misrepresentation by the insured, the court could properly take into account whether or not the insurance documents had been supplied to the insured in his own language. In this way, we believe that insurers will be persuaded to provide Chinese translations of insurance documents wherever practicable. We recommend that as a matter of good insurance practice, wherever practicable an insured should be supplied with a copy of any warranty on which the insurer intends to rely and we recommend that this should be supplied in both English and Chinese. We further recommend that any exemptions specified in the insurance policy should be brought specifically to the attention of the insured by providing him with details of such exemptions in English and Chinese. Our recommendations regarding insurance intermediaries which follow in Part 2 of our Report should in any case encourage more widespread explanation of the terms and conditions of insurance policies to prospective insureds.

PART II

CHAPTER IV

THE SCOPE OF THE PROBLEM

4.01 The second part of our terms of reference is directed towards the manner in which contracts of insurance are made. A number of issues concern us here. These include the language in which insurance contracts are drafted and the standard of information which is available to the prospective insured.

4.02 In Hong Kong, the activities of insurance companies are regulated by the Insurance Companies Ordinance, Cap. 41, but no similar regulation exists for the intermediaries who conduct the majority of insurance business with the public. Regulation in one form or another has been introduced in a number of other jurisdictions and it may be that Hong Kong, with its dual use of English and Chinese and its lack of uniformity in educational attainment, has a particular need for such regulation.

THE MEANING OF "INTERMEDIARY"

4.03 Insurance intermediaries may be divided into two categories : insurance brokers and insurance agents. These may be further sub-divided into part-time and full-time agents and brokers but for our purposes the more significant classification is the initial division between brokers and agents.

Insurance brokers

4.04 "Insurance brokers" were defined in a European Economic Community directive on insurance intermediaries as :-

> *"persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim" (Directive 77/92 EEC Article 13(2)(1)(a)).*

This definition was adopted in the UK Government White Paper (Cmnd. 6715) on Insurance Intermediaries. The essential characteristic of an insurance broker is that he is not tied to any particular insurance company but is free to negotiate business with the company offering the most favourable terms. A broker acts on the instructions of the prospective insured and is his agent in law.

Insurance agents

4.05 "Insurance agents" are defined in the EEC directive as

> *"persons instructed ….. or empowered to act in the name and on behalf of ….. one or more insurance undertaking ….. "*
> (Article 13(2)(1)(b)).

An agent is tied to one or more companies and his job is to sell policies issued by the companies he represents. Unlike a broker, who generally acts as the agent of the insured, an "insurance agent" conducts business as the agent of the insurer and it is to the insurer that he is responsible. While some agents are full-time employees of a particular insurance company, some receive commissions from a number of different companies and others in a position to sell insurance, such as solicitors, accountants and travel agents, operate as part-time agents of insurers on a commission basis.

Intermediaries in Hong Kong

4.06 There are no definitive statistics available to the sub-committee on the numbers of each category of insurance intermediary in Hong Kong and the extent to which insurance business is placed with insurers through such intermediaries. Whilst some insurances are negotiated directly with insurers, there is clear evidence that the bulk of insurance business, both commercial and domestic, is placed through intermediaries. There are 14 members of the Hong Kong Insurance Brokers Association. These are essentially the major international insurance broking concerns, which are corporate bodies concentrating their activities in the commercial/industrial market and which conduct their affairs according to well established international standards. Whilst the broking community are relative newcomers to the Hong Kong insurance market it is estimated that there may be a hundred or more corporate bodies, partnerships and individuals whose intermediary activities are essentially of a broking nature as defined in Para. 4.04. The remaining intermediaries, both full time and part time, of which there are several thousand can all be classified as agents as defined in Para. 4.05.

DIFFICULTIES IN HONG KONG

4.07 Although the theoretical distinction between "insurance brokers" and "insurance agents" may seem obvious, the public perception of that

distinction in Hong Kong is restricted by two factors. The first is language and the second is the lack of public awareness of the intricacies of insurance law and practice.

Language and Terminology

4.08 In countries such as the United Kingdom and the U.S.A. the distinction between brokers and agents is clearly drawn and apparently understood by the insurance-buying public. In Hong Kong, the terms in the Chinese language for agents and brokers are interchangeable and this interchangeability of terms has been extended to the English usage. The position is further complicated by the tendency of some intermediaries to adopt titles such as "insurance advisers" or "insurance consultants" which give no indication of the legal status of the intermediary in relation to the insured.

Public ignorance of Insurance Practice

4.09 In addition to the confusion of terminology in Hong Kong, we have heard evidence from those connected with the insurance industry that there is widespread ignorance of insurance practice. It is unlikely that the majority of those seeking insurance in Hong Kong in their personal capacity are aware of the significance of the distinction between "broker" and "agent" or of the duties which lie on the insured to make full disclosure. We understand that because insurance proposal forms are sometimes printed without a Chinese translation, the intermediary may offer to complete the proposal form on the instructions of the prospective insured. Such a practice is likely to lead to difficulties where the insured has not been adequately informed of his duty of disclosure and is largely ignorant of insurance practice and procedure.

Standards of Intermediaries

4.10 The general public's inadequate knowledge of insurance matters is compounded by the circumstances in which insurance business is conducted in Hong Kong. No professional standards are stipulated for insurance intermediaries and there is nothing to prevent anyone setting up in business as an insurance broker or agent. Although under the law of agency brokers may generally be considered to act as the agents of the insured, there is a danger that, in the absence of professional standards, when placing insurance business on their client's behalf they may not always consider adequately the suitability of the policy for the insured. We believe that a failure to appreciate and consider the needs of the insured is more likely to arise in circumstances where the broker has had to undergo no formal training or obtain any recognised qualification.

4.11 In the United Kingdom, the Department of Trade identified some of the problems caused by intermediaries in an unregulated market when it said :

> *"In many cases, it may be in the interest of the insurance agent committed to promote the policies of one insurance company to obscure this fact. ….. There is also unease that it is still possible for anyone to set up in business as an insurance broker - whatever his knowledge and experience of insurance, whatever his character and ethics, whatever his financial resources or arrangements for handling his client's money. Concern has also been expressed over inadequate standards of training for insurance agents. Again, there is room for doubt, in the case of a small number of life assurance companies, how far agents, who may use high-pressure sales techniques, are effectively controlled by the companies they work for" (paragraphs 5 and 6, "Insurance Intermediaries" Department of Trade White Paper, 1977).*

It is apparent that these same problems arise in Hong Kong. Indeed, where (as in Hong Kong) there is widespread ignorance of insurance law and practice, it becomes particularly important that the intermediary with whom the prospective insured is dealing is competent and able adequately to advise and assist in the completion of the insurance contract. If regulation and training of intermediaries is necessary in countries such as the United Kingdom, a fortiori it is necessary in a society such as Hong Kong .

Presentation of insurance documents

4.12 As we have already indicated, the use of two languages (and a host of dialects) in Hong Kong is likely to exacerbate the difficulties faced by the average insured. Since some insurance documents are printed only in English, the non-English speaking insured is at a serious disadvantage. The problems associated with dual language policies have been addressed in paragraph 3.27 and our conclusions are to be found in that paragraph and paragraphs 7.07 and 7.08.

4.13 Related to the language of the contract of insurance is the manner in which that language is presented. A policy was brought to our attention in which the size of print of the policy conditions made reading difficult and was likely to deter all but the most assiduous insured from checking the terms of his insurance. In fairness to the company concerned we should add that it seemed to us that the reason for reducing the size of the print was not to deter an insured from reading the terms of the policy but to reduce the size of the document and its printing costs. It also appeared to us that the policy in question was good value for money and in no sense unfair to an insured. Nevertheless, it may be that a minimum type size should be specified for insurance documents and we shall return to this later (see paragraph 6.14).

Restriction of consumer choice

4.14 We have learned of cases where the public's choice of an insurer has been restricted by the seller of a related product. The most widespread example arises in connection with the sale on loan terms of a car where the seller requires insurance to be taken out with a particular insurer. For a variety of reasons, the purchaser might prefer to be insured with another insurer and may think this restriction of choice undesirable. The matter does not fall directly within our terms of reference and we have reached no firm conclusions upon it but we consider it to be an area which might merit further examination by government.

CONCLUSIONS

4.15 As with the matters covered by the first part of our report, so with this second part we have had few complaints from members of the public and little direct evidence that there is a significant problem in Hong Kong other than in the motor insurance field. Nevertheless, we believe that the public does not always receive the service which it is entitled to expect from the insurance industry and that there are inadequate safeguards against abuse of the system. In particular, the lack of training for intermediaries and absence of effective control of their activities give cause for concern. Widespread ignorance of insurance law and practice and the functions of insurance intermediaries increase the dangers of the present situation where unqualified intermediaries may sell inappropriate insurance to uninformed insureds. The difficulties caused by language in Hong Kong are an additional cause for concern and make the provision of proper insurance advice to prospective insureds particularly important.

CHAPTER V

POSSIBLE SOLUTIONS -APPROACHES OF OTHER JURISDICTIONS

5.01 The problems outlined in the previous chapter have been recognised elsewhere and a variety of solutions have been suggested or adopted. We now examine some of these solutions and endeavour to identify an approach appropriate to Hong Kong.

THE UNITED KINGDOM

Insurance Brokers

5.02 In May 1975 the Secretary of State for Trade in the United Kingdom approached existing brokers' organisations and asked them to consider how a self-regulatory body for insurance brokers might be established to draw up codes of conduct, control admission and maintain discipline. As an alternative, the brokers' organisations were asked to consider the possibility of a Government-run licensing system for brokers. In August 1975 "A Consultative Document on the Regulation of Insurance Brokers" was sent to the Secretary of State by the four insurance brokers' organisations. This document proposed a system of self-regulation and gave three main reasons for favouring this approach:-

(a) the insurance broking industry had a long record of behaving with responsibility towards all types of insurance user;

(b) insurance brokers were already members of one or other of four main broking associations and accepted the disciplines which membership implied; and

(c) the absence of Government constraint had been one of the important factors in the world-wide reputation of the British insurance broking industry. The introduction of a licensing system by Government would imply a lack of confidence in British insurance brokers which could have adverse effects on the industry.

5.03 The British insurance brokers' associations suggested that the British Insurance Brokers' Council, composed of nine members representing the four insurance broking bodies, should operate a scheme of self-regulation. All those wishing to describe themselves as "insurance brokers" would be required to apply for registration with the Council. Before registering, an

applicant would have to satisfy certain requirements regarding his qualifications and be considered a "fit and proper person".

5.04 The Department of Trade published the Consultative Document by the insurance brokers' organisations as an Annex to its own White Paper on Insurance Intermediaries. The Department accepted "in principle the case made out in the consultative document for a scheme of self-regulation of insurance broking" and while considering that these proposals could "provide the basis for a practicable and effective scheme of self-regulation, ….. the details need further debate and elaboration" (paragraphs 10 and 11). The United Kingdom Government rejected the possibility of introducing State licensing for insurance brokers "unless it proves impossible to achieve an effective and open system of regulation run by the brokers themselves". The main objections to State licensing were the absence of Government officials with sufficient expertise and knowledge to administer the scheme and the reluctance "to adopt a scheme which would increase demands for public expenditure and manpower even though the expenditure might be balanced by equivalent income" (paragraph 9).

5.05 As a result of discussions following the publication of the Department of Trade's White Paper, the Insurance Brokers (Registration) Act 1977 was passed. This established the Insurance Brokers Registration Council whose purpose was to "establish and maintain a register of insurance brokers containing the names, addresses and qualifications ….. of all persons who are entitled ….. to be registered and apply ….. to be so registered" (section 2 of the Insurance Brokers (Registration) Act 1977). As from 1 December 1981, only persons registered with the Council are entitled to describe themselves as "insurance brokers" (section 22) and the unauthorised use of the title "insurance broker" constitutes a criminal offence.

5.06 Disciplinary proceedings are established under Sections 13 to 20 of the 1977 Act and the Disciplinary Committee of the Insurance Brokers Registration Council is empowered in certain circumstances to remove a broker's name from the Register. Section 10 requires the Council to draw up a Code of Conduct for brokers and a code was approved by Statutory Instrument 1394 of 1978. The Code identifies three principles which should govern the behaviour of insurance brokers in the conduct of their business. These are :-

(a) insurance brokers should at all times conduct their business with utmost good faith and integrity;

(b) they should do everything possible to satisfy the insurance requirements of their clients and should place the interests of those clients before all other considerations; and

(c) statements made by or on behalf of insurance brokers when advertising should not be misleading or extravagant.

5.07 The remainder of the Code consists of an elaboration of these principles. Of particular interest are paragraphs 3(6) and 3(10) of the Code which state :-

> *"(6) Insurance brokers shall, upon request, disclose to any client who is an individual and who is, or is contemplating becoming, the holder of a United Kingdom policy of insurance the amount of commission paid by the insurer under any relevant policy of insurance"; and*
>
> *(10) Before any work involving a charge is undertaken or an agreement to carry out business is concluded, insurance brokers shall disclose and identify any amount they propose to charge to the client or policyholder which will be in addition to the premium payable to the insurer".*

5.08 Under Section 12 of the 1977 Act, the Insurance Brokers Registration Council is required to make rules requiring insurance brokers to arrange and maintain professional indemnity insurance. These rules were produced as the Insurance Brokers Registration Council (Indemnity Insurance and Grants Scheme) Rules 1979 by Statutory Instrument 408 of 1979. The Rules require each practising insurance broker to insure himself :

> *"(a) against losses arising from claims made against the insured :*
>
> *(A) for breach of duty in connection with the business by reason of any negligent act, error or omission or by reason of any dishonest or fraudulent act or omission; and*
>
> *(B) in respect of libel or slander or in Scotland defamation,*
>
> *committed in the conduct of the business by the insured, any employee or former employee of the insured, and where the business is or was carried on in partnership any partner or former partner of the insured; and*
>
> *(b) against claims arising in connection with the business in respect of :*
>
> *(A) any loss of money or other property whatsoever belonging to the insured or for which the dishonest or fraudulent act or omission of any employee or former employee of the insured, and where the business is or was carried on in partnership any partner or former partner of the insured; and*

(B) legal liability incurred by reason of loss of documents and costs and expenses incurred in replacing or restoring such documents"
(Rule 3(2)(i) of the 1979 Rules).

Insurance Agents

5.09 While considerable attention has been given in the United Kingdom to the activities of insurance brokers and a system of registration has been established by statute, no such control exists for insurance agents. The Insurance Companies Act 1974 provides some measure of regulation by providing under section 63 that :

> *"any person who, by any statement, promises or forecasts which he knows to be misleading, false or deceptive, ….. or by reckless making of any statement (dishonest or otherwise), induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurance company shall be guilty of an offence".*

5.10 Regulations were made under section 64 of the 1974 Act (1976 S.I. 1976/521) which require the agents of insurance companies to disclose their relationship with the company when inviting a member of the public to enter into an insurance contract, thereby enabling the prospective insured to distinguish between an agent and a broker. In theory, this information should assist the prospective insured in evaluating the advice given to him by the intermediary.

5.11 The United Kingdom Government examined the possibility of establishing a central system of control over insurance agents in its White Paper on Insurance Intermediaries (Cmnd. 6715) but concluded that such a scheme was unworkable in view of the wide variety of agents retained by companies and the high cost in terms of manpower and money of operating an effective system of control. The Government considered that the most effective way of improving the standards of insurance agents was to make the companies employing them fully responsible for their conduct in carrying out the terms of the agency agreement. This, the Government believed, would have several advantages for the consumer without laying an unreasonable burden on the insurer. The advantages of such an approach included :

"(i) insurers and others using agents to sell insurance would need to consider in the light of their legal responsibility whether they should raise their standards of selectivity and training for their sales forces;

(ii) policyholders would be surer of their rights under insurance policies and, unless an agent had acted outside the terms of his appointment, they would be able to get redress more easily for his failings by proceeding

directly against the responsible insurance company - a more substantial target" (paragraph 15 of Cmnd 6715).

To date, no legislative enactment of these proposals has taken place.

AUSTRALIA

5.12 In 1980, the Law Reform Commission of Australia published its Report on "Insurance Agents and Brokers" (Report No. 16) setting forth recommendations for increased control of insurance intermediaries. In formulating these proposals, the Commission paid particular attention to three main principles. These were the protection of innocent purchasers from losses occurring as a result of the methods used to market goods and services; the promotion of informed choice by consumers; and the encouragement of competition.

Insurance Brokers

5.13 The Commission examined the way in which the insurance broking system operated in Australia and identified four main reasons for the imposition of statutory controls. These were a lack of standards ensuring competence and fitness; a lack of standards ensuring impartiality; a need for universal professional indemnity and fidelity guarantee insurance; and a history of broker insolvencies.

5.14 Turning first to the question of competence and fitness, the Commission were sceptical of proposals by the brokers themselves regarding qualifications and considered that these were seriously anti-competitive. The Commission considered that "provisions which bar entry to, or allow for disqualification from, an occupation or profession and which incorporate such criteria as 'character and suitability' or 'unprofessional conduct' are vague, inappropriate and potentially anti-competitive. The criteria relevant to the insurance broking profession should be stated in "clear and specific terms" (page xix of the Australian Law Reform Commission Report).

5.15 Attempts to ensure impartiality of insurance brokers by requiring a spread of business would prove costly to supervise but the Australian Commission identified a number of alternative ways in which the independence of the insurance broker could be encouraged. First, cross-directorships and cross-employment between brokers and insurers should be forbidden. Second, where the broker acts under a binder (a kind of limited agency whereby the broker arranges permanent cover on behalf of insurers in certain areas of risk and subject to specified limits) he should be required to disclose to his client that, in doing so, he is acting as the agent of the insurer and not of the client. Third, the broker should be required to disclose to the insured the name and place of business of the insurer under a contract of insurance arranged by the broker.

5.16 The manner in which brokers receive remuneration affects their impartiality and accordingly the Commission took the view that a broker should be required to disclose to the insured and the insurer any amount paid or payable to the broker by either insured or insurer.

5.17 Broker insolvencies in Australia represented a major problem and the Commission considered that a principal cause of these insolvencies was the mixing of funds received on behalf of the insurers (premiums) and insureds (return premiums and claims payments) with the broker's general business funds. Premiums were sometimes retained by brokers for substantial periods of time and invested for the broker's own benefit in what were often dubious investments. To reduce the risk of insolvency, the Commission recommended that brokers should be made subject to financial restrictions as to the holding and investment of insurance moneys and to audit and inspection requirements. Further, there should be a requirement that all insurance moneys other than general insurance premiums should be held in trust by a broker for the insurer and should not be capable of investment by the broker. Conversely, claims payments paid to a broker should be deemed to be held on behalf of the insurer until actually paid to the insured.

5.18 A further recommendation which arose from the history of broker insolvencies in Australia was the proposal that brokers should be required to take out professional indemnity insurance.

5.19 The Commission favoured a system of registration for insurance brokers but felt that it would be unrealistic to expect the public, even with the assistance of publicity, to appreciate the distinction between a registered and an unregistered broker. They therefore recommended that all brokers should be required to conform to the financial requirements the Commission proposed and that no unregistered person should be permitted to describe himself or his business in a way likely to lead a person to believe that he was a registered insurance broker. Furthermore, in a measure which would encourage the insurers themselves to take steps to check the bona fides of brokers with whom they deal, the Commission recommended that :

> *"any person other than a regulated broker who acts for reward in arranging a contract of insurance as an intermediary should be deemed, in relation to any matter relating to insurance and as between the insurer and the client of the intermediary, to be the agent of the insurer, not of the intending or actual insured" (para. 117).*

Insurance Agents

5.20 It was felt by the commission that the law as to the responsibility for an agent's actions was unsatisfactory in certain respects. The Commission therefore recommended that :

"An insurer should be made responsible for loss or damage caused by misrepresentation or other conduct of its agents or employees which is relied on in good faith by an insured or intending insured in relation to any matter relating to insurance, whether or not the agent or employee acted within the scope of his authority or employment. An agreement which seeks to limit this responsibility should be rendered ineffective. To avoid the risk of an insured being misled, it should be an offence for an insurer to make or offer to make such an agreement. It should be an offence for an agent or employee wilfully and with intent to deceive to misrepresent the effect of, or benefits available under, an insurance policy or to misrecord information on a proposal or claim form or to advise an insured or intending insured to do so" (pages xvii and xviii).

THE UNITED STATES OF AMERICA

5.21 While particular provisions vary from state to state, the general requirements governing insurance intermediaries are common to all states. In all states, agents must be licensed and brokers must be licensed in all but 15 states. Before a licence is issued to a broker or agent, the applicant must have completed a prescribed course of study and have passed specific examinations relating to insurance matters.

5.22 It is an offence for a person to act as an insurance intermediary without the requisite licence. Insurers are thus only able to employ licensed agents and accept business from licensed brokers. The scheme of licensing is administered by government officials who may revoke or suspend an intermediary's licence for appropriate reasons, such as fraud or dishonesty or professional incompetence

MALAYSIA

5.23 By an amendment to the Malaysian Insurance Act, section 44A now provides that :-

"(1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the

purpose of the formation of the contract, to be a statement made or act done by the insurer ….."

5.24 As a result of this amendment, a number of measures were taken by the insurers to safeguard their position. The most novel of these was the introduction of authorisation cards for agents, coupled with an extensive publicity campaign in the Malay, Chinese, Tamil and English press to familiarise the public with the system and to encourage people to demand production of an authorisation card by any agent with whom they intended to do business.

5.25 In addition to the introduction of authorisation cards, the Malaysian insurers inserted a number of additional clauses in their proposal forms. One clause drew the prospective insured's attention to the authorisation card system while another was a declaration by the prospective insured that the answers in the proposal form were true and that he had "not withheld any information which might influence the acceptance of this proposal, and that the warranty hereby given shall be the basis of the contract with the company".

5.26 As a further restraint on unscrupulous agents, Section 16A of the Insurance Act provides that :-

"Any person who, by any statement, promise or forecast which he knows to be misleading, false, or deceptive, or by any fraudulent concealment of a material fact, or by the reckless making (fraudulently or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive. induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurer shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringitt or to imprisonment for a term not exceeding one year or to both".

CHAPTER VI

OUR RECOMMENDATIONS

Classification of Intermediaries

6.01 We have outlined in Chapter IV some of the problems which arise in Hong Kong in relation to intermediaries. In particular, we have noted that there is a lack of general awareness of the distinction to be drawn between brokers and agents and the different responsibilities which each has. We believe that this distinction should be clarified and to that end we recommend that an insurance broker should be defined as a person who arranges policies of insurance as an agent for potential policy holders or policy holders. All insurance brokers would be required to register with the Insurance Authority. We explain later our proposals regarding registration. We further recommend that an insurance agent should he defined as any person conducting insurance business on behalf of another for profit as an agent for one or more insurers. Sometimes, an individual may act both as a broker and as an agent. This may lead to confusion where it becomes unclear as to whether the intermediary is at the particular time acting as agent of the insurer or of the insured. In general, a broker acts as the agent of the insured. We recommend in paragraph 6.07 that an insurance agent should be the agent of the insurer at all material times. One possibility which the Commission considered to achieve greater clarity was to provide by law that the broker should be deemed to be the agent of the insured unless he had informed the insured in writing that he was acting as agent for the insurer. We concluded, however, that such a proposal was unlikely to achieve any significant benefit for the insured. We consider that the question of an intermediary's capacity should be determined under current law and no presumption in law such as has been proposed should be introduced. We recommend, however, that the insurance industry's code of conduct should include a requirement that an intermediary should make clear to an insured in what capacity the intermediary is acting. The code should also require an intermediary acting for more than one insurance company to inform the insured of the company for which he is acting at any given time (and see para. 6.11).

Insurance Brokers

6.02 As we have already observed, Hong Kong provides no control on the activities of brokers. It is open to anyone to commence business as a broker and to hold himself out as such. We have received no complaints from members of the public regarding the conduct of brokers but we nevertheless consider that some measure of control is necessary in advance of what might

in future be a problem. We believe that some system of registration is desirable and we recommend that anyone seeking to carry on business as an insurance broker should be required to register with the Insurance Authority. The Insurance Authority should be required to keep a register of brokers which would be open to public inspection. We propose that minimum standards of education and financial probity should be laid down by the legislature following consultation with the insurance broking industry. No person should be registered as a broker unless he satisfies the Insurance Authority that he has complied with the minimum standards specified by the legislature. In order to provide effective continuing control of the broking industry, a registered broker should be required to notify the Authority of any change in its registration particulars and a failure to do so should be a criminal offence.

6.03 Recognising that professional standards may often best be encouraged by the industry itself, we considered recommending that an individual should be permitted to practise as a broker either by registering with the Insurance Authority or by registering as a member of an approved broking association. Such an approach was attractive in that it would tend to encourage self-regulation of the industry in the long term but there were disadvantages in a system of dual registration, in particular the possibility that different disciplinary standards might be applied by the Authority and the Associations. Nevertheless, the achievement of self-regulation together with a minimisation of the Authority's workload are clearly desirable aims. We therefore recommend that it should be open to any broking association to apply to have itself registered with the Insurance Authority. If the Authority is satisfied that the requirements for membership of the particular association are consistent with the minimum standards specified for registration of individual brokers, it should register the association. The registration criteria both for registration of individual brokers and of broking associations should be determined after discussions between the Insurance Authority and the broking industry. We consider that, while all brokers must register with the Authority, the fact that an applicant for registration is already a member of a registered broking association should automatically be taken as satisfying the Authority's registration requirements. Every registered association should be required to submit a full list of its members to the Authority and to notify the Authority of any subsequent changes in membership or other details submitted on registration. A failure to do so should be an offence.

6.04 Both individual brokers and corporate bodies should be entitled to register as brokers. Where the latter are concerned, we consider that the Insurance Authority should be given details of the directors and secretaries of the company at the time when application for registration is made. Section 158(1) of the Companies Ordinance, Cap. 32, requires companies to maintain a register of directors and secretaries. The Registrar of Companies must be furnished with a return which details the particulars contained in the register. This return must be lodged when the directors are first appointed and when there is any change in the particulars in the register. We believe that similar details should be supplied to the Insurance Authority when an application for registration as a broker is made and we accordingly recommend that the

Insurance Authority should be served by the corporate body with a copy of the return of particulars in the register of directors and secretaries which is required to be served on the Registrar of Companies under section 158 of the Companies Ordinance, Cap. 32. Where a new director is appointed, or there is any other change in the information previously supplied to the Authority, notification of that appointment or change must be given to the Authority by copying to the Authority the return required by s.158(5) of Cap. 32. We believe that this will enable the Authority to maintain a realistic measure of control over corporate bodies which act as brokers without imposing impractical registration requirements. Where partnerships are concerned we think that a similar approach to that adopted in relation to corporate bodies is appropriate. Accordingly, we recommend that a partnership should be required to register the name of the partnership. On first applying for registration, the partnership must furnish the Insurance Authority with the names and addresses of all partners in the firm. Where there is any change in the particulars furnished by the firm, such as the appointment of a new partner or the retirement of an existing one, the firm must submit the appropriately amended details to the Insurance Authority. We considered whether different provisions should apply in relation to limited partnerships and concluded that the procedure we propose was suitable for all partnerships. We believe that, as with our recommendations in relation to corporate bodies, it provides the Insurance Authority with some means of control without overburdening its resources.

6.05 To provide support to the scheme we propose, we recommend that it should be an offence for any person to conduct insurance broking business who is not registered as a broker with the Insurance Authority. Similarly, we recommend that it should be an offence for any such unregistered person to hold himself out as an insurance broker. We considered what, if any, disciplinary powers should be given to the Insurance Authority for the regulation of those registered as brokers and concluded that only the power to cancel or suspend registration should be given to the Authority. To do more and, for instance, to allow the Authority to fine erring brokers would be to increase the complexity of the administrative machinery and to place a heavy burden on the Authority's staff resources. The power of suspension provides a useful facility to enable the Authority to carry out an investigation while protecting the public in the meantime. In general, we do not think that a failure to comply with the requirements imposed by registration should be a criminal offence and believe that the power to cancel registration provides a sufficient deterrent to improper conduct. However, we think it necessary to impose a criminal sanction by way of a fine where a broker fails to notify the Insurance Authority of changes in the particulars submitted on registration, cancellation or suspension being too severe for what in some cases may be merely an oversight. In considering cancellation the Authority should be able to take account of a cancellation of registration in another jurisdiction but need not be bound by that action. In the interests of simplicity, we rejected the possibility of establishing a separate appeal procedure and we consider that sufficient control of the Authority's discretion can be achieved by leaving the exercise of its powers subject to challenge through the courts by judicial review.

6.06 We believe that these proposals will minimise the likelihood of under-qualified persons seeking to provide broking services to the public. There remain the difficulties which may be caused by financial failure of a broking concern and, as a further safeguard against loss by buyers of insurance, we recommend that all insurance brokers be required to arrange and maintain professional indemnity insurance. We further recommend that accounts rules similar to those administered by the Law Society should be imposed and that brokers should be required to keep client accounts separate from others operated by the firm.

Insurance Agents

6.07 We believe that many of the problems which we have described in Chapter IV in relation to agents can be cured by the adoption of a general provision that insurance agents should be agents of the insurer at all material times. Accordingly, we recommend that an insurer should be held to be responsible for the conduct of its insurance agent where that conduct is relied on in good faith by the insured or intending insured in relation to any matter relating to insurance, whether or not the agent or employee acted within the scope of his authority or employment. Any agreement seeking to limit the extent of the insurer's responsibility should be rendered ineffective. In making this recommendation we have adopted the approach taken by the Australian Law Reform Commission whose report impressed us as providing a realistic solution (see paragraph 5.20). Concern has been expressed to us by members of the insurance industry that this recommendation is unduly harsh on insurers and may encourage deliberate fraud and collusion. With respect, we do not think that that is so. The element of good faith on the part of the insured is crucial and the court will need to be satisfied that the insured genuinely relied on the agent's conduct in order to make the insurer liable. If there is collusion between agent and insured then the element of good faith will be absent from the insured's own conduct and the insurer will be entitled to avoid the policy. Similarly, if the agent's conduct is so manifestly wrong that no reasonable insured could have relied on it in good faith then the insurer will not be bound to indemnify the insured.

6.08 We think it desirable in the interests of both insurers and the insurance buying public that there should be no doubt as to who is or is not an agent. Accordingly, we recommend that every insurer should be required to keep a register of its insurance agents and that that register should be open to public inspection at the insurer's principal registered office in Hong Kong and be submitted to the Insurance Authority on demand. A failure to keep the register up to date should be an offence. We further recommend that it should be an offence for a person falsely to hold himself out as an insurance agent or to solicit insurance. The fact that an intermediary does not appear on an insurer's register of agents does not necessarily mean that he is not an agent of the insurer, however. We consider that an insurer should be liable for the conduct of any person who arranges insurance with the insurer for reward for a policy holder where the insurer has by his subsequent conduct

effectively accepted the person arranging the policy as his agent. For the purposes of determining whether the insurer has accepted a person as his agent, the issuing by the insurer of the policy in question should be prima facie evidence that the insurer has ratified that person's previous conduct. In effect these recommendations mean that if a person arranges insurance for another for reward and he is not a registered insurance broker, he will be treated as an insurance agent if the insurer issues a policy.

6.09 Our attention has been directed to the system of identity cards which is used in Malaysia (see paragraphs 5.24 and 5.25). We considered the introduction of such a scheme in Hong Kong but concluded that it would prove difficult to administer and would be open to abuse. We believe that the other measures we have proposed will achieve more effective control of the industry.

6.10 By making insurance companies responsible for the actions of their agents, we believe that insurers will take greater care in the employment and training of agents. An insurer will be unlikely to fail to regulate his agents' activities when he may be held liable for their deficiencies. We recommend that insurance companies through their trade associations and in consultation with their regulating authority, the Insurance Authority, be encouraged to establish :

(i) a code of practice for the supervision of the activities of their agents;

(ii) a standard format for contracts of agency;

(iii) training facilities and programmes for agents; and

(iv) agreed summaries in English and Chinese of the cover provided by all standard insurance contracts.

6.11 We have considered the difficulties that might arise when an individual acts as the agent for more than one insurance company. If the agent conducts insurance business without indicating which company he represents at the particular time (for instance, where business is conducted by telephone without the use of proposal forms) there may subsequently be a dispute as to which company should be held responsible for the agent's actions. We believe that where such a situation arises, the companies for which the intermediary is a registered agent should be jointly and severally liable. We considered limiting the liability of insurers for the acts of their agents to liability incurred in respect of the same class of insurance as that for which the agent was an agent of the insurer but concluded that this would not provide the level of consumer protection which we desired to achieve. As a further protection to insureds, we recommend that where a registered insurance broker acts as an agent in respect of a particular transaction he should not undertake any insurance business in relation to an insured or prospective insured in respect of that transaction unless he has first informed the insured that, in undertaking that business, he is acting as the agent of the

insurer and not of the insured. We do not think that this should be a statutory requirement but rather a matter to be incorporated in the industry's code of practice.

Communication of Terms of Contract with Insured

6.12 We have referred to the difficulties caused by the use of two major languages in Hong Kong and the desirability of providing both English and Chinese versions of all insurance documents. We have concluded that the latter is impracticable but have recommended that a summary of the cover provided under each insurance contract should be available in both English and Chinese.

6.13 We believe that this would assist insured persons greatly in their dealings with insurers. We further believe that the recommendations we have made in respect of insurance brokers and agents should bring about a marked improvement in the standard of service which the public receives from insurance intermediaries and the quality of information which is given to insureds. By the introduction of minimum standards of qualification, we believe that the risk of unprofessional conduct by insurance brokers will be diminished. If insurance agents become the responsibility of insurers, and a potential liability for them, we think it inevitable that insurers will scrutinise the conduct of their agents more carefully than at present.

6.14 We made reference earlier to insurance documents which use small print and we considered the possibility of recommending a minimum print-size for all insurance documents (see paragraph 4.13). We are reluctant to make such a recommendation for, as we observed at paragraph 4.13, the purpose of small print is frequently to reduce printing costs rather than to mislead insureds. In the circumstances, we believe the matter is one best left to market forces and that the public will, by its refusal to purchase insurance with features it considers unacceptable (such as excessively small print), pressure insurers into providing a more acceptable product. Our recommendations regarding the provision of summaries of policies in English and Chinese should in any case minimise the difficulties caused by insurance documents with under-sized print.

PART III

CHAPTER VII

SUMMARY OF OUR RECOMMENDATIONS

Scope of Application of our Recommendations

7.01 We recommend that our proposals should apply to all insureds, whether individuals or commercial bodies (paragraph 3.03). The proposals contained in this report should not apply to reinsurance, marine insurance or aviation insurance (paragraph 3.04). We recommend that our proposals should apply to all insurance contracts the proper law of which is that of Hong Kong (other than those categories of insurance excluded in paragraph 3.04). The court should be empowered to disregard any contract term which purports to apply the law of a jurisdiction other than Hong Kong if it appears to the court that that term was included wholly or mainly for the purpose of avoiding the application of the proposed amendments to the law contained in this Report (paragraph 3.07). Our proposals should apply to all contracts taken out, reinstated or renewed after the date of implementation of these proposals (paragraph 3.08).

Statements of Practice or Legislation?

7.02 We do not believe that a code of practice provides adequate safeguards for insured persons and we recommend that our proposals should be incorporated into legislation. However, we believe that the insurance industry should nevertheless be encouraged to supplement the law by self-regulation, including statements such as those which have clearly been of benefit in England (paragraph 3.11).

Non-disclosure

7.03 We recommend that a contract of insurance should not be rendered voidable or unenforceable by reason of non-disclosure of a fact unless that fact was material to the particular contract of insurance and the insured knew, or a reasonable man in his circumstances ought to have known, that the fact not disclosed was material to the insurer in relation to the particular contract of insurance (paragraph 3.17). The insured should be assumed to know of any fact which could have been ascertained by reasonable inquiry and would have been so ascertained by a reasonable man proposing to enter into the contract of insurance in question (paragraph 3.18).

Misrepresentation

7.04 We recommend that no contract of insurance should be rendered voidable or unenforceable by reason of misrepresentation unless the misrepresentation was material to the insurer in relation to the particular contract of insurance and

(a) the misrepresentation was fraudulent; or
(b) the insured knew, or a reasonable man in his circumstances ought to have known, that the statement was material to the insurer in relation to the particular contract of insurance (paragraph 3.20).

Warranties and Basis of Contract Clauses

7.05 We recommend that where any proceedings are taken in court in respect of a difference or dispute arising out of a contract of insurance, the court should be empowered to disregard a failure by an insured to observe or perform a term or condition of the contract of insurance if it is just and equitable in all the circumstances so to do and if the insurer has not been materially prejudiced by the failure (paragraph 3.22).

7.06 We recommend that any "basis of contract clause" should be ineffective to the extent that it purports to convert into a warranty any statement by the insured as to the existence of past or present facts, whether contained in a proposal form or elsewhere. (paragraph 3.23).

Proposal Forms

7.07 We recommend that all proposal forms be required to bear a boldly printed warning in both English and Chinese to the effect that a failure to disclose all facts which the insurer may think relevant to his assessment of the risk may lead to avoidance of the policy. We recommend that a printed warning in both English and Chinese should appear on all renewal notices, stressing the need to reveal all changes in circumstances since the time of the original proposal. We recommend that if there is a failure to comply with the requirements concerning warning notices on proposal forms and renewal notices, the insurer shall not be entitled to rely in any proceedings in court arising out of the policy on any failure by the insured to disclose any material fact unless the court is satisfied that the insured has not been prejudiced by the insurer's failure to comply. (paragraph 3.25).

7.08 Where a proposal form is used, we recommend that an insured should as a matter of good insurance practice receive a copy of his completed proposal form at the time the policy is granted wherever practicable (paragraph 3.26). We recommend that a Chinese summary of the cover provided under an insurance contract should be provided in every case. We recommend that as a matter of good insurance practice, wherever practicable

an insured should be supplied with a copy of any warranty on which the insurer intends to rely and this should be supplied in both English and Chinese. We further recommend that any exemptions specified in the insurance policy should be drawn specifically to the attention of the insured by providing him with details of such exemptions in English and Chinese. (Paragraph 3.27).

Classification of Intermediaries

7.09 We recommend that an insurance broker should be defined as a person who arranges policies of insurance as an agent for potential policy holders or policy holders. We recommend that an insurance agent should be defined as any person conducting insurance business on behalf of another for profit as an agent for one or more insurers. We recommend that the insurance industry's code of conduct should include a requirement that an intermediary should make clear to an insured in what capacity the intermediary is acting. The code should also require an intermediary acting for more than one insurance company to inform the insured of the company for which he is acting at any given time (paragraph 6.01).

Insurance Brokers

7.10 We recommend that anyone seeking to carry on business as an insurance broker should be required to register with the Insurance Authority (paragraph 6.02). It should be open to any broking association to apply to have itself registered with the Insurance Authority. Membership of a registered association should automatically satisfy the insurance registration requirements (paragraph 6.03).

7.11 We recommend that both individual brokers and corporate bodies should be entitled to register as brokers. Where corporate bodies are concerned, we recommend that a corporate body applying for registration as a broker must serve on the Insurance Authority a copy of the return of particulars in the company's register of directors and secretaries which is required under section 158 of the Companies Ordinance, Cap. 32. Where a new director is appointed, or there is any other change in the information previously supplied to the Authority, notification of that appointment or change must be given to the Authority by copying to the Authority the return required by s.158(5) of Cap. 32. In the case of partnerships, we recommend that a partnership should be required to register the name of the partnership. On first applying for registration, the partnership must furnish the Insurance Authority with the names and addresses of all partners in the firm. Where there is any change is the particulars furnished by the firm, such as the appointment of a new partner or the retirement of an existing one, the firm must submit the appropriately amended details to the Insurance Authority (paragraph 6.04).

7.12 We recommend that it should be an offence for any person to conduct insurance broking business who is not registered as a broker with the

Insurance Authority. We recommend that it should be an offence for any such unregistered person to hold himself out as an insurance broker. The power to cancel or suspend registration should be given to the Insurance Authority (paragraph 6.05).

7.13 We recommend that all insurance brokers be required to arrange and maintain professional indemnity insurance. We further recommend that accounts rules similar to those administered by the Law Society should be imposed and that brokers should be required to keep client accounts separate from others operated by the firm (paragraph 6.06).

Insurance Agents

7.14 We recommend that an insurer should be held to be responsible for the conduct of its insurance agent where that conduct is relied on in good faith by the insured or intending insured in relation to any matter relating to insurance, whether or not the agent or employee acted within the scope of his authority or employment. Any agreement seeking to limit the extent of the insurer's responsibility should be rendered ineffective (paragraph 6.07).

7.15 We recommend that every insurer should be required to keep a register of its insurance agents and that that register should be open to public inspection at the insurer's principal registered office in Hong Kong and be submitted to the Insurance Authority on demand. A failure to keep the register up to date should be an offence. We further recommend that it should be an offence for a person falsely to hold himself out as an insurance agent and to solicit insurance. We consider that an insurer should be liable for the conduct of any person who arranges insurance with the insurer for reward for a policy holder where the insurer has by his subsequent conduct effectively accepted the person arranging the policy as his agent. For the purposes of determining whether the insurer has accepted a person as its agent, the issuing by the insurer of the policy in question should be prima facie evidence that the insurer has ratified that person's previous conduct. (paragraph 6.08).

7.16 We recommend that insurance companies should be encouraged to establish :-

(i) a code of practice for the supervision of the activities of their agents;
(ii) a standard format for contracts of agency;
(iii) training facilities and programmes for agents; and
(iv) agreed summaries in English and Chinese of the cover provided by all standard insurance contracts (paragraph 6.10).

7.17 We consider that where an individual acts as the agent for more than one insurance company, and he conducts insurance business without indicating which company he represents at the particular time, the companies for which the individual is a registered agent should be jointly and severally

liable. Where a registered insurance broker acts as an agent in respect of a particular transaction he should not undertaking any insurance business in relation to an insured or prospective insured in respect of that transaction unless he has first informed the insured that, in undertaking that business, he is acting as the agent of the insurer and not of the insured (paragraph 6.11).

第三部份

第七章　建議摘要

建議適用範圍

7.01　本委員會建議，本報告書所載的建議，應適用於所有投保人，無論投保人是個別人士或商業機構（第 3.03 段），而不適用於再保險、水上或航空運輸險（第 3.04 段）。本委員會建議，本報告書所載的建議，應適用於所有根據香港法律均屬恰當的保險合約（第 3.04 段並無記載的保險類別除外）。法庭如認爲訂明適用香港以外審裁權的法律的任何合約條文，純粹或主要爲避免本報告書所載對法例所作的擬議修訂的應用而列入合約之內，則有權對該等條文不予理會（第 3.07 段）。本報告書所載的建議，應適用於所有在此等建議實施日期後簽訂、重新簽訂或續期的合約（第 3.08 段）。

訂明業務守則抑或立法？

7.02　本委員會並不認爲業務守則可以給予投保人足夠的保障，因此，本委員會建議將本報告書所載的建議列入法例之內。然而，本委員會認爲當局亦應鼓勵保險行業自律，以保充法律不足之處，包括發出聲明，例如英國的保險業聲明，可使有關人士明顯受益（第 3.11 段）。

隱瞞事實

7.03　本委員會建議不得以隱瞞一項事實爲理由，而決定一份保險合約可予作廢或不能履行；除非該項事實對該份保險合約確屬重要，而投保人知悉，或有理性的人處於相同境況下亦應已知悉該項隱瞞的事實，就該份保險合約而言，對承保人確屬重要（第 3.17 段）。投保人得假定知悉可由合情合理的查詢查明、並且是一名有理性的人在願意參與該份保險合約時可予確定的任何事實。（第 3.18 段）

虛報

7.04　本委員會建議不得以虛報爲理由，而決定一份保險合約可予作廢或不能履行；除非有關的虛報就該份保險合約而言，對承保人確屬重要及

(a)　該項虛報屬欺詐性質；或
(b)　投保人知悉，或有理性的人在相同境況下亦應已知悉，就該份保險合約而言，該項陳述對承保人確屬重要（第 3.20 段）。

保證及合約條款的基礎

7.05　本委員會建議，因保險合約引起歧見或糾紛而在法庭提出訴訟時，倘投保人未有遵守或履行保險合約所載的條款或條件，而此舉在任何情況下均屬公平合理，兼且不損害承保人的利益，則法庭應有權對未有遵守或履行條款或條件一事不予理會（第 3.22 段）。

7.06　本委員會建議，倘任何「合約條款的基礎」的含意，是將投保人在要保書或其他文件內就過去或目前存在的事實而作的任何聲明，轉變爲一項保證者，則該「合約條款的基礎」應屬無效（第 3.23 段）。

要保書

7.07　本委員會建議，應規定所有要保書，以顯眼的中英文字體，刋印一則警告，聲明如未有呈報承保人認爲可供其評估所承擔的風險的全部有關資料，可能會導致承保人拒絕履行保險單上的責任。本委員會並建議，應在所有續保通知書上，以中英文字體刋印一則警告，强調聲明投保人必須將在首次投保後所發生的情況變遷呈報。本委員會又建議，如承保人未有遵守在要保書及續保通知書上刋登警告的規定，除非法庭認爲投保人並未因承保人沒有遵守該項規定而蒙受損失，否則承保人無權在任何因保險問題而引起的法庭訴訟上，以投保人未有呈報任何重要的事實作爲辯護理由。（第 3.25 段）。

7.08　如需填報要保書，本委員會建議，承保人在批出保險單時，在可行情況下，應依照良好保險業務慣例，將填妥的要保書副本乙份發給投保人（第 3.26 段）。本委員會又建議，個別保險合約所提供的承保範圍，應備有中文本摘要。本委員會又建議，在可行情況下，作爲良好保險業務慣

例，承保人應將任何保證條款副本乙份發給投保人，該保證條款是承保人擬用作憑據者，同時亦應中英文對照。本委員會進一步建議，承保人應使投保人特別注意保險單內述明的任何豁免事項，此等豁免事項應以中英文詳細闡明（第 3.27 段）。

保險業中間人的分類

7.09　本委員會建議，保險經紀的釋義應是以代理人的身份，爲可能成爲投保人的人士或投保人安排購買保險事宜的人士。本委員會亦建議，保險代理人的釋義，應是以承保人代理人的身份，承保人的數目爲一個或以上，爲別人經營保險業務而從中賺取利潤的任何人士。本委員會又建議，保險業的行爲守則，應包括一項保險業中間人應向投保人清楚說明中間人身份的規定，該守則亦應規定，爲超過一間保險公司服務的保險業中間人，應在任何指定的時間向投保人告知其所代表的公司名稱（第 6.01 段）。

保險經紀

7.10　本委員會建議，任何人士如擬執業爲保險經紀，則應向保險業務管理局註冊（第 6.02 段）。任何經紀協會均可自行決定是否向保險業務管理局申請註冊。凡已加入註冊經紀協會爲會員的人士，即自動符合保險註冊方面的規定（第 6.03 段）。

7.11　本委員會建議，個別經紀及法人團體均應有權註冊成爲保險經紀。在法人團體方面，本委員會建議，申請註冊成爲保險經紀的法人團體，須根據香港法例第三十二章公司條例第一五八條，向保險業務管理局呈遞申報書副本乙份，申報書內則須填報公司董事及秘書名冊所載的詳情。如公司委任新董事，或先前向保險業務管理局提供的資料有任何其他改變，亦應根據香港法例第三十二章一五八條第（5）款的規定，向管理局呈遞申報書副本乙份，申報該項委任或有關資料改變事宜。在合夥公司方面，本委員會建議，應規定合夥公司將名稱註冊。合夥公司在首次申請註冊時，須將所有合夥人姓名及地址向保險業務管理局呈報。如該公司所呈遞的資料有任何改變，例如委任新的合夥人或現任合夥人退夥，該公司得將已作適當修訂的詳情向保險業務管理局呈報（第 6.04 段）。

7.12　本委員會建議，任何人士若未經保險業務管理局註冊爲保險經紀，而從事保險經紀業務，則屬違法。此外，若此等未經註冊人士，對外自

稱爲保險經紀，亦屬違法。而保險業務管理局亦應有權吊銷或暫停保險經紀的註冊（第 6.05 段）。

7.13　本委員會建議，凡保險經紀均須購有專業賠償保險。同時，此等經紀更須遵守一套類似律師公會所實施的帳目規則，並須將客戶帳目，與公司的其他帳目分開（第 6.06 段）。

保險代理人

7.14　本委員會建議，承保人須對其保險代理人的行爲負責，不管這些代理人或僱員的行爲是否超越了他的權力或職業範圍；理由是投保人或有意投保的人士在處理任何有關保險事項時，都是全心信賴保險代理人的。任何企圖規限承保人責任範圍的合約，均應視作無效（第 6.07 段）。

7.15　本委員會建議，應規定承保人須在其本港註冊總辦事處存放一份保險代理人登記冊，此登記冊應公開讓大眾查閱，並在保險業務管理局索閱時呈交。如登記冊所載資料過時仍未修訂，則屬違法。本委員會並建議，任何人士，如僞稱爲保險代理人而兜接別人投保，亦屬違法。本委員會認爲，任何人士，如替投保人安排向承保人購買保險，藉以從中賺取報酬，而承保人其後的行爲，實際上是接受安排保險單的人士爲其代理人，則承保人須對該人的行爲負責。爲決定承保人曾否接受某人爲其代理人，承保人發出之該份保險單應成爲其曾經批准該人先前行爲的表面證據（第 6.08 段）。

7.16　本委員會建議，應鼓勵保險公司訂立下列各項：—

(i)　一套業務守則，以資監督其代理人的行爲操守；
(ii)　代理合約的標準格式；
(iii)　爲代理人辦理訓練設施和計劃；及
(iv)　所有標準保險合約所載的承保範圍，經過協議後應備有中英文本摘要（第 6.10 段）。

7.17　本委員會認爲，凡爲超過一間保險公司任代理人的人士，而該人士在經營保險業務，並無述明當時他代表某一公司，則該人曾註冊爲代理人的全部公司均負有連帶責任。註冊保險經紀如以代理人的身份進行某宗保險交易時，則不應就該宗交易與投保人或可能成爲投保人的人士進行任何保險業務，除非他已知投保人在處理該宗交易方面，其身份屬承保人而非投保人的代理人（第 6.11 段）。

Annexure 1

Members of Insurance Sub-Committee
(Topic 9)

Chairman
Professor Peter Willoughby, J.P.
School of Law
University of Hong Kong

Deputy Chairman
Hon Mr Justice Barker
Justice of Appeal

Members
Mr. Thomas T.C. Chan
Executive Director
Seabanc Finance Company Ltd.

Mr Clarence C.K. Cheng
Solicitor
Cheng, Yeung & Co.

Mr Graham Cheng
Chairman
Taching Petroleum Co. Ltd.

Miss Ophelia Cheung
Executive Director
Consumer Council

Mr Peter Graham
Deputy Principal Crown Counsel
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Attorney General's Chambers

Mr Alan G. Guthrie*
Managing Director
Sedgwick Chartered Hong Kong Ltd.

Mr. Andrew Hicks
School of Law
University of Hong Kong
(Resigned, July 1983)

Mr Terry D. Jenkins *
Managing Director (Asia)
Sentry Insurance

Mr Henry Litton, Q.C.

Mr M.N. Somerville
Assistant Director
Jardine, Matheson & Co. Ltd.
Group Managing Director
Lombard Insurance Group

Mr. Michael K. Turnbull
Senior Legal Aid Counsel
Legal Aid Department

Mr Barrie Wilcox
Insurance Officer
Registrar General's Department
(Resigned, November 1982)

Mr. Robert L. Wilson*
Senior Underwriter,
Manulife

Mr Yao Kang
Managing Director
Swire Insurance Ltd.

* These members were appointed to the Sub-committee after the initial discussions on non-disclosure and breach of warranty had been concluded.

In addition, Mr Archie Lam, Insurance Officer (Acting), Registrar General's Department was invited to attend as an observer following Mr Wilcox's resignation.

Secretaries

T.H.Kwan)
S.M.I. Stoker) Attorney General's Chambers

Annexure 2

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Annexure 3

Representative Bodies to which letter of 31st May 1982 was sent

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Annexure 4

Press Notice by Department of Trade

STATEMENTS OF INSURANCE PRACTICE

At the request of the Government British insurers have recently completed a review of the practices set out in the Statements of Practices adopted in 1977. It was found that in general they had been closely followed. The insurers have decided to confirm two further points in the Statements. These relate to the clarity of insurance documents and the prompt payment of claims when they have been accepted and, in the appropriate cases, where the title has been established. Although insurers continue to receive complaints from policy-holders, the insurance associations and Lloyd's emphasise that the number is small in relation to the millions of policies in operation. A further review of the Statements may be appropriate in due course.

This was announced today by Mr Reginald Eyre, Parliamentary Under Secretary of State for Trade, in the House of Commons in reply to a question from Mr Robert McCrindle MP (Brentwood & Ongar). Mr Eyre continued :

> *"The codification of good practice in the Statements is a useful means of protecting the private consumer and I accordingly welcome the additions. I also welcome the important new safeguard for some policyholders provided by the Insurance Ombudsman Bureau, set up by a number of insurance companies earlier this year and the more recent Personal Insurance Arbitration Service to which a number of other insurance companies subscribe. I hope, however, that the advantages to the consumer of an industry-wide complaints procedure will be considered by the industry in the light of the experience of the working of the new schemes."*

Notes for Editors

1. Three Statements of Insurance Practice were drawn up by insurance bodies in 1977 :

- Statement of Insurance Practice - Non-life Business (British Insurance Association and Lloyd's)
- Statement of Long-Term Insurance Practices (Life Offices Association, Associated Life offices Association and accepted by the Linked Life Assurance Group)
- Statement of Industrial Assurance Practice (Industrial Life Offices Association).

2. The Insurance Ombudsman Bureau was set up by a number of insurance companies in March 1981 to deal with complaints relating to personal, mainly non-life, insurance policies. So far twelve companies (and their subsidiaries) have joined the bureau.

3. The Personal Insurance Arbitration Services was set up in November 1981 by a number of other insurances companies in conjunction with the Chartered Institute of Arbitrators. It will deal with disputes over life and non-life contracts of insurance. Twenty-eight non-life and composite groups (and their subsidiaries) have said that they will use the service.

4. The Department is drawing the attention of insurance companies, who are not members of the insurance bodies responsible for the Statements, to Mr. Eyre's announcement.

5. The Statements of Practice should not be confused with the insurers' 1981 Codes of Practice for insurance selling by non-registered insurance intermediaries.

BRITISH INSURANCE ASSOCIATION

STATEMENT OF (NON-LIFE) INSURANCE PRACTICE

The following Statement of normal insurance practice applies to non-life insurances of policyholders resident in the UK and insured in their private capacity only.

1. **PROPOSAL FORMS**

(a) The declaration at the foot of the proposal form should be restricted to completion according to the proposer's knowledge and belief.

(b) If not included in the declaration, prominently displayed on the proposal form should be a statement:

(i) drawing the attention of the proposer to the consequences of the failure to disclose all material facts, explained as those facts an insurer would regard as likely to influence the acceptance and assessment of the proposal;

(ii) warning that if the proposer is in any doubt about facts considered material, he should disclose them.

(c) Those matters which insurers have found generally to be material will be the subject of clear questions in proposal forms.

(d) So far as is practicable, insurers will avoid asking questions which would require expert knowledge beyond that which the proposer could reasonably be expected to possess or obtain or which would require a value judgement on the part of the proposer.

(e) Unless the prospectus or the proposal form contains full details of the standard cover offered, and whether or not it contains an outline of that cover, the proposal form shall include a statement that a copy of the policy form is available on request.

(f) Unless the completed form or a copy of it has been sent to a policyholder, a copy will be made available when an insurer raises an issue under the proposal form.

2. **CLAIMS**

(a) Under the conditions regarding notification of a claim, the policyholder shall not be asked to do more than report a claim and subsequent developments as soon as reasonably possible

except in the case of legal processes and claims which a third party requires the policyholder to notify within a fixed time where immediate advice may be required.

(b) Except where fraud, deception or negligence is involved, an insurer will not unreasonably repudiate liability to indemnify a policyholder :

(i) on the grounds of non-disclosure or misrepresentation of a material fact where knowledge of the fact would not materially have influenced the insurer's judgement in the acceptance or assessment of the insurance.

(ii) on the grounds of a breach of warranty or condition where the circumstances of the loss are unconnected with the breach.

(c) Liability under the policy having been established and the amount payable by the insurer agreed, payment will be made without avoidable delay.

3. RENEWALS

Renewal notices should contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy inception or last renewal date, whichever was the later.

4. COMMENCEMENT

Any changes to insurance documents will be made as and when they need to be reprinted, but the Statement will apply in the meantime.

5. POLICY DOCUMENTS

Insurers will continue to develop clearer and more explicit proposal forms and policy documents whilst bearing in mind the legal nature of insurance contracts.

6. EEC

This Statement will need reconsideration when the EEC Contract Law Directive is taken into English/Scots Law.

APPLICATION

It should be borne in mind that there will sometimes be exceptional circumstances which will require exceptional treatment.

STATEMENT OF LONG TERM INSURANCE PRACTICE

This statement relates to long-term insurance affected by individuals resident in the UK in a private capacity. Although the statement is not mandatory, it has been recognised by members of The Life Officers' Association and Associated Scottish Life Offices as an indication of insurance practice, it being understood that there will sometimes be exceptional circumstances where the statement would be inappropriate.

Industrial life assurance policy holders are already protected by The Industrial Assurance Acts 1923 to 1968 and regulations issued thereunder, to an extent not provided for ordinary branch policyholders. The statement has, therefore, been modified in its application to industrial assurance business in discussion with the Industrial Assurance Commissioner.

Life assurance is either very largely or else entirely a mutual enterprise and the aim of the industry in recent years has been to reduce to a minimum the formalities (and therefore the expense to the policyholder) involved in issuing a new life policy subject only to the need to protect the general body of policyholders from the effects of non-disclosure by a small minority of proposers.

1. CLAIMS

(a) An insurer will not unreasonably reject a claim. (However, fraud or deception will, and negligence or non-disclosure or misrepresentation of a material fact may, result in adjustment or constitute grounds for rejection). In particular, an insurer will not reject a claim on grounds of non-disclosure or misrepresentation of a matter that was outside the knowledge of the proposer.

(b) Under any conditions regarding a time limit for notification of a claim, the claimant will not be asked to do more than report a claim and subsequent developments as soon as reasonably possible.

(c) Payment of claims will be made without avoidable delay once the insured event has been proved and the entitlement of the claimant to receive payment has been established.

2. PROPOSAL FORMS

(a) If the proposal form calls for the disclosure of material facts a statement should be included in the declaration, or prominently displayed elsewhere on the form or in the document of which it forms part:

(i) drawing attention to the consequences of failure to disclose all material facts and explaining that these are facts that an insurer would regard as likely to influence the assessment and acceptance of a proposal;

(ii) warning that if the signatory is in any doubt about whether certain facts are material, these facts should be disclosed.

(b) Those matters which insurers have commonly found to be material should be the subject of clear questions in proposal forms.

(c) Insurers should avoid asking questions which would require knowledge beyond that which the signatory could reasonably be expected to possess.

(d) The proposal form or a supporting document should include a statement that a copy of the policy form or of the policy conditions is available on request.

(e) A copy of the proposal should be made available to the policyholder when an insurer raises an issue under that proposal - information not relevant to that issue being deleted where necessary to preserve confidentiality.

3. POLICIES AND ACCOMPANYING DOCUMENTS

(a) Insurers will continue to develop clearer and more explicit proposal forms and policy documents whilst bearing in mind the legal nature of insurance contracts.

(b) Life assurance policies or accompanying documents should indicate :-

(i) the circumstances in which interest would accrue after the assurance has matured; and
(ii) whether or not there are rights to surrender values in the contract and, if so, what those rights are.

(Note: The appropriate sales literature should endeavour to impress on proposers that a whole life or endowment assurance is intended to be a long-term contract and that surrender values, especially in the early years, are frequently less than the total premiums paid.).

4. COMMENCEMENT

Any changes to insurance documents will be made as and when they need to be reprinted but the statement will apply in the meantime.

INDUSTRIAL LIFE OFFICES ASSOCIATION

STATEMENT OF INDUSTRIAL ASSURANCE PRACTICE

This statement relates to Industrial Assurance effected by individuals resident in the United Kingdom. Although the statement is not mandatory, it has been recognised by members of the I.L.O.A. as an indication of industrial assurance practice, it being understood that there will sometimes be exceptional circumstances where the statement would be inappropriate.

It should be explained that industrial assurance policyholders are already protected by the Industrial Assurance Acts 1923 to 1968 and Regulations issued thereunder to an extent not provided for ordinary branch policyholders. These Acts give the Industrial Assurance Commissioner wide powers and cover inter alia the following aspects :-

(a) Completion of proposal forms
(b) Issue and maintenance of Premium Receipt Books
(c) Notification in Premium Receipt Books of certain statutory rights of a policyholder including the rights to :-

  (i) an arrears notice before forfeiture
  (ii) free policies and surrender values for certain categories of policies
  (iii) relief from forfeiture of benefit under a policy on health grounds unless the proposer has made an untrue statement of knowledge and belief as to the assured's health
  (iv) refer to the Commissioner as arbitrator disputes between the policyholder and the company or society.

Because of these provisions in the special legislation governing industrial assurance, this statement of practice has been modified slightly from that recognised by members of the L.O.A. and A.S.L.O. as an indication of ordinary long term insurance practice.

Nothing in this statement must be interpreted as superseding the provisions of the Industrial Assurance and Friendly Society Acts.

1. Claims

(a) An insurer will not unreasonably reject a claim (However, fraud or deception will, and negligence or non-disclosure or misrepresentation of a material fact may, result in adjustment or constitute grounds for rejection). In particular, an insurer will not reject a claim on grounds of non-disclosure or misrepresentation of a matter that was outside the knowledge of the proposer.

(b) Under any conditions regarding time limit for notification of a claim, the claimant will not be asked to do more than report a claim and subsequent developments as soon as reasonably possible.

(c) Payment of claims will be made without avoidable delay once the insured event has been proved and the entitlement of the claimant to receive payment has been established.

2. Proposal Forms

(a) If the proposal form calls for the disclosure of material facts a statement should be included in the declaration, or prominently displayed elsewhere on the form or in the document of which it forms part :

(i) drawing attention to the consequence of failure to disclose all material facts and explaining that these are facts that an insurer would regard as likely to influence the assessment and acceptance of a proposal;

(ii) warning that if the signatory is in any doubt about whether certain facts are material, these facts should be disclosed.

(b) Those matters which insurers have commonly found to be material should be the subject of clear questions in proposal forms.

(c) Insurers should avoid asking questions which would require knowledge beyond that which the signatory could reasonably be expected to possess.

(d) Any premium (or deposit) paid on completion of the proposal form should be returned to the policyholder if, on issue, the policy document is rejected by the proposer.

(e) A copy of the proposal should be made available to the policyholder, if requested, when an insurer raises an issue under that proposal - information not relevant to that issue being deleted where necessary to preserve confidentiality.

3. Policies and Accompanying Documents

(a) Insurers will continue to develop clearer and more explicit proposal forms and policy documents whilst bearing in mind the legal nature of insurance contracts

(b) Life assurance policies or accompanying documents should indicate :

(i) the circumstances in which interest would accrue after the assurance has matured; and
(ii) whether or not there are rights to surrender values in the contract and, if so, what those rights are.

(Note : The appropriate sales literature should endeavour to impress on proposers that whole life or endowment assurance is intended to be a long term contract and that surrender values, especially in the early years, are frequently less than the total premiums paid).

4. **Comment**

Any changes to insurance documents will be made as and when they need to be reprinted but the statement will apply in the meantime.

The member offices of the ILOA are shown on the attached list.

December 1981

INDUSTRIAL LIFE OFFICES ASSOCIATION

MEMBER OFFICES

Britannic
Co-operative
County
Liverpool Victoria
London, Aberdeen & Northern
London & Manchester
Pearl
Philanthropic
Pioneer
Prudential
Rational
Refuge
Reliance
Royal Liver
Royal London
Scottish Legal
Tunstall
United Friendly

Wesleyan and General

Industrial Life Association
Aldermary House
Queen Street
London, EC4N ITL
Telephone: 01-248 4477

Note : ILOA members also transact substantial amounts of ordinary long-term business and non-life business and recognise the relevant statements of practice issued by the LOA/ASLO and the BIA.

Annexure 5

A BILL

To

Amend the Insurance Companies Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title.

1. This Ordinance may be cited as the Insurance Companies (Amendment) Ordinance 1986 and shall come into operation on a day to be appointed by the Governor by notice in the Gazette.

Addition of Part VIIA. (Cap. 41.)

2. The principal Ordinance is amended by adding after Part VII the following -

"PART VIIA

SPECIAL PROVISIONS RELATING TO CERTAIN POLICIES

Definitions.

50A. In this Part, unless the context otherwise requires -

"insurer" includes Lloyd's:

"proposal", in relation to a policy, includes any document for the entering into, reinstatement or renewal of the policy.

Application of Part.

50B. (1) Subject to subsections (3) and (4), this Part shall apply to every policy and every proposal for a policy where the proper law of the contract is the law of Hong Kong.

(2) For the purposes of subsection (1), where any term in a policy, including any term appearing in the proposal for the policy and being, by whatever means, part of the terms of that policy, applies or purports to apply the law of some place outside Hong Kong to or in relation to that policy but the term appears to a court, arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Part, that term shall be deemed not to be a term of that policy.

(3) This Part shall not apply to a policy other than a policy entered into, reinstated or renewed on or after the commencement of this Part.

(4) This Part shall not apply to a policy where the insurance business the subject of the policy –

First Schedule.

(a) is of class 5, 6, 11 or 12 as defined in Part 3 of the First Schedule; or

(b) is reinsurance.

Modification of the general duty of disclosure.

50C. (1) Subject to subsection (2), the duty of disclosure imposed by law on a potential policy holder or a policy holder in relation to the proposal for that policy shall be limited to those facts -

(a) that are material to the insurer in relation to that policy; and

(b) that the potential policy holder or the policy holder, as the case may be, knows, or a reasonable man in his circumstances ought to know, are material to the insurer in relation to that policy.

(2) Notwithstanding that there has been a failure by a policy holder to disclose in relation to the proposal for that policy any fact

(a) that is material to the insurer in relation to that policy; and

(b) that a reasonable man in his circumstances ought to have known was material to the insurer in relation to that policy,

that policy is not voidable by reason only that the fact was not so disclosed unless that fact was known by the policy holder or -

(i) could have been ascertained by reasonable inquiry by him, and

(ii) would have been so ascertained by a reasonable man proposing to enter into that policy.

(3) Any provision of a policy or of any other contract which purports, directly or indirectly, to enable the insurer in relation to that policy to avoid that policy on account of, or to rely for any other purpose on, a failure by the policy holder to disclose any fact which, having regard to the provisions of this section, he is under no duty to disclose shall be void.

Exclusion of remedies for innocent misrepresentation in certain cases.

50D. Where a misrepresentation has been made by a policy holder in or in relation to the policy or the proposal for the policy, the insurer shall not be entitled to rely for any purpose upon the misrepresentation unless the misrepresentation is material to the insurer in relation to that policy and -

(a) the misrepresentation was made fraudulently; or

(b) the policy holder knew, or a reasonable man in his circumstances ought to have known, that the misrepresentation was material to the insurer in relation to that policy.

Failure to perform term of policy.

50E. (1) In any proceedings taken in a court in respect of a difference or dispute arising out of a policy in respect of which there has been a failure by the policy holder to observe or perform a term of the policy, the court may, where it is satisfied that -

(a) it is just and equitable in all the circumstances so to do; and

(b) the insurer has not been materially prejudiced by the failure,

order that the failure be disregarded for the purposes of those proceedings.

(2) Where an order of a kind referred to in subsection (1) is made, the rights and liabilities of all persons in respect of the policy to which the order relates shall be determined as if the failure the subject of the order had not occurred.

Certain provisions cannot constitute warranty.

50F. No provision in the proposal for a policy or in the policy whereby the policy holder promises that a state of affairs exists or has existed shall be capable of constituting, by whatever means, a warranty.

Warnings to policy holders.

50G. (1) An insurer shall ensure that every proposal issued by it for a policy other than the proposal for a reinstatement or renewal of a policy bears on its face an inscription -

(a) in both English and Chinese; and

(b) in legible letters or characters,

containing the following words, or words to the like effect -

"WARNING: You must disclose all facts relevant to the risk. If you fail to do so you may not be protected by the policy. If you are in doubt as to any matter ask the insurer. (Chinese translation to be inserted)".

(2) An insurer shall ensure that every proposal issued by it for a policy other than the proposal for the entering into of a policy bears on its face an inscription -

(a) in both English and Chinese; and

(b) in legible letters or characters,

containing the following words, or words to the like effect –

"WARNING: You must disclose any change in facts previously disclosed to the insurer, or any new facts relevant to the risk. If you fail to do so you may not be protected by the policy. If you are in doubt as to any matter ask the insurer. (Chinese translation to be inserted)"

Effect of insurer failing to comply with section 50G.

50H. Notwithstanding any other provision of this Part, in any proceedings taken in a court in respect of a difference or dispute arising out of a policy in respect of which there has been a failure by the insurer to comply with section 50G in respect of the proposal for the policy, the insurer shall not be entitled to rely for any purpose upon a failure by the policy holder to disclose in relation to that proposal any fact unless the court is satisfied that the policy holder has not been prejudiced by the insurer's failure to comply with that section.".

Explanatory Memorandum

This Bill, which is published in conjunction with the Insurance (Brokers and Agents) Bill, implements certain recommendations made by the Law Reform Commission in Part I of its report entitled "Report on Laws on Insurance". A summary of those recommendations appears in Part III of that report.

2. Clause 2 inserts a new Part VIIA into the principal Ordinance. The new Part contains 8 new sections that modify the law on insurance in relation to certain policies.

3. New section 50A sets out 2 definitions. The term "insurer" is defined to include Lloyd's, as it is intended that new Part VIIA shall apply to insurance business carried on in Hong Kong by it as well as to insurance

business carried on by insurers authorized under the principal Ordinance. The term "proposal" is defined widely to include any document for the entering into, reinstatement or renewal of a policy.

4. New section 50B specifies the policies (including proposals for policies) to which new Part VIIA shall apply or not apply, as the case may be. It shall apply to every policy where the proper law of the contract is the law of Hong Kong. For that purpose, a court, arbitrator or arbiter is empowered to disregard any term in a policy which applies or purports to apply the law of some place outside Hong Kong where it appears that the term occurs in the policy wholly or mainly for the purpose of evading the operation of new Part VIIA. The new Part shall apply only to policies entered into, reinstated or renewed on or after the date on which the Part comes into operation. The new Part shall not apply to certain classes of insurance specified in Part 3 of the First Schedule to the principal Ordinance (being aviation and marine insurance), or to reinsurance.

5. New section 50C modifies the duty of disclosure imposed by law on a person in relation to the proposal for a policy. Subsection (1) provides that the duty of disclosure imposed on the person is limited to those facts that are material to the insurer in relation to the policy concerned and that the person knows, or a reasonable man in his circumstances ought to know, are so material. Subsection (2) provides that, even though a person has failed to disclose a fact which, under the provisions of subsection (1), he was required to disclose, the policy is not voidable by reason only of that failure unless the fact not disclosed was known by that person or, alternatively, could have been ascertained by reasonable inquiry by him and would have been so ascertained by a reasonable man proposing to enter into that policy. Subsection (3) prevents an insurer from relying on any provision in a policy which purports to impose a stricter duty of disclosure than that required by new section 50C.

6. New section 50D prevents an insurer from relying for any purpose upon any misrepresentation by a policy holder unless the misrepresentation is material to the insurer in relation to the policy concerned and

(a) was made fraudulently; or

(b) the policy holder knew, or a reasonable man in his circumstances ought to have known, that the misrepresentation was so material.

7. New section 50E empowers a court to disregard a failure by a policy holder to observe or perform a term of the policy where it is satisfied that it is just and equitable in all the circumstances to do so and that the insurer has not been materially prejudiced by that failure.

8. New section 50F provides that no provision in the proposal for a policy or the policy can convert into a warranty any promise by the policy holder that a state of affairs exists or has existed.

9. New section 50G requires an insurer to insert warnings, in both English and Chinese, on proposals issued by it. The particular warning to be inserted depends on whether the proposal is for the entering into of a policy, or the reinstatement or renewal of a policy. One warning alerts potential policy holders that they must disclose all facts relevant to the risk and the other warning alerts policy holders that they must disclose any change in facts previously disclosed to the insurer, or any new facts relevant to the risk.

10. New section 50H provides that, in any proceedings taken in a court in respect of a dispute arising out of a policy where the insurer has failed to insert the warning required by new section 50G, the insurer shall not be entitled to rely for any purpose upon a failure by the policy holder to disclose any fact unless the court is satisfied that the policy holder has not been prejudiced by the insurer's failure to insert that warning.

11. [Public service staffing and financial implications].

Annexure 6

INSURANCE (BROKERS AND AGENTS) BILL 1986
ARRANGEMENT OF CLAUSES

Clause

PART I

PRELIMINARY

PART II

REGISTRATION OF INSURANCE BROKERS AND BROKING ASSOCIATIONS

PART III

REGULATION OF INSURANCE BROKERS AND BROKING ASSOCIATIONS

A BILL
To

Provide for the registration of insurance brokers and for the regulation by the Insurance Authority of the professional conduct of registered insurance brokers; to provide for the registration of broking associations; to prohibit any person who is not a registered insurance broker from acting as an insurance broker; to provide for the regulation of insurance agents; to provide for the regulation of insurers in their dealings with insurance brokers and insurance agents; to provide for the keeping of certain registers and the furnishing of certain information to the Insurance Authority; and for matters incidental thereto or connected therewith.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement.

PART I

PRELIMINARY

1. (1) This Ordinance may be cited as the Insurance (Brokers and Agents) Ordinance 1986.

(2) This Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette and the Governor may appoint different days for different provisions.

Interpretation.

2. (1) In this Ordinance, unless the context otherwise requires -

"approved" means approved by the Insurance Authority;

"authorized insurer" means -

(Cap. 41.)

(a) an insurer within the meaning of section 2(1) of the Insurance Companies Ordinance authorized under that Ordinance to carry on insurance business, whether of one or more classes;

(Cap. 41.)

(b) an association of underwriters approved under section 6 of the Insurance Companies Ordinance by the Governor in Council: or

(c) the society of underwriters known in the United Kingdom as Lloyd's;

"body corporate" includes a body incorporated outside Hong Kong;

"broking association" means an association of insurance brokers;

"disciplinary action" means action by the Insurance Authority that results in –

(a) the cancellation or suspension under section 13 of the registration of an insurance broker; or

(b) the cancellation or suspension under section 16 of the registration of a broking association;

"firm" means an unincorporate body of 2 or more individuals

who have entered into partnership with one another with a view to carrying on business for profit;

"insurance agent" means a person who -

(a) for reward; and

(b) as an agent for one or more insurers,

arranges policies or, as an employee of an insurer, arranges policies;

(Cap. 41.) "Insurance Authority" has the meaning assigned to it by section 2(1) of the Insurance Companies Ordinance;

"insurance broker" means a person who carries on the business of arranging policies as an agent for policy holders or potential policy holders;

(Cap. 41.) "insurance business" means any class of insurance business specified in the First Schedule of the Insurance Companies Ordinance;

"insurer" means authorized insurer;

(Cap. 41.) "policy" has the meaning assigned to it by section 2(1) of the Insurance Companies Ordinance;

"policy holder" has the meaning assigned to it by section 2(1) of the Insurance Companies Ordinance;

"register" means –

(a) in relation to registered insurance brokers, the register referred to in section 4(1)(a);

(b) in relation to registered broking associations, the register referred to in section 4(1)(b); and

(c) in relation to an insurer's insurance agents, the register referred to in section 19(1);

"registered" means registered under this Ordinance;

"registered broking association" means a broking association that is registered as a broking association;

"registered insurance broker" means a person who is registered as an insurance broker;

"registration certificate" means a registration certificate issued under section 10(3).

(2) Any reference in this Ordinance to a member of a broking association, whether registered or otherwise, is a reference to a bona fide member of the broking association.

(Cap. 1.)

(3) In this Ordinance, unless the context otherwise requires, and without prejudice to section 7(1) of the Interpretation and General Clauses Ordinance, words and expressions importing the masculine gender include bodies corporate and firms.

Governor may give directions to the Insurance Authority.

3. The Governor may give directions generally or in a particular case with respect to the exercise by the Insurance Authority of any of his functions under this Ordinance, and the Insurance Authority shall comply with any such direction.

PART II

REGISTRATION OF INSURANCE BROKERS AND BROKING ASSOCIATIONS

Registers.
[cf. Cap. 41, s.5.]

4. (1) The Insurance Authority shall establish and maintain -

(a) a register of persons who are registered insurance brokers; and

(b) a register of broking associations that are registered broking associations.

(2) The registers shall be kept at the office of the Insurance Authority or such other place as he may specify by notice in the Gazette.

(3) The Insurance Authority shall, as soon as practicable after 1 January in each year, cause to be published in the Gazette -

(a) a list of the names and business addresses of persons entered in the register referred to in subsection (1)(a) or, if any such person has no business address, his residential address; and

(b) a list of the names and business addresses of each broking association entered in the register referred to in subsection (1)(b),

which publication shall be prima facie evidence of -

(i) the registration as insurance brokers of the persons named in the publication; or

(ii) the registration as broking associations of the broking associations named in the publication,

as the case may be.

(4) Any person shall be entitled on payment of the prescribed fee -

(a) to inspect a register during ordinary office hours and take copies of any entries therein; and

(b) to obtain from the Insurance Authority a copy, certified by or under the authority of the Insurance Authority to be correct, of any entry in a register.

(5) The registers shall be kept by recording the matters in question -

(a) in bound books or any other legible form; or

(b) otherwise than in a legible form so long as the recording is capable of being reproduced in a legible form,

but where the registers are kept otherwise than by making entries in a bound book, adequate precautions shall be taken for guarding against falsification and facilitating its discovery.

Person not to act as insurance broker unless registered.

5. (1) No person shall carry on business as an insurance broker unless -

(a) he is a registered insurance broker; and

(b) there is in force an approved policy of professional indemnity insurance with an approved insurer under which that person is indemnified in respect of liabilities that may arise out of or in the course of his business as an insurance broker.

(2) A person who contravenes subsection (1)

commits an offence and is liable to a fine of $ …… together with a fine of $ …… for each day on which the offence continues.

Application for registration as insurance broker.

6. (1) Any person may make an application to the Insurance Authority to be registered as an insurance broker.

(2) An application under subsection (1) by a person to be registered as an insurance broker shall be in the prescribed form and accompanied by -

(a) the prescribed fee; and

(b) evidence, satisfactory to the Insurance Authority, that he is a member of a registered broking association or that -

(i) in the case of an individual, he holds the qualifications prescribed for individuals to be registered as insurance brokers and is a fit and proper person to be so registered;

(ii) in the case of a body corporate, It complies with the requirements prescribed for bodies corporate to be registered as insurance brokers; and

(iii) in the case of a firm, it complies with the requirements prescribed for firms to be registered as insurance brokers.

(3) An application under subsection (1) In respect of a body corporate may be made by any person authorized in that behalf by the body corporate.

(4) An application under subsection (1) in respect of partners in a firm may be made by any of those partners.

Determination of application for registration as insurance broker.

7. The Insurance Authority may determine an application under section 6(1) by a person for registration as an insurance broker -

(a) by authorizing the registration where the Insurance Authority is satisfied that the person is a member of a registered broking association or complies with section 6(2)(b)(i), (ii) or (iii): or

(b) in any other case, by refusing to authorize the

registration.

Application for registration as broking association.

8. (1) Any broking association may make an application to the Insurance Authority to be registered as a broking association.

(2) An application under subsection (1) by a broking association to be registered as a broking association shall be in the prescribed form and accompanied by –

(a) the prescribed fee;

(b) evidence, satisfactory to the Insurance Authority, that -

(i) the qualifications set by the broking association for an individual to be a member of the broking association are not less than the qualifications referred to in section 6(2)(b)(i) for individuals to be registered as insurance brokers and that the broking association requires the individual to be a fit and proper person to be such a member;

(ii) the requirements set by the broking association for a body corporate to be a member of the broking association are not less than the requirements referred to in section 6(2)(b)(ii) for bodies corporate to be registered as insurance brokers; and

(iii) the requirements set by the broking association for a firm to be a member of the broking association are not less than the requirements referred to in section 6(2)(b)(iii) for firms to be registered as insurance brokers; and

(c) a complete list of all its members showing in relation to each such member -

(i) his name;

(ii) his professional address or addresses, if any, in Hong Kong or, if he has no professional address, his place of residence, whether in Hong Kong or elsewhere; and

(iii) the date on which he became such a member.

Determination of application for registration as broking association.

9. The Insurance Authority may determine an application under section 8(1) by a broking association for registration as a broking association -

(a) by authorizing the registration where the Insurance Authority is satisfied that the broking association complies with section 8(2)(b); or

(b) in any other case, by refusing to authorize the registration.

Method of registration.

10. (1) Where the Insurance Authority authorizes under section 7 the registration of a person as an insurance broker, the Insurance Authority shall enter, in relation to the person, in the appropriate register -

(a) in the case of an individual -

(i) his name;

(ii) his professional address or addresses, if any, in Hong Kong or, if he has no professional address, his place of residence, whether in Hong Kong or elsewhere;

(iii) the name of the registered broking association of which he is a member or particulars of the qualifications referred to in section 6(2)(b)(i), as the case may be;

(iv) the date of his registration;

(v) the conditions, if any, of his registration; and

(vi) such other particulars, if any, as may be prescribed;

(b) in the case of a body corporate -

(i) its name;

(ii) its principal place of business in Hong Kong;

(iii) the name of the registered broking association of which it is a member or particulars of the requirements referred to in section

6(2)(b)(ii), as the case may be;

(iv) the date of its registration;

(v) the conditions, if any, of its registration; and

(vi) such other particulars, if any, as may be prescribed; and

(c) in the case of a firm -

(i) its name;

(ii) its principal place of business in Hong Kong;

(iii) the name of the registered broking association of which it is a member or particulars of the requirements referred to in section 6(2)(b)(iii), as the case may be;

(iv) the date of its registration;

(v) the conditions, if any, of its registration; and

(vi) such other particulars, if any, as may be prescribed.

(2) Where the Insurance Authority authorizes under section 9 the registration of a broking association as a broking association, the Insurance Authority shall enter, in relation to the broking association, in the appropriate register -

(a) its name;

(b) its principal place of business in Hong Kong; and

(c) the date of its registration.

(3) Subject to subsection (4), as soon as practicable after registration under this section of a person or broking association, the Insurance Authority shall, on payment to him of the prescribed fee, issue to the person or broking association a registration certificate in the prescribed form.

(4) For the purposes of subsection (3), the

regulations may provide for different fees and different forms for individuals, bodies corporate, firms and broking associations.

Notice of determination to refuse registration.

11. Where the Insurance Authority refuses under section 7 or 9 to authorize, respectively, the registration of a person, or the registration of a broking association, the Insurance Authority shall -

(a) record the reasons for his determination;

(b) serve on the person or broking association not later than 7 days after so determining, notice of his determination; and

(c) where the person or broking association so requests, supply the person or broking association with a copy of the reasons for his determination.

Alteration of register, etc.

12. (1) Any registered insurance broker or registered broking association in respect of whom there is any change of any particulars supplied in or with his application for registration shall notify the Insurance Authority of the change not later than 14 days after that change.

(2) The Insurance Authority shall remove from the appropriate register the name of a registered insurance broker who dies or who requests his name to be so removed and may make such alterations to the particulars recorded in a register as he thinks fit.

(3) Any registered insurance broker or registered broking association who fails to comply with subsection (1) commits an offence and is liable to a fine of $ ….. together with a fine of $ ….. for each day on which the offence continues.

PART III

REGULATION OF INSURANCE BROKERS AND BROKING ASSOCIATIONS

Cancellation or suspension of registration of insurance broker.

13. The Insurance Authority may, after conducting such inquiry as he thinks fit and taking into account any representations made to him by a registered insurance broker, cancel, or suspend for a period specified by the Insurance Authority, the registration of the insurance broker

where the Insurance Authority is satisfied that the insurance broker -

(a) has been guilty of unprofessional conduct;

(b) has been convicted, whether in Hong Kong or elsewhere, of an offence that renders the insurance broker unfit to carry on business as an insurance broker;

(c) has obtained registration by fraud or misrepresentation in a material particular; or

(d) has failed to comply with a requirement of this Ordinance applicable to him.

Suspension of registration of insurance broker pending outcome of inquiry.

14. (1) Where the Insurance Authority intends to conduct, or is conducting, an inquiry referred to in section 13 in respect of a registered insurance broker and he is of the opinion that, in the interest of the public, the insurance broker should not carry on business as an insurance broker pending the outcome of any such inquiry, he may, by notice in writing served on the insurance broker, suspend the registration of that insurance broker.

(2) The suspension of registration imposed by a notice served under subsection (1) on an insurance broker shall expire immediately upon -

(a) the taking of disciplinary action against the insurance broker; or

(b) any statement by the Insurance Authority in a notice in writing served on the insurance broker that he does not intend to take disciplinary action against that insurance broker.

(3) The notice under subsection (1) shall include a requirement that the insurance broker the subject of the notice surrender his registration certificate to the Insurance Authority within the period specified in the notice.

(4) Subject to subsection (5), where the Insurance Authority serves a notice under subsection (1) on an insurance broker, he shall remove the name of the insurance broker from the register.

(5) Where the Insurance Authority has, in pursuance of subsection (4), removed from the register the name of an

insurance broker, he shall, where he serves a statement referred to in subsection (2)(b) on the insurance broker, at the same time reinsert the name and return to the insurance broker his registration certificate.

(6) Any insurance broker who fails to comply with a requirement contained in a notice referred to in subsection (1) served upon him commits an offence and is liable to a fine of $ …… together with a fine of $ …… for each day on which the offence continues.

Notification to registered insurance broker.

15. (1) The Insurance Authority shall, as soon as practicable after taking disciplinary action against a registered insurance broker, serve a notice in writing on the insurance broker, which notice shall include –

(a) a statement of; and

(b) the reasons for,

the action so taken and the requirement specified in subsection (2).

(2) The notice under subsection (1) shall include a requirement that the insurance broker the subject of the action surrender his registration certificate to the Insurance Authority within the period specified in the notice unless the registration certificate has already been surrendered under section 14.

(3) Subject to subsection (4), where the Insurance Authority cancels or suspends under section 13 the registration of an insurance broker, he shall remove the name of the insurance broker from the register unless the name has already been so removed under section 14.

(4) Where the Insurance Authority has, in pursuance of subsection (3), removed from the register the name of an insurance broker whose registration has been suspended under section 13, he shall, as soon as practicable after the expiration of the period of suspension, reinsert the name and issue to the insurance broker a registration certificate.

(5) Any insurance broker who fails to comply with a requirement contained in a notice referred to in subsection (2) served upon him commits an offence and is liable to a fine of $ …… together with a fine of $ …… for each day on which the offence continues.

Cancellation

16. The Insurance Authority may, after conducting

or suspension of registration of broking association.

such inquiry as he thinks fit and taking Into account any representations made to him by a registered broking association, cancel, or suspend for a period specified by the Insurance Authority, the registration of the broking association where the Insurance Authority is satisfied that the broking association -

(a) has altered its qualifications for individuals, has altered its requirements for bodies corporate, or has altered its requirements for firms, to be members of it to, respectively, qualifications that are less than the qualifications referred to in section 6(2)(b)(i) for individuals to be registered as insurance brokers, requirements that are less than the requirements referred to in section 6(2)(b)(ii) for bodies corporate to be registered as insurance brokers, or requirements that are less than the requirements referred to in section 6(2)(b)(iii) for firms to be registered as insurance brokers; or

(b) is accepting as members persons who -

(i) in the case of individuals, do not meet the qualifications set by it to be such members or who are not fit and proper persons to be such members;

(ii) in the case of bodies corporate, do not meet the requirements set by it to be such members; or

(iii) in the case of firms, do not meet the requirements set by it to be such members.

Notification to broking association.

17. (1) The Insurance Authority shall, as soon as practicable after taking disciplinary action against a registered broking association, serve a notice in writing on the broking association, which notice shall include -

(a) a statement of; and

(b) the reasons for,

the action so taken and the requirement specified in subsection (2).

(2) The notice under subsection (1) shall include a requirement that the broking association the subject of the

action surrender its registration certificate to the Insurance Authority within the period specified in the notice.

(3) Subject to subsection (4), where the Insurance Authority cancels or suspends under section 16 the registration of a broking association, he shall remove the name of the broking association from the appropriate register.

(4) Where the Insurance Authority has, in pursuance of subsection (3), removed from the register the name of a broking association whose registration has been suspended under section 16, he shall, as soon as practicable after the expiration of the period of suspension, reinsert the name and issue to the broking association a registration certificate.

(5) Any broking association that fails to comply with a requirement contained in a notice referred to in subsection (2) served upon it commits an offence and is liable to a fine of $ …… together with a fine of $ …… for each day on which the offence continues.

Effect of disciplinary action.

18. Disciplinary action shall take effect on the date of service on the insurance broker or broking association the subject of the action of the notice under section 15(1) or 17(1), as the case may be, that relates to that action.

PART IV

REGULATION OF INSURANCE AGENTS

Insurers to keep register of insurance agents.

19. (1) Each Insurer shall establish and maintain a register of its insurance agents, which register shall –

(a) contain the prescribed information;

(b) be kept by recording the matters in question in bound books or in any other legible form:

(c) be kept at the principal registered office of the insurer;

(d) be open for inspection by the public during ordinary office hours; and

(e) be produced to the Insurance Authority at any time upon demand.

(2) Where, in relation to any act in respect of the arranging of any policy, there is a dispute as to whether a person was, in respect of that act, the insurance agent of an insurer, the appearance of the person's name in the insurer's register of insurance agents for any period during which that act was carried out, shall be conclusive evidence, as between the parties to the dispute (including the insurer if he is not already a party to that dispute) that the person so named was the insurance agent of that insurer for that period, irrespective of whether any such party to the dispute had ascertained, whether before or during the carrying out of that act, that the person's name appeared in that register.

(3) Any insurer which fails to comply with subsection (1) commits an offence and is liable to a fine of $ …… together with a fine of $ …… for each day on which the offence continues.

Liability of insurer for insurance agents.

20. (1) An insurer is liable, as between the insurer and a policy holder or potential policy holder, for the conduct of the insurer's insurance agent, being conduct relied on in good faith by the policy holder or potential policy holder, in relation to any matter relating to the arranging of the policy concerned and is so liable notwithstanding that -

(a) the insurance agent did not act within the scope of his actual or apparent authority; or

(b) the insurance agent's name did not appear in the insurer's register of insurance agents for the period to which that conduct relates.

(2) Subject to subsection (3), an insurer is liable, as between the insurer and a policy holder, for the conduct of any person, being conduct relied on in good faith by the policy holder, in relation to any matter relating to the arranging of the policy concerned where actions by the insurer subsequent to that conduct ratify, or could reasonably be construed to ratify, that conduct as being the conduct of its insurance agent, for which purpose the issuing of that policy shall be prima facie evidence that the insurer has so ratified the conduct of that person.

(3) The liability under subsection (2) of an insurer shall not extend so as to make the insurer liable for the conduct of a person referred to in that subsection unless that person receives, or is entitled to receive (irrespective of whether the entitlement is legally enforceable or not), from

the insurer some reward in relation to the policy to which that conduct relates.

(4) The liability -

(a) under subsection (1) of an insurer extends so as to make the insurer liable to a policy holder or potential policy holder in respect of any loss or damage suffered by the policy holder or potential policy holder as a result of the conduct of the insurer's Insurance agent; and

(b) under subsection (2) of an insurer extends so as to make the insurer liable to a policy holder in respect of any loss or damage suffered by the policy holder as a result of the conduct of a person referred to in that subsection.

(5) Subsection (1) or (4)(a) shall not affect any liability of an insurance agent to a policy holder or potential policy holder and subsection (2) or (4)(b) shall not affect any liability of a person referred to in subsection (2) to a policy holder.

(6) Where an insurance agent who acts for more than one insurer -

(a) conducts his business in relation to a particular policy holder or potential policy holder in such a manner that he does not indicate, whether explicitly or implicitly, which insurer he is acting for at that time; and

(b) causes any loss or damage to be suffered by the policy holder or potential policy holder referred to in paragraph (a),

then all the insurers for whom the insurance agent was such an agent at the time concerned are jointly and severally liable, in accordance with this section, for that loss or damage.

(7) Any agreement, insofar as it purports to alter or restrict the operation of subsection (1), (2), (4) or (6), is void.

PART V

MISCELLANEOUS

Registered insurance broker who acts as insurance agent to disclose that fact.

21. (1) Where a registered insurance broker acts, or intends to act, as an insurance agent for an insurer in respect of arranging any policy, he shall not do any act for or in relation to a policy holder or potential policy holder in respect of that policy unless he has first informed the policy holder or potential policy holder that, in doing that act, he would be acting as the agent of the insurer and not of the policy holder or potential policy holder.

(2) Any registered insurance broker who fails to comply with subsection (1) commits an offence and is liable to a fine of $ …….

Penalty for pretending to be registered, etc. 1977 c. 46, s. 22

22. (1) Any person who knowingly -

(a) takes or uses any style, title or description which consists of or includes the expression "insurance broker" when he is not a registered insurance broker: or

(b) takes or uses any name, title, addition or description falsely implying, or otherwise pretends, that he Is a registered insurance broker,

commits an offence and is liable to a fine of $ .....

(2) References in subsection (1) to the expression "insurance broker" include references to the following related expressions -

(a) "assurance broker";

(b) "reinsurance broker"; and

(c) "reassurance broker".

Penalty for pretending to be insurance agent.

23. Any person who knowingly holds himself out to be an insurance agent of an insurer when he is not an insurance agent of that insurer commits an offence and is liable to a fine of $ ……

Misrepre-sentation.

24. Any person who knowingly obtains registration as an insurance broker or becomes a member of a registered broking association by a representation that is false in a material particular commits an offence and is liable to a fine of $ ……

Service of

25. (1) Any notice to be served under this Ordinance

notices.

(Cap. 1.)
[cf. Cap. 41, s. 55.]

on any person may be served by post, and, without prejudice to section 8 of the Interpretation and General Clauses Ordinance, a letter containing that notice shall be deemed to be properly addressed if it is addressed to that person at his last known business address.

(2) For the purposes of subsection (1), "business address" means -

(a) in relation to a body corporate formed or established in Hong Kong, its registered office in Hong Kong; and

(b) in relation to a body corporate formed or established outside Hong Kong, the address of any person resident in Hong Kong who is authorized to accept service of process in Hong Kong on behalf of that body corporate.

Limitation of time for proceedings in respect of offences.
[cf. Cap. 41, s. 58.]

26. Criminal proceedings for an offence under this Ordinance may be instituted at any time before, but shall not be instituted after, the expiration of 2 years after the discovery of the offence by the Insurance Authority or 6 years from the commission of the offence, whichever is the earlier.

Regulations.

27. The Governor in Council may make regulations for all or any of the following matters –

(a) the manner in which the books, accounts and records of registered insurance brokers shall be opened, maintained and operated;

(b) the inspection or audit of the books, accounts and records kept by registered insurance brokers;

(c) the submitting to the Insurance Authority of copies of any documents required by any other Ordinance, including the Companies Ordinance, the Business Registration Ordinance, the Limited Partnerships Ordinance and the Partnership Ordinance, to be submitted to a public officer or public body by a body corporate or firm that is a registered insurance broker;

(Cap. 32.)
(Cap. 310.)
(Cap. 37.)
(Cap. 38.)

(d) anything required or permitted to be prescribed under this Ordinance; and

(e) the better carrying into effect of this

Ordinance.

Transitional.

28. (1) Subject to subsection (2), any person who was, immediately before the commencement of this Ordinance, carrying on business as an insurance broker shall, on and from that commencement, be deemed to be a registered insurance broker.

(2) The deemed registration under subsection (1) of a person as an insurance broker shall expire immediately upon the expiration of 6 months after the commencement of this Ordinance unless the person has, before the expiration of that period, made an application under section 6(1) for registration as an insurance broker, in which case that deemed registration shall expire immediately upon the determination under section 7 of that application.

Explanatory Memorandum

This Bill, which is published in conjunction with the Insurance Companies (Amendment) Bill, implements certain recommendations made by the Law Reform Commission in Part II of its report entitled "Report on Laws on Insurance". A summary of those recommendations appears in Part III of that report.

2. The Bill principally provides for the registration of insurance brokers and insurance broking associations and for the regulation of the professional conduct of insurance brokers. In addition, it requires insurers to keep a register of their insurance agents and sets out the liability of insurers for the conduct of their insurance agents.

3. Clause 2(1) defines the terms used in the Bill. The definition of "insurance agent" also includes an employee of an insurer who arranges policies. Consequently, the provisions of the Bill that apply to insurance agents, and in particular clause 20, will also apply to such employees.

4. Clause 3 empowers the Governor to give directions to the Insurance Authority with respect to the exercise by the Insurance Authority of any of his functions under the Bill.

5. Part II (clauses 4 to 12) provides for the registration of insurance brokers and broking associations. Clause 4 requires two registers to be kept: a register of persons who are registered insurance brokers and a register of broking associations that are registered broking associations. The registers are open to inspection by the public. Clause 5 provides that no person shall carry on business as an insurance broker unless he Is registered and protected by a professional indemnity insurance policy in respect of that business. Clauses 6 and 7 provide for the registration of persons (whether an individual, a body corporate or a firm) as insurance brokers. The applicant for registration must satisfy the Insurance Authority that he is a member of a registered broking association or, alternatively, that he meets the prescribed qualifications or requirements (to appear in regulations) for registration. Clauses 8 and 9 provide for the registration of broking associations. In order to be registered, a broking association must primarily satisfy the Insurance Authority that its qualifications or requirements for a person to become a member of it are not less than those prescribed for persons to be registered as insurance brokers.

6. Part III (clauses 13 to 18) provides for the regulation of the conduct of registered insurance brokers and broking associations. Clause 13 sets out the grounds on which the Insurance Authority can suspend or cancel the registration of an insurance broker. The Insurance Authority may take such action only after conducting an inquiry into the matter and taking into account any representations made to him by the insurance broker. Clause 14 empowers the Insurance Authority to suspend the registration of an insurance broker pending the outcome of any such inquiry where he is of the opinion that such suspension is in the interest of the public. Clause 16 sets out the

grounds on which the Insurance Authority can suspend or cancel the registration of a broking association after conducting an inquiry. The grounds for such action are that the broking association is accepting as members persons who do not meet its qualifications or requirements for membership, or that it has altered those qualifications or requirements to qualifications or requirements that are less than those prescribed for persons to be registered as insurance brokers.

7. Part IV (clauses 19 and 20) requires insurers to keep a register of their insurance agents (to be open to inspection by the public) and sets out the liability of insurers in respect of the conduct of their insurance agents in arranging policies.

8. Part V (clauses 21 to 28) makes miscellaneous provisions. Clause 21 requires a registered insurance broker who acts, or intends to act, as an insurance agent in respect of arranging any policy, to inform the person concerned that he would be acting as the agent of the insurer and not of that person. Clause 27 provides that the Governor in Council may make certain regulations, including regulations prescribing the manner in which the books, accounts and records of registered insurance brokers shall be kept and regulations providing for their inspection. Clause 28 is a transitional provision allowing existing insurance brokers up to 6 months within which to register, during which time they are deemed to be registered.

9. [Public Service staffing and financial implications.]