



Investment & Financial Services Association Ltd

ABN 82 080 744 163

2 October 2007

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GPO Box 6  
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By email: [David\\_Mitchell@agd.nsw.gov.au](mailto:David_Mitchell@agd.nsw.gov.au)

Dear David,

**Re: Insurance Act 1902 (NSW)**

I write in response to your recent inquiry and subsequent discussion on the Insurance Act 1902 (NSW) (Act) and the recommendation by the Independent Pricing and Regulatory Tribunal of NSW for the Government to review this Act.

IFSA is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 145 members who are responsible for investing over \$1 trillion on behalf of more than nine million Australians. Members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

Following a review of the Act, IFSA submits that this Act should be repealed in so far as it applies to life insurance, and that consideration should be given to repealing the Act in its entirety.

Appendix A provided our analysis of the Act and the basis for our conclusion.

Please feel free to contact myself on (02) 9299 3022 if you wish to discuss this matter further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Micó', written in a cursive style.

**David Micó**  
Senior Policy Manager

Cc: John Anning  
General Manager Policy – Regulation Directorate  
Insurance Council

## **APPENDIX A – Insurance Act 1902 (NSW)**

### **Overview**

Nowadays insurance in Australia is generally and extensively regulated by the Commonwealth in the exercise of its power under paragraph 51(xiv) of the Constitution to make laws relating to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'. Some examples of this regulation are:

- the Life Insurance Act 1995 (Cth);
- the Insurance Act 1973 (Cth);
- the Marine Insurance Act 1909 (Cth);
- the Insurance Contracts Act 1984 (Cth); and
- Chapter 7 'Financial services and markets' of the Corporations Act 2001 (Cth).

For historical reasons, three classes of insurance are still regulated by the States and Territories. They are:

1. workers compensation insurance – eg the Workers Compensation Act 1987 (NSW);
2. compulsory third party (CTP) insurance – eg the Motor Vehicles (Third Party Insurance) Act 1942 (NSW); and
3. home warranty insurance – eg the Home Building Act 1989 (NSW).

Some State and Territory legislation also prescribes professional indemnity insurance for certain classes of professionals, such as medical practitioners, certain other health care practitioners (dentists, pharmacists, etc), solicitors, and finance brokers – eg the Health Care Liability Act 2001 (NSW) and the Legal Profession Act 2004 (NSW).

With few exceptions, State and Territory insurance legislation is limited to the four areas identified above – ie workers compensation, CTP, home warranty and professional indemnity insurance. The two most significant exceptions are:

- the Insurance Act 1902 (NSW); and
- Part III of the Instruments Act 1958 (Vic).

IFSA submits that State or Territory insurance legislation which applies outside the four specified areas imposes an additional and unwarranted regulatory burden on insurers – especially as insurers typically carry on business throughout the whole of Australia. In other words, outside the four specified areas there should be uniform national insurance laws, regulated at the Commonwealth level.

Most of the sections of the Insurance Act 1902 that relate to life insurance overlap with sections of the Life Insurance Act 1995 (Cth) or the Insurance Contracts Act 1984 (Cth). This leads to uncertainty and confusion. In particular, each instance of overlap requires consideration of whether, and if so to what extent, the Commonwealth and State provisions are inconsistent, as section 109 of the Constitution renders the State provision invalid to the extent of any inconsistency.

IFSA submits that the Insurance Act should be repealed in so far as it applies to life insurance, and that consideration should be given to repealing the Act in its entirety.

IFSA's comments on the substantive sections of the Act that relate to life insurance are provided below.

## **IFSA's comments on sections of the Insurance Act 1902 that relate to life insurance**

### ***Part 2 Life insurance encouragement***

*4 Policy and premiums protected on bankruptcy and against Court process*

*5 Conditions of protection for life insurance and endowment*

*6 Conditions of protection for annuities*

*7 Protection under s 4 restricted to certain persons*

These four sections are related. They overlap with sections 204 and 205 of the Life Insurance Act and subparagraphs 116(2)(d)(i) and (ii) of the Bankruptcy Act 1966 (Cth). They can be repealed.

*8 In insurances for benefit of family, moneys payable not to form part of estate*

*9 Appointment of trustees*

*10 Shares in insurance money, how settled*

These three sections are related. They overlap with section 48A of the Insurance Contracts Act. They can be repealed.

In relation to sections 9 and 10, money payable by an insurer under an insurance policy may be subject to a trust (on ordinary equitable principles): *Vanderpitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 at 79. Sections 201 to 203 of the Life Insurance Act recognise this.

*10A Suicide of insured*

This section overlaps with section 228 of the Life Insurance Act. It can be repealed.

### ***Part 3 Lost life insurance policies***

*11 Issue of special policy in substitution of lost or destroyed policies*

*12 Intended issue of special policy to be advertised*

*13 Contents and effect of special policy*

These three sections are related. They overlap with Division 7 of Part 10 of the Life Insurance Act. They can be repealed.

### ***Part 5A Procedural and evidentiary provisions***

#### *17A Rights of insurer to challenge evidence where false claim alleged*

This section applies where a third party commences civil proceedings against the insured. It therefore applies to liability insurance, but not life insurance. (Incidentally, paragraph 17A(6) refers to the Evidence Act 1898, which has been repealed.)

### ***Part 6 Miscellaneous***

#### *18 Powers of court in relation to insurance contracts*

This section overlaps with section 54 of the Insurance Contracts Act. It can be repealed.

#### *18A Misrepresentation and non-disclosure*

#### *18B Limitation on exclusion clauses*

These two sections do not apply to life insurance: paragraph 21(2)(b).

#### *19 Insured not bound to arbitrate*

This section overlaps with section 43 of the Insurance Contracts Act. It can be repealed.