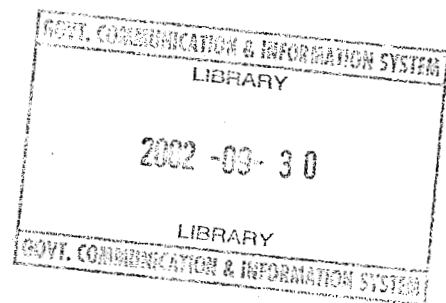


REPUBLIC OF SOUTH AFRICA

INSURANCE AMENDMENT BILL

(As introduced in the National Assembly as a section 75 Bill; Bill published in Government Gazette No 23736 of 13 August 2002) (The English text is the official text of the Bill)

(MINISTER OF FINANCE)



[B 52—2002]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Long-term Insurance Act, 1998, so as to insert certain definitions and substitute a definition; to further regulate advertising material relating to long-term policies, changes to a long-term insurer's name and conditions of registration; to make new provision regarding the business of reinsurers; to make new provision in respect of notifications of certain appointments, terminations and resignations, certain acts by a long-term insurer in respect of own shares, references to associates of persons holding interests in long-term insurers, maintenance of financially sound conditions and in respect of certain deeming provisions relating to assets of a long-term insurer; to correct incorrect references; to provide for further prohibitions concerning assets; to effect textual corrections; to provide for the exemption from the conditions in place for a certain conditional transaction; to further regulate the issuing of receipts in respect of premium payments; to make further provision in respect of failure to disclose material information by policyholders; to further regulate interest on unpaid premiums, loans and advances by long-term insurers, the holding of assets in the Republic by long-term insurers and the valuation of liabilities of long-term insurers; to repeal Schedule 2 to the said Act; and to refine the requirements in Schedule 3 for the calculation of the values of assets, liabilities and capital adequacy requirement; to amend the Short-term Insurance Act, 1998, so as to substitute certain definitions; to further regulate advertising material relating to short-term policies; to prohibit certain references in short-term policies to funerals; to make new provision regarding the business of reinsurers, changes to a short-term insurer's name, notification of certain appointments, terminations and resignations, certain acts by a short-term insurer in respect of own shares and references to associates of persons holding interests in short-term insurers; to provide for further prohibitions concerning assets; to provide for the furnishing of free policy copies to policyholders; to make further provision in respect of failure to disclose material information by policyholders; to further regulate the holding of assets in the Republic by short-term insurers and the calculation of the value of the assets of a short-term insurer; and to repeal a certain Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of Arrangement of Sections of Act 52 of 1998

1. The Arrangement of Sections of the Long-term Insurance Act, 1998, is hereby amended—

- (a) by the insertion after item 15 of the following item:
 “15A. Reinsurers carrying on reinsurance business only, authorised to provide policy benefits under fund policies directly”; 5
- (b) by the substitution for item 18 of the following item:
 “18. Notification of certain appointments, **[and]** terminations and resignations”; 10
- (c) by the substitution for item 59 of the following item:
 “59. Misrepresentation and failure to disclose material information”; 10
- (d) by the substitution for item 61 of the following item:
 “61. **[Prescription of certain debt]** Interest on unpaid premiums, policy loans and advances”; 15
- (e) by the deletion of item “Schedule 2 Method of calculation of value of assets and liabilities”; and 15
- (f) by the substitution in item “Schedule 3” for the words “Financial soundness method of calculation of value of assets and liabilities” of the words:
 “Calculation of values of assets, liabilities and capital adequacy requirement”. 20

Amendment of section 1 of Act 52 of 1998

2. Section 1(1) of the Long-term Insurance Act, 1998, is hereby amended—

- (a) by the insertion after the definition of “Board” of the following definition:
 “‘capital adequacy requirement’ means an amount which a long-term insurer is required to have in terms of paragraph 2 of Schedule 3;”; 25
- (b) by the insertion after the definition of “disability policy” of the following definition:
 “‘fair value’ means the fair value of an asset determined by reference to South African Statements of Generally Accepted Accounting Practice;”; 30
- (c) by the insertion after the definition of “life policy” of the following definitions:
 “‘linked liabilities’ means the liabilities of a long-term insurer in respect of linked policies;
 ‘linked policy’ means a long-term policy of which the amount of the policy benefits is not guaranteed by the long-term insurer and is to be determined solely by reference to the value of particular assets or categories of assets which are specified in the policy and are actually held by or on behalf of the insurer specifically for the purposes of the policy;”; 35
- (d) by the substitution for the definition of “managing executive” of the following definition:
 “‘managing executive’ means the chief executive officer of a long-term insurer **[or]** and **[a]** every manager of that long-term insurer who reports directly to that chief executive officer;”; and 40
- (e) by the insertion after the definition of “managing executive” of the following definition:
 “‘market-related policy’ means a long-term policy, other than a linked policy, of which the amount of the policy benefits is not guaranteed by the long-term insurer and is to be determined in whole or in part by reference to the value of particular assets or categories of assets;”. 45 50

Amendment of section 4 of Act 52 of 1998

3. Section 4 of the Long-term Insurance Act, 1998, is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection:
 “(3) (a) If any advertisement, brochure or similar **[document]** communication which relates to the business of a long-term insurer, or to a long-term policy, and which is being, or is to be, published or issued by a person, is misleading or contrary to the public interest or contains an incorrect statement of fact, the Registrar may by notice direct that person 55

not to publish or issue it or to cease publishing or issuing it or to effect the changes to it which the Registrar deems fit.

- (b) An advertisement, brochure or similar communication which relates to a long-term policy must include the name of the long-term insurer underwriting the long-term policy.”; and
 (b) by the substitution in subsection (7)(a) and (b) for the expression “Short-term Insurance Act, 1997” of the expression “Short-term Insurance Act, 1998”.

Amendment of section 8 of Act 52 of 1998

4. Section 8 of the Long-term Insurance Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) No long-term insurer shall change its name, or a translation, shortened form or derivative thereof, without the prior approval of the Registrar.”.

Amendment of section 10 of Act 52 of 1998

5. Section 10 of the Long-term Insurance Act, 1998, is hereby amended by the substitution for paragraph (h) of the following paragraph:

“(h) reasonably necessary to ensure that the long-term insurance business concerned is carried on soundly and in a manner whereby the long-term insurer will [be in a position to meet] have assets with a fair value of not less than its liabilities and capital adequacy requirement,”.

Insertion of section 15A in Act 52 of 1998

6. The following section is hereby inserted in the Long-term Insurance Act, 1998, after section 15:

“Reinsurers carrying on reinsurance business only, authorised to provide policy benefits under fund policies directly

15A. Notwithstanding sections 15(4) and 70, a person who is, by virtue of registration under this Act, authorised to carry on reinsurance business only may, subject to section 11, carry on the business of providing or undertaking to provide policy benefits in terms of a fund policy directly to any fund contemplated in the definition of ‘fund’ in section 1(1).”.

Substitution of section 18 of Act 52 of 1998

7. The following section is hereby substituted for section 18 of the Long-term Insurance Act, 1998:

“Notification of certain appointments, terminations and resignations

18. (1) A long-term insurer shall notify the Registrar, in the form and of the information required by the Registrar, in respect of every director or managing executive appointed by it or whose appointment has been terminated by it, or who has resigned, within 30 days after such appointment or termination or resignation, as the case may be, together with the reasons for any such termination or resignation.

(2) Any such director or managing executive who resigns or whose appointment has been terminated by a long-term insurer shall, at the request of the Registrar, inform the Registrar in writing of any matter relating to the affairs of that insurer of which the director or managing executive became aware in the performance of his or her duties and which may prejudice the insurer’s ability to comply with this Act.”.

Amendment of section 24 of Act 52 of 1998

8. Section 24 of the Long-term Insurance Act, 1998, is hereby amended—

- (a) by the substitution in paragraph (a) for subparagraph (vi) of the following subparagraph:

- “(vi) reduce its share capital [in terms of sections 83 and 84 of the Companies Act];” and
- (b) by the addition to paragraph (a) of the following subparagraphs and proviso:
 - “(vii) issue different classes of ordinary shares;
 - (viii) convert any of its ordinary shares of a particular class into ordinary shares of another class;
 - (ix) allow its subsidiary to acquire directly or indirectly shares in it in terms of section 89 of the Companies Act:

Provided that such conditions may, notwithstanding paragraphs (a), (b) and (c) of section 11(1), include a varied or a new registration condition contemplated in sections 10 and 11, and that in any such case section 11(2) shall apply with the necessary changes;”.

Amendment of section 26 of Act 52 of 1998

9. Section 26 of the Long-term Insurance Act, 1998, is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) Subject to this section, no person shall, without the approval of the Registrar, acquire or hold shares or any other interest in a long-term insurer which results in that person, directly or indirectly, alone or with [an associate] a related party, exercising control over that long-term insurer.”;
 - (b) by the substitution for subsection (2) of the following subsection:
 - “(2) No person shall acquire shares in a long-term insurer if the aggregate nominal value of those shares, by itself or together with the aggregate nominal value of the shares already owned by that person or by that person and his, her or its [associates] related parties, will amount to 25 percent or more of the total nominal value of all of the issued shares of the long-term insurer concerned, without first having obtained the approval of the Registrar.”;
 - (c) by the substitution in subsection (3)(a) for subparagraph (i) of the following subparagraph:
 - “(i) subject to the aggregate nominal value of the shares owned by the person concerned and his, her or its [associates] related parties not exceeding such percentage as may be determined by the Registrar without further approval in terms of this section;”;
 - (d) by the substitution in subsection (3)(c) for the words preceding subparagraph (i) of the following words:
 - “may be refused if the person concerned, alone or with his, her or its [associates] related parties, has not already owned shares in the long-term insurer—”;
 - (e) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words:
 - “For the purposes of this section [‘associate’] ‘related party’, in relation to—”;
 - (f) by the substitution in subsection (6) for the words preceding paragraph (a) of the following words:
 - “For the purposes of this section a person shall be deemed to exercise control over a long-term insurer if that person, alone or with [associates] related parties—”.

Amendment of section 29 of Act 52 of 1998

10. Section 29 of the Long-term Insurance Act, 1998, is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 - “(b) providing for its liabilities and capital adequacy requirement; and”;
 - (b) by the substitution in subsection (1) for the words following on paragraph (c) of the following words:
 - “so as to be in a position to meet its liabilities and capital adequacy requirement at all times.”.

Amendment of section 30 of Act 52 of 1998

11. Section 30 of the Long-term Insurance Act, 1998, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) A long-term insurer shall—

(a) have assets the aggregate value of which, on any day, is not less than the aggregate value, on that day, of its liabilities and capital adequacy requirement; and”;

(b) subject to section 32, have, in the Republic, assets, the aggregate value of which, on any day, is not less than the aggregate value, on that day, of those of its liabilities which are to be met in the Republic, and the capital adequacy requirement in respect of those liabilities,

when the values of those assets, [and] liabilities and capital adequacy requirement are calculated [by means of—

(i) the method set out in Schedule 2; and

(ii) the financial soundness method] as set out in Schedule 3.”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) A long-term insurer shall not declare a dividend or pay a dividend to its shareholders [if, and for so long as,]—

(a) while it fails to comply with subsection (1);

(b) if that has the result that the insurer fails to comply with subsection (1); or

(c) if [the] after such declaration or payment [of the dividend would result in it failing to comply with subsection (1)] the insurer has an aggregate value of assets which is less than the aggregate value of its liabilities, issued share capital and non-distributable reserves.”.

Amendment of section 31 of Act 52 of 1998

12. Section 31 of the Long-term Insurance Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to section 32, a long-term insurer shall, in the Republic, have assets, other than assets in respect of linked liabilities [referred to in section 33(2)]—

(a) which have an aggregate value which, on any day, is not less than the aggregate value, on that day, of those of its liabilities which have to be met in the Republic, and minimum capital adequacy requirement, when the values of those assets are calculated by reference to their [market] fair value [as defined in the regulations] and the values of those liabilities, other than the said linked liabilities, and minimum capital adequacy requirement, are calculated [by means of the method] as set out in Schedule [2] 3; and

(b) which are of the kinds specified in Schedule 1; and

(c) which have a [market] fair value [, as defined in the regulations,] which, when expressed as a percentage of the aggregate value of its liabilities and minimum capital adequacy requirement referred to in paragraph (a), does not exceed the percentage specified in the regulations in respect of particular kinds or categories of those assets, unless the Registrar otherwise approves either in advance or at any time after having received the notice referred to in section 29(3)—

(i) in a particular case;

(ii) for the specified period; and

(iii) subject to such conditions as the Registrar may determine.”.

Amendment of section 33 of Act 52 of 1998

13. Section 33 of the Long-term Insurance Act, 1998, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) For the purposes of this Act, the liabilities of a long-term insurer shall include its contingent liabilities for policy benefits which have not become claimable, and which are specified in [Schedules] Schedule 3 [and 4].”; and

(b) by the deletion of subsection (2).

Amendment of section 34 of Act 52 of 1998

14. Section 34 of the Long-term Insurance Act, 1998, is hereby amended—
- (a) by the addition to subsection (1) of the following paragraph:
“(e) include in its assets shares held directly or indirectly in its holding company.”; and
 - (b) by the substitution for paragraph (a) of subsection (2) of the following paragraph:
“(a) derivatives designated as an asset in respect of a linked policy [referred to in section 33(2)].”.

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Amendment of section 36 of Act 52 of 1998

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15. Section 36 of the Long-term Insurance Act, 1998, is hereby amended by the insertion of the figure (1) at the beginning of the first subsection, which currently is not numbered.

Amendment of section 39 of Act 52 of 1998

16. Section 39 of the Long-term Insurance Act, 1998, is hereby amended by the substitution for paragraph (c) of the following paragraph: 15
- “(c) unless payment of the [costs] cost referred to in section 38(1)(c)(i) has been made or secured.”.

Amendment of section 44 of Act 52 of 1998

17. Section 44 of the Long-term Insurance Act, 1998, is hereby amended by the addition of the following subsection: 20

“(4) Subsection (1) shall not apply to a long-term insurer if it lends money to one of its policyholders upon the security of a long-term policy issued by itself.”.

Amendment of section 47 of Act 52 of 1998

18. Section 47 of the Long-term Insurance Act, 1998, is hereby amended by the addition to subsection (2) of the following paragraph, the existing subsection becoming paragraph (a): 25

“(b) Paragraph (a) does not apply to a receipt issued by a bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990).”.

Amendment of section 59 of Act 52 of 1998

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19. Section 59 of the Long-term Insurance Act, 1998, is hereby amended by the substitution for the heading and subsection (1) of the following heading and subsection, respectively:

Misrepresentation and failure to disclose material information

59. (1) (a) Notwithstanding anything to the contrary contained in a long-term policy [contained], whether entered into before or after the commencement of this Act, but subject to subsection (2)— 35

[(a)] (i) the policy shall not be invalidated;

[(b)] (ii) the obligation of the long-term insurer thereunder shall not be excluded or limited; and 40

[(c)] (iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any variation thereof. 45

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may 50

be, should have been correctly disclosed to the insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.”.

Substitution of section 61 of Act 52 of 1998

20. (1) The following section is hereby substituted for section 61 of the Long-term Insurance Act, 1998: 5

“Interest on unpaid premiums, policy loans and advances

61. (1) Interest on an unpaid premium, or on a loan made by a long-term insurer on the sole security of a long-term policy, or on an advance made by a long-term insurer in respect of an amount which is to be payable under a long-term policy, shall not cease to accrue when the unpaid interest has accumulated to, or exceeds, an amount equal to the amount of that unpaid premium, loan or advance. 10

(2) ~~Debt consisting of interest on an unpaid premium, or on a loan granted by a long-term insurer on sole security of a long-term policy, or on an advance granted by a long-term insurer in respect of an amount which is to be payable under a long-term policy, shall, in~~ In the case of a long-term policy entered into or issued after 31 December 1973, an interest-bearing debt referred to in subsection (1) shall not prescribe before the liability of the long-term insurer under the long-term policy prescribes.”. 15 20

(2) Subsection (1) shall be deemed to have come into operation on 1 January 1999.

Substitution of certain expression in Afrikaans text of Act 52 of 1998

21. The Long-term Insurance Act, 1998, is hereby amended by the substitution in the Afrikaans text in the definition of “uitvoerende bestuurder” in section 1(1), and in sections 9(3)(b)(ii), 22(1) and 23(3)(b) for the expression “bestuurder” of the expression “bestuur”. 25

Amendment of Schedule 1 to Act 52 of 1998

22. Schedule 1 to the Long-term Insurance Act, 1998, is hereby amended—

(a) by the substitution in paragraph 1 for the definition of “securities” of the following definition: 30

“ ‘securities’ includes bills, bonds, debentures and debenture stock, loan stock, promissory notes, annuities, negotiable certificates of deposit and other financial instruments [of whatever nature] prescribed by the Registrar;”;

(b) by the substitution in paragraph 2(b) for subparagraph (i) of the following subparagraph: 35

“(i) an over-the-counter instrument, it is capable of being readily closed out and is entered into with a counterparty for which the relevant criteria have been approved by the Registrar subject to such conditions as he or she may determine;”;

(c) by the substitution in paragraph 3 for subitem (1) of item 16 of the following subitem in the Table: 40

“(1) Shares and [debentures] securities issued by a company incorporated in the Republic.”;

(d) by the substitution in the said Table for paragraphs (a) and (b), respectively, of item 16(5) of the following paragraphs: 45

“(a) Listed—

(i) securities issued by a government of a country other than the Republic; or 50

(ii) securities and shares issued by an institution incorporated outside the Republic

[, in respect of which the Registrar has recognised the—

(aa) stock exchange outside the Republic; or

(bb) country, other than the Republic, in which the regulated market concerned is situated, subject to the conditions determined by the Registrar].

(b) A credit balance in an account with, or a deposit, including a negotiable certificate of deposit or a bill, accepted by, an institution incorporated outside the Republic, [in a country approved by the Registrar,] which would have been a bank in terms of the Banks Act, 1990, if it were incorporated in the Republic.”; and

(e) by the substitution in the said Table for item 20 of the following item:

“20. Other claims, n.e.s., against—

(a) a long-term insurer in terms of a long-term policy;

(b) a person in the Republic; and

(c) a body corporate and any stock or shares in a body corporate which is not incorporated and registered in the Republic but which, in the opinion of the Registrar, carries on business in the Republic and which has been approved by the Registrar generally by notice in the *Gazette* and subject to the conditions determined by the Registrar and specified in the notice.”.

Repeal of Schedule 2 to Act 52 of 1998

23. The Long-term Insurance Act, 1998, is hereby amended by the repeal of Schedule 2.

Substitution of Schedule 3 to Act 52 of 1998

24. The following Schedule is hereby substituted for Schedule 3 to the Long-term Insurance Act, 1998:

“Schedule 3

(Sections 30 and 31)

Calculation of values of assets, liabilities and capital adequacy requirement

Definition

1. For the purposes of this Schedule ‘approved reinsurance policy’ means—

- (a) for the purposes of calculating the contingent liabilities of a long-term insurer under unmatured long-term policies in terms of which the policy benefits are to be provided—
 - (i) in the Republic, any proportional reinsurance policy in terms of which the reinsurer is liable for the liabilities under unmatured policies which remain in force until the contingent liability under unmatured policies has expired, entered into by the long-term insurer with—
 - (aa) another long-term insurer registered to do long-term business of the same class, only if that reinsurance policy is also to be discharged in the Republic; or
 - (bb) another insurer approved by the Registrar to the extent and subject to the conditions determined by the Registrar; or
 - (cc) any reinsurance effected prior to 1 January 1952, and relating to long-term policies issued before that date; or
 - (ii) outside the Republic, a reinsurance policy relating to the contingent liabilities and capital adequacy requirement concerned; or
- (b) for the purposes of calculating the liabilities of a long-term insurer other than contingent liabilities under unmatured long-term policies, any reinsurance.

Calculation of values

2. The values of assets, liabilities and the capital adequacy requirement shall be deemed to have been calculated in terms of this Schedule if the requirements set out in this Schedule and the requirements prescribed by the Registrar, after consulting the Actuarial Society of South Africa, have been complied with in making the calculations. 5

Effect of reinsurance

3. The contingent liabilities under unmatured policies shall be the net of contingent liabilities covered by approved reinsurance policies.

Amounts to be disregarded

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4. For the purposes of the calculation of the value of assets—

- (a) only such assets actually held by the long-term insurer or those approved by the Registrar in terms of section 34(1)(a) and (b), may be taken into account; and
- (b) there shall be disregarded—
 - (i) an amount which remains unpaid after the expiry of a period of 12 months from the date on which it became due and payable;
 - (ii) an amount representing administrative, organisational or business extension expenses incurred directly or indirectly in the carrying on of long-term insurance business;
 - (iii) an amount representing goodwill or an item of a similar nature;
 - (iv) an amount representing a negative liability in respect of a long-term policy in terms of which the long-term insurer concerned provides or undertakes to provide a policy benefit: Provided that this provision shall not be construed as precluding the deduction of a negative liability in respect of a long-term policy from liabilities;
 - (v) an amount representing a prepaid expense or a deferred expense; and
 - (vi) an amount representing a reinsurance contract in terms of which the long-term insurer is the policyholder, except to the extent that it represents a claim against a reinsurer in terms of the reinsurance contract.

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Calculation subject to certain provisions

5. For the purposes of the calculation of the value of contingent liabilities— 35

- (a) where a portion of a future premium is not contractually payable but can become payable at the option of the policyholder, such portion of a future premium and the benefits purchased thereby shall be disregarded, unless it causes an increase in the net liability, in which case it shall be valued; and
- (b) no allowance shall be made for potential profits to be earned from long-term insurance policies which the long-term insurer may enter into in future.

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Registrar may reject certain values

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6. Notwithstanding paragraph 2, if the Registrar is not satisfied that the value of an asset, a contingent liability or the capital adequacy requirement calculated in terms of this Schedule reflects a proper value, the Registrar may—

- (a) direct the insurer to appoint another person, at the cost of the insurer, to place a proper value on that asset, contingent liability or capital adequacy requirement; or
- (b) direct the long-term insurer to calculate the value in another manner which the Registrar determines and which will produce a proper value.

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Valuation of other liabilities

7. (1) The liabilities of a long-term insurer, other than its contingent liabilities under long-term policies, shall be determined in accordance with South African Statements of Generally Accepted Accounting Practice.

(2) Notwithstanding subparagraph (1), any liability of a long-term insurer in respect of which its creditor has waived any right to have the obligation discharged until all obligations to other creditors have been discharged in full, shall be valued in a manner and for an amount determined by the long-term insurer and approved by the Registrar.”. 5

Amendment of Arrangement of Sections of Act 53 of 1998

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25. The Arrangement of Sections of the Short-term Insurance Act, 1998, is hereby amended—

- (a) by the insertion after item 15 of the following item:
 “15A. Reinsurers carrying on reinsurance business only, authorised to enter into certain short-term policies directly”; 15
- (b) by the substitution for item 18 of the following item:
 “18. Notification of certain appointments, [and] terminations and resignations”; and
- (c) by the substitution for item 53 of the following item:
 “53. Misrepresentation and failure to disclose material information”. 20

Amendment of section 1 of Act 53 of 1998

26. Section 1(1) of the Short-term Insurance Act, 1998, is hereby amended—

- (a) by the substitution for the definition of “Lloyd’s underwriter” of the following definition:
 “‘Lloyd’s underwriter’ means an underwriting or non-underwriting member of Lloyd’s;”; 25
- (b) by the substitution for the definition of “managing executive” of the following definition:
 “‘managing executive’ means the chief executive officer of a short-term insurer [or] and [a] every manager of that short-term insurer who reports directly to that chief executive officer;”; and 30
- (c) by the substitution for the words preceding paragraph (a) of the definition of “representative” of the following words:
 “‘representative’ means a natural person employed—”. 35

Amendment of section 4 of Act 53 of 1998

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27. Section 4 of the Short-term Insurance Act, 1998, is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection:
 “(3) (a) If any advertisement, brochure or similar [document] communication which relates to the business of a short-term insurer, or to a short-term policy, and which is being, or is to be, published or issued by a person, is misleading or contrary to the public interest or contains an incorrect statement of fact, the Registrar may by notice direct that person not to publish or issue it or to cease publishing or issuing it or to effect the changes to it which the Registrar deems fit. 40
- (b) An advertisement, brochure or similar communication which relates to a short-term policy must include the name of the short-term insurer underwriting the short-term policy.”; and 45
- (b) by the substitution in paragraphs (a) and (b) of subsection (7) for the expression “Long-term Insurance Act, 1997” of the expression “Long-term Insurance Act, 1998”. 50

Amendment of section 8 of Act 53 of 1998

28. Section 8 of the Short-term Insurance Act, 1998, is hereby amended by the substitution for subsection (6) of the following subsection:

- “(6) No short-term insurer which is liable under a short-term insurance policy [shall change its name without the prior approval of the Registrar] may refer 55

to or use in any such policy or advertisement, brochure or similar communication the term 'funeral' or 'burial' or any derivative thereof."

Insertion of section 15A in Act 53 of 1998

29. The following section is hereby inserted in the Short-term Insurance Act, 1998, after section 15:

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"Reinsurers carrying on reinsurance business only, authorised to enter into certain short-term policies directly

15A. The Registrar may, subject to section 11, and notwithstanding sections 15(5) and 68, grant approval to an insurer carrying on reinsurance business only, to directly enter into short-term policies other than short-term reinsurance policies."

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Amendment of section 17 of Act 53 of 1998

30. Section 17 of the Short-term Insurance Act, 1998, is hereby amended by the substitution for paragraph (b) of the following paragraph:

"(b) its name, or a translation, shortened form or derivative thereof,"

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Substitution of section 18 of Act 53 of 1998

31. The following section is hereby substituted for section 18 of the Short-term Insurance Act, 1998:

"Notification of certain appointments, terminations and resignations

18. (1) A short-term insurer shall notify the Registrar, in the form and of the information required by the Registrar, in respect of every director or managing executive appointed by it or whose appointment has been terminated by it, or who has resigned, within 30 days after such appointment or termination or resignation, as the case may be, together with the reasons for any such termination or resignation.

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(2) Any such director or managing executive who resigns or whose appointment has been terminated by a short-term insurer shall, at the request of the Registrar, inform the Registrar in writing of any matter relating to the affairs of that insurer of which the director or managing executive became aware in the performance of his or her duties and which may prejudice the insurer's ability to comply with this Act."

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Amendment of section 23 of Act 53 of 1998

32. Section 23 of the Short-term Insurance Act, 1998, is hereby amended—

(a) by the substitution in paragraph (a) for subparagraph (vi) of the following subparagraph:

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"(vi) reduce its share capital [in terms of sections 83 and 84 of the Companies Act];"; and

(b) by the addition to paragraph (a) of the following subparagraphs and proviso:

"(vii) issue different classes of ordinary shares;

(viii) convert any of its ordinary shares of a particular class into ordinary shares of another class;

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(ix) allow its subsidiary to acquire directly or indirectly shares in terms of section 89 of the Companies Act;

Provided that such conditions may, notwithstanding paragraphs (a), (b) and (c) of section 11(1), include a varied or a new registration condition contemplated in sections 10 and 11, and that in any such case section 11(2) shall apply with the necessary changes;"

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Amendment of section 25 of Act 53 of 1998

33. Section 25 of the Short-term Insurance Act, 1998, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

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“(1) Subject to this section, no person shall, without the approval of the Registrar, acquire or hold shares or any other interest in a short-term insurer which results in that person, directly or indirectly, alone or with [an associate] a related party, exercising control over that short-term insurer.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) No person shall acquire shares in a short-term insurer if the aggregate nominal value of those shares, by itself or together with the aggregate nominal value of the shares already owned by that person or by that person and his, her or its [associates] related parties, will amount to 25 percent or more of the total nominal value of all of the issued shares of the short-term insurer concerned, without first having obtained the approval of the Registrar.”;

(c) by the substitution in subsection (3)(a) for subparagraph (i) of the following subparagraph:

“(i) subject to the aggregate nominal value of the shares owned by the person concerned and his, her or its [associates] related parties not exceeding such percentage as may be determined by the Registrar without further approval in terms of this section.”;

(d) by the substitution in subsection (3)(c) for the words preceding subparagraph (i) of the following words:

“may be refused if the person concerned, alone or with his, her or its [associates] related parties, has not already owned shares in the short-term insurer—”;

(e) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

“For the purposes of this section [‘associate’] ‘related party’, in relation to—”;

(f) by the substitution in subsection (6) for the words preceding paragraph (a) of the following words:

“For the purposes of this section a person shall be deemed to exercise control over a short-term insurer if that person, alone or with [associates] related parties—”.

Amendment of section 33 of Act 53 of 1998

34. Section 33 of the Short-term Insurance Act, 1998, is hereby amended by the insertion in subsection (1) after paragraph (d) of the following paragraph:

“(e) include in its assets, shares directly or indirectly held in its holding company,”.

Amendment of section 47 of Act 53 of 1998

35. Section 47 of the Short-term Insurance Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The policyholder, and the person who entered into the short-term policy, shall be entitled[, **against payment of a fee not exceeding that which may be prescribed by the Registrar,**] to be provided, upon request, with a copy of the policy.”.

Amendment of section 53 of Act 53 of 1998

36. Section 53 of the Short-term Insurance Act, 1998, is hereby amended by the substitution for the heading and subsection (1) of the following heading and subsection respectively:

Misrepresentation and failure to disclose material information

53. (1) (a) Notwithstanding anything to the contrary contained in a short-term policy [contained], whether entered into before or after the commencement of this Act, but subject to subsection (2)—
 [(a)](i) the policy shall not be invalidated;

[(b)] (ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

[(c)] (iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

Amendment of Schedule 1 to Act 53 of 1998

37. Schedule 1 to the Short-term Insurance Act, 1998, is hereby amended—

(a) by the substitution in paragraph 1 for the definition of “securities” of the following definition:

“ ‘securities’ includes bills, bonds, debentures and debenture stock, loan stock, promissory notes, annuities, negotiable certificates of deposit and other financial instruments **[of whatever nature]** prescribed by the Registrar;”;

(b) by the substitution in paragraph 2(b) for subparagraph (i) of the following subparagraph:

“(i) an over-the-counter instrument, it is capable of being readily closed out and is entered into with a counterparty for which the relevant criteria have been approved by the Registrar subject to such conditions as he or she may determine;”;

(c) by the substitution in the Table in paragraph 3, for subitem (1) of item 16 of the following subitem:

“(1) Shares and **[debentures]** securities issued by a company incorporated in the Republic.”;

(d) by the substitution in the said Table for paragraphs (a) and (b), respectively, of item 16(5) of the following paragraphs:

“(a) Listed—

(i) securities issued by a government of a country other than the Republic; or

(ii) securities and shares issued by an institution incorporated outside the Republic

[, in respect of which the Registrar has recognised the—

(aa) stock exchange outside the Republic; or

(bb) country, other than the Republic, in which the regulated market concerned is situated,

subject to the conditions determined by the Registrar].

(b) A credit balance in an account with, or a deposit, including a negotiable certificate of deposit, or a bill, accepted by, an institution incorporated outside the Republic, **[in a country approved by the Registrar]**, which would have been a bank in terms of the Banks Act, 1990, if it were incorporated in the Republic.”; and

(e) by the substitution in the said Table for item 20 of the following item:

“20. Other claims, n.e.s., against—

(a) a long-term insurer in terms of a long-term policy;

(b) a person in the Republic; and

(c) a body corporate and any stock or shares in a body corporate which is not incorporated and registered in the Republic but which, in the opinion of the Registrar, carries on business in the Republic and which has been approved by the Registrar generally by notice in the *Gazette* and subject to the conditions determined by the Registrar and specified in the notice.”.

Amendment of Schedule 2 to Act 53 of 1998

38. Part I of Schedule 2 to the Short-term Insurance Act, 1998, is hereby amended by the substitution in paragraph 1(a) for subparagraph (v) of the following subparagraph:

- “(v) an amount representing **[a negative liability or]** a reinsurance contract in terms of which the short-term insurer concerned is the policyholder, except to the extent that it represents a claim against a reinsurer in terms of an approved reinsurance policy; and”.

Amendment of Schedule 3 to Act 53 of 1998

39. Schedule 3 to the Short-term Insurance Act, 1998, is hereby amended—

- (a) by the substitution in paragraph 6 for subparagraph (2) of the following subparagraph: 10

“(2) Subject to section 63[(4)] (6), the aggregate value of the assets referred to in subparagraph (1) shall, in respect of each particular kind or category specified by regulation, when expressed as a percentage of the aggregate minimum amount required to be held in trust at that time in accordance with Schedule [3] 2, not exceed the percentage specified by regulation in relation to that kind or category of asset.”; and 15

- (b) by the substitution in paragraph 8 for the proviso to subparagraph (1), of the following proviso:

“Provided that this paragraph shall cease to apply, and the provisions of paragraphs 2 up to and including 7 shall apply from the latter date without change to— 20

- (i) such policy in the event of the reinsurance, as set out in the trust deeds of the Lloyd's Trusts, of all the obligations under the policy by another Lloyd's syndicate; **[and]** or 25
(ii) if the Registrar and Lloyd's so agree.”.

Substitution of certain expression in Afrikaans text of Act 53 of 1998

40. The Short-term Insurance Act, 1998, is hereby amended by the substitution in the Afrikaans text in the definition of “uitvoerende bestuurder” in section 1(1), and in sections 9(3)(b)(ii), 21(1) and 22(3)(b) for the expression “bestuurder” of the expression “bestuur”. 30

Repeal of Act 49 of 1998

41. The Insurance Amendment Act, 1998 (Act No. 49 of 1998), is hereby repealed.

Short title and commencement

42. This Act is called the Insurance Amendment Act, 2002, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 35

MEMORANDUM ON THE OBJECTS OF THE INSURANCE AMENDMENT BILL, 2002

1. INTRODUCTION

The Insurance Amendment Bill, 2002 ("the Bill"), provides for amendments to the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998) ("the Acts"), following an intensive review by the Registrars of Long-term and Short-term Insurance of the administration, implementation and efficacy of the Acts since their promulgation four years ago.

The Bill is designed to update and consolidate the insurance industry's legislative framework in terms of internationally accepted principles and best practice.

2. PRINCIPLES

The stated objects of the Bill are as follows:

- (a) Amendments identical to the relevant sections of both Acts:
 - (i) Addition and expansion of certain definitions (section 1);
 - (ii) Regulation of advertising material related to insurance policies (section 4);
 - (iii) Expansion of the Registrar's approval when an insurer changes a translation, shortened form or derivative of its name (section 8);
 - (iv) To allow reinsurance companies, in certain circumstances, to conduct business directly with certain entities (section 15A);
 - (v) Expansion of notifications to the Registrars of Short-term and Long-term Insurance of appointments, terminations and resignations of directors and executive management of insurers (section 18);
 - (vi) The issuing of different classes of ordinary shares, the buying back of own shares and the holding of shares by a subsidiary in an insurer, and the inclusion of certain of these shares in the method of calculating the assets of that insurer (section 23 and section 24 respectively); and
 - (vii) Extension of the scope of misrepresentations by policyholders and the legal consequences thereof (section 53 of Short-term Insurance Act and section 59 of Long-term Insurance Act).
- (b) Amendments specific to the Long-term Insurance Act, 1998:
 - (i) To enhance the financial soundness of the industry by amendments to the actuarial method of calculating the value of assets, liabilities and the capital adequacy requirement of all long-term insurers (Schedules 2 and 3);
 - (ii) The granting of an exemption to a long-term insurer to comply with certain requirements of the Long-term Insurance Act when money is advanced (loaned) to a policyholder upon the security of a long-term policy taken out with that insurer (section 44);
 - (iii) The granting of an exemption to banks for the issuing of specific receipts in respect of long-term insurance premiums paid in cash (section 47); and
 - (iv) The payment of interest on unpaid loans due to long-term insurers by policyholders (section 61).
- (c) Amendments specific to the Short-term Insurance Act, 1998:
 - (i) The prohibition of the use of the words "funeral" or "burial" in short-term policies and advertising materials (section 8(6));
 - (ii) To provide policyholders with a copy of their policy free of charge (section 47); and
 - (iii) Improvements of the wording of Schedules 1, 2 and 3 to the Act.

3. CLAUSES

The references in the paragraphs of this Memorandum (consecutively numbered on left margin) to "clause" in the headings of paragraphs, refer to the applicable clause of the Bill.

3.1 Clause 1: Amendment of Arrangement of Sections of Act 52 of 1998

This amendment effects changes to the Arrangement of Sections of the Long-term Insurance Act, 1998, consequent to the insertion and amendment of certain sections of the Act and the repeal of Schedule 2 thereto.

3.2 Clause 2: Amendment of section 1 of Act 52 of 1998 (Definitions)

(1) *Current position*

The present definition of “managing executive” is used, *inter alia*, as one of the categories of persons who, for purposes of registration of a long-term insurer, have to be fit and proper to hold the office concerned. Currently this definition is interpreted as being limited to the chief executive officer or an executive manager of the long-term insurer.

(2) *New approach*

The definition of “managing executive” is expanded to include not only the chief executive officer and executive management, but also senior managers who report directly to the chief executive officer.

(3) *Reasons*

The amendment of the definition of “managing executive” is necessary since—

- it is desirable, from a regulatory point of view, that both the chief executive officer and a manager reporting to the chief executive officer must be fit and proper; and
- the concept of “fit and proper” must not only apply to a person, but also to the top management of a long-term insurer.

Apart from this amendment to an existing definition, other new definitions are necessary in order to bring the definitions of certain words in line with those commonly used in accounting practice. In addition, definitions are inserted to cater for the new provisions referred to hereunder (see paragraph 3.21 of this Memorandum) on the financial soundness valuation method in respect of assets, liabilities and capital adequacy requirement for long-term insurers.

The new definitions to be introduced are: “fair value”, to replace the currently used term “market value” in accordance with international accounting standards; “linked policy” and “market-related policy”, which were previously defined in Schedule 2 of the Long-Term Insurance Act (to be repealed); and “capital adequacy requirement” and “linked liabilities”, which are required in the new provisions relating to the method of valuation of assets, liabilities and capital adequacy requirement.

3.3 Clause 3: Amendment of section 4 of Act 52 of 1998

(a) *Current position*

Subsection (3) of section 4 deals with the Registrar’s powers to direct a person either to cease publishing or not to publish certain advertising material if such material is misleading or contrary to the public interest. It further authorises the Registrar to direct the effecting of changes thereto.

(b) *New approach*

Subsection (3) is expanded to ensure that advertising material that relates to a long-term insurance policy includes the name of the long-term insurer who underwrites the policy.

(c) *Reasons*

The amendment is necessary since—

- it is a measure to prevent persons from carrying on unregistered insurance business;

- it affords the public an opportunity to verify the contents of the advertising material with the particular long-term insurer; and
- the provision was not carried forward to the current Long-term Insurance Act, despite having been included in the repealed Insurance Act, 1943 (Act No. 27 of 1943).

3.4 Clause 4: Amendment of section 8(2) of Act 52 of 1998

(i) Current position

Section 8(2) requires the Registrar's prior approval if a long-term insurer wishes to change its name.

(ii) New approach

The subsection is expanded to include the requirement to obtain the Registrar's approval also if a translation, shortened form or derivative of the long-term insurer's name is changed.

(iii) Reasons

The amendment is necessary since—

- the Registrar has to determine whether the name, or a translation, shortened form or derivative thereof, of a long-term insurer is acceptable;
- it is essential that the Registrar keeps record not only of any change of the name, but also of the shortened version or derivative of the name, and that records in the Office of the Registrar are updated; and
- it is essential to prevent a long-term insurer from using a name closely related to the name of another long-term insurer as this may create and promote confusion and uncertainty amongst prospective clients.

3.5 Clause 5: Amendment of section 10 of Act 52 of 1998

This amendment is consequential to the proposed amendment to Schedule 3 to separate the expressions "liability" and "capital adequacy requirement".

3.6 Clause 6: Insertion of section 15A in Act 52 of 1998

(a) Current position

In terms of sections 15(4) and 70 of the Long-term Insurance Act, only professional reinsurers may carry on long-term and short-term reinsurance business in one (composite) legal entity.

(b) New approach

The new approach is to allow professional reinsurers to also conduct insurance directly with "funds", as defined in section 1(1) of the said Act.

(c) Reasons

Under the repealed Insurance Act, 1943, professional reinsurers were allowed to directly conduct business with certain funds. These funds provide benefits to their members and should also be enabled to directly place business with professional reinsurers.

3.7 Clause 7: Substitution of section 18 of Act 52 of 1998

(a) Current position

Section 18 of the Long-term Insurance Act regulates notification of the Registrar whenever a long-term insurer appoints or terminates the appointments of its directors and managing executive. The section is currently interpreted as not dealing with cases of

resignations by directors and managing executives and also not providing the Registrar the right to obtain further information from the specific person.

(b) New approach

The need has been identified to extend section 18 also to cover cases of resignations by directors and managing executives and to provide in addition, at the request of the Registrar, for further information from directors and managing executives who resign or whose appointments have been terminated by long-term insurers on circumstances which may prejudice the relevant long-term insurer's ability to comply with the provisions of the said Act.

(c) Reasons

Resignations and terminations of appointments may be the result of irregular circumstances in an insurer's internal affairs and it is necessary for information thereon to be given, or be available for submission to the Registrar as soon as possible as the interests of policyholders and other stakeholders may be at risk.

3.8. Clause 8: Amendment of section 24 of Act 52 of 1998

(a) Amendment of section 24(a)(vi)

This amendment is consequential to the deletions of sections 83 and 84 of the Companies Act.

(b) The addition of subparagraphs (vii) and (viii) to paragraph (a) of section 24

This addition in regard to the issuing of different classes of ordinary shares is necessary to regulate long-term insurers, which conduct their business on a cell basis. The objective of cell business is to differentiate between profits to different shareholders which is achieved through the issuing of different classes of shares. Other kinds of shares and loan capital are already subject to approval by the Registrar in terms of section 24.

(c) The addition of subparagraph (ix) to paragraph (a) of section 24

This addition regulates the acquisition of shares directly or indirectly in a long-term insurer by its subsidiary. The direct or indirect acquisition by a subsidiary of shares in an insurer has an impact on the financial soundness condition of the insurer. It is therefore imperative for the Registrar to approve such transaction subject to conditions prior to the transaction being effected.

3.9 Clause 9: Amendment of section 26 of Act 52 of 1998

(a) Current position

Section 26 of the Long-term Insurance Act, 1998, imposes limitations on the control and the holding of shares and other interests in long-term insurers. To widen the net of such restrictions and to avoid indirect frustration of the objectives sought to be achieved by the section, limitations are also imposed on certain "associates" of persons primarily vested with such rights and interests.

(b) New approach

The expression "associate" must be replaced by "related party".

(c) Reasons

The replacement is necessary in order to be more closely in line and to avoid misinterpretation with South African Statements of Generally Accepted Accounting Practice.

3.10 Clauses 10, 11 and 12: Amendment of sections 29, 30 and 31 of Act 52 of 1998

(a) Amendment of section 29

This amendment is consequential to the proposed amendment to Schedule 3 to separate the expressions “liability” and “capital adequacy requirement”.

(b) Amendment of section 30

This amendment is consequential to the proposed amendment to Schedule 3 to separate the expressions “liability” and “capital adequacy requirement”.

In addition, further restriction on dividend payments by long-term insurers has been made.

(c) Amendment of section 31

(i) Current position

This section amongst others requires long-term insurers to spread their assets in relation to certain liabilities, calculated by the method set out in Schedule 2. Paragraph 3.21 contains an explanation of Schedule 2.

(ii) New approach

It is now proposed in paragraph 3.21 that Schedule 2 be deleted. Those liabilities mentioned in subparagraph (i) above will now be calculated on the method of valuation in Schedule 3, as proposed in paragraph 3.21.

For purpose of spreading, distinction is made between liabilities and minimum capital adequacy requirement as a result of amendments to Schedule 3.

Furthermore the expression “market value” is replaced with “fair value”.

(iii) Reasons

The reasons for the deletion of Schedule 2 and the introduction of a new amended Schedule 3 are mentioned in paragraph 3.21 of this memorandum. The reason for the introduction of a minimum capital adequacy requirement is to set a minimum level at which long-term insurers must spread their assets.

3.11 Clause 13: Amendment of section 33 of Act 52 of 1998

The proposed amendment of section 33(1) of the Act rectifies textual errors in regard to references to the relevant Schedules of the Act.

3.12 Clause 14: Amendment of section 34 of Act 52 of 1998

(a) Addition of paragraph (e) to subsection (1) of section 34

The purpose of this addition is to enable an insurer to apply for approval to include shares held directly or indirectly in its holding company in its assets. Shares held in this manner may have an impact on the financial soundness condition of the insurer, as well as the capital adequacy of the group to which the insurer belongs. It is therefore imperative for the Registrar to approve such holding.

(b) Amendment of paragraph (a) of subsection (2) of section 34

This amendment follows the insertion of a definition of “linked policy” in clause 2(c) of the Bill and the proposed deletion of section 33(2).

3.13 Clause 15: Amendment of section 36 of Act 52 of 1998

The amendment rectifies a textual error in the English text of section 36.

3.14 Clause 16: Amendment of section 39 of Act 52 of 1998

The amendment rectifies a textual error in section 39(c).

3.15 Clause 17: Amendment of section 44 of Act 52 of 1998

(a) Current position

Section 44(1) of the Long-term Insurance Act provides that a person who is required to provide a policy or policy benefits as security for a certain transaction, must be given a free choice regarding certain matters.

(b) New approach

To exclude "policy loans" from the said requirements. The exclusion will only apply in the case where a long-term insurer lends money to the holder of, and upon the security of, a long-term policy taken out with that insurer.

(c) Reasons

The giving of policy loans is a long-standing practice and has become a standard commercial feature and facility of long-term policies.

3.16 Clause 18: Amendment of section 47 of Act 52 of 1998

(a) Current position

Section 47(1) of the Long-term Insurance Act requires that where a premium is paid in cash, a receipt must be issued containing certain information which includes the name of the insurance company involved, the policy number and details of the recipient.

(b) New approach

Banks must be excluded from the said requirements of the subsection.

(c) Reasons

The current banking systems do not make provision for a bank to state the names of the insurance company and of the policyholder in receipts. The result is that banks are continuously breaching the provisions of section 47(1). This section envisages to particularly protect a particular segment of the market, and most specifically the less sophisticated part of the market where premiums are paid in cash to a person collecting it on a frequent basis. Enough protection is built into the current banking system to safeguard a policyholder paying the premium in cash to a bank.

3.17 Clause 19: Amendment of section 59 of Act 52 of 1998

(a) Current position

Section 59(1) replaced, as regards long-term policies, section 63(3) of the repealed Insurance Act, 1943, with similar wording, dealing with misrepresentations by policyholders (in general), and section 59(2) replaced section 49 of the said repealed Act, dealing specifically with incorrect references to policyholder ages. The said section 63(3) was inserted in the repealed Act in 1969 and although also intended to curtail statutory remedies of insurers in cases of representations by policyholders which amounted to non-material inaccuracies, it was essentially aimed at preventing insurers from relying on breaches of warranties in policies in cases of non-material inaccurate representations by policyholders. This reliance is widely regarded as constituting a practice which is immoral and should not be followed by reputable insurers. The said section was according to its terms clearly retrospective but could clearly, due to the rule of law that retrospectivity must be strictly interpreted and applied, not have been applied in cases where claims had been prescribed or already concluded or settled. The section

also applied to both long-term and short-term policies, and was in terms of section 60(1)(q) of the repealed Act also applicable to policies of Lloyd's.

In section 59(1) of the Long-term Insurance Act the provisions of section 63(3) of the repealed Act were re-enacted as regards long-term policies, together with the provisions relating to retrospectivity (which are also subject to the abovementioned retrospective restrictions), and in section 59(2) the same happened as regards section 49 of the repealed Act.

(b) New approach

The intention in the newly worded section 59(1) is not to affect the application of the section as regards the matters referred to in paragraph (a) above, but only to clearly broaden the scope of the expression "representation". In strict law this expression in this context basically and in the first place refers to representations by means of positive acts ("misrepresentations *per commissionem*") committed by a policyholder, but can according to legal dogmatics also be interpreted as covering (negative) cases of omissions ("misrepresentations *per omissionem*"), such as failures to disclose certain information. The intention behind the new section 59(1) is to make this legal position clear in order to promote the extension of the relative protection granted in the section to policyholders who are guilty of non-material inaccuracies. In conjunction with this aim, the new paragraph (b) of section 59(1) intends to legally clarify the concept of "materiality" of representations.

(c) Reasons

The new wording should clearly promote legal certainty as regards the exact intention behind section 59(1)(a), and also clarifies the legal position following conflicting views expressed in two judgments of the Supreme Court of Appeal. As regards the new section 59(1)(b), this summarises views on the relevant "materiality" as enunciated by the Courts.

3.18 Clause 20: Substitution of section 61 of Act 52 of 1998

(a) Current position

The Act is silent on the working of the *in duplum*-rule and therefore the common law principles apply in respect of cases mentioned in section 61, namely, that unpaid interest on a capital amount due only accumulates up to an amount equal to the capital.

(b) New approach

The application of the rule must be excluded in the case of loans against long-term policies.

(c) Reasons

A provision corresponding to the provision proposed in the new section 61(1), was included in section 68A(1) of the now repealed Insurance Act, 1943, following recommendations by the South African Law Commission during 1970. The current Long-term Insurance Act was promulgated without the provision. The Life Offices' Association made representations to the Advisory Committee on Long-term Insurance regarding this matter and the Committee resolved that an amendment should be made. The reasons for this amendment are that:

- an adversarial relationship may develop between insurers and policyholders if policy loans are not repaid;
- other policyholders have to subsidise those who do not repay the loans;
- a high level of lapsed policies may occur; and
- insurers can circumvent the common law rule quite easily by implementing certain system changes which will have huge cost implications and which will ultimately have to be borne by policyholders.

3.19 Clause 21: General section effecting textual improvements

Clause 2(d) of the Bill effects a terminological change in the Afrikaans text of the Long-term Insurance Act, to replace “uitvoerende bestuurder” with “uitvoerende bestuur”. Clause 21 of the Bill effects consequential changes to other sections of the Act where currently the word “bestuurder” is still used. (See also clause 40 of the Bill as regards corresponding changes to the Short-term Insurance Act.)

3.20 Clause 22: Amendment of Schedule 1 to Act 52 of 1998

(a) (i) Clause 22(a), (b) and (c): *Current position*

Schedule 1 to the Long-term Insurance Act deals with the assets of long-term insurers.

(aa) Clause 22(a): The concluding words “and other financial instruments of whatever nature” in the definition of “securities” effects a virtual unlimited extension of the definition.

(bb) Clause 22(b): Paragraph 2(b)(i) of Schedule 1 requires that the Registrar must approve a counterparty to an over-the-counter instrument.

(cc) Clause 22(c): Item 16(1) of the Table in paragraph 3 of Schedule 1 refers to “debentures” which are already included in the definition of “securities” in paragraph 1 of the Schedule.

(ii) *New approach*

(aa) Clause 22(a): The wide effect of the current wording has to be limited for the sake of legal certainty by empowering the Registrar rather to prescribe the other financial instruments contemplated.

(bb) Clause 22(b): Instead of approving the counterparty the Registrar will approve the criteria for a counterparty.

(cc) Clause 22(c): “Debentures” is replaced by the wider “securities” (as defined).

(iii) *Reasons*

(aa) Clause 22(a): Legal certainty requires a more specific provision instead of a vague generality.

(bb) Clause 22(b): It is practically not possible for the Registrar to approve each and every counterparty.

(cc) Clause 22(c): To enable the Registrar to approve of new kinds of financial instruments which are continuously being developed.

(b) Clause 22(d):

(i) *Current position*

Listed securities and shares issued by a foreign government or institution will be regarded as an asset in the Republic which long-term insurers must hold, if the Registrar has recognised the stock exchange or the country in which a regulated market exists.

(ii) *New approach*

A few aspects of the amendment proposals are formal and textual, but essentially the proposals mean that the relevant assets will still be regarded as assets in the Republic, but the stock exchange or the country within which a regulated market exists, shall no longer be subject to recognition by the Registrar. These assets, however, remain subject to the spreading limitations required in terms of section 31 of the Long-term Insurance Act.

(iii) Reasons

Investing on a recognised stock exchange or in a country within which a regulated market exists is not necessarily a guarantee that it will be a good investment. The proposed amendments will have the effect that greater responsibility will be placed on the directors of long-term insurance companies to assess the risks in investing on foreign stock exchanges and regulated markets. Furthermore, this will facilitate investments in e.g. SADC and other developing countries without having to wait for the Registrar's recognition.

(c) Section 22(e)*(i) Current position*

Item 20 in the Table in paragraph 3 of Schedule 1 to the Long-term Insurance Act, contains one of the classes of assets which a long-term insurer may hold in the Republic. The item only includes claims against stocks or shares in a body which is not incorporated and registered in the Republic, but which in the opinion of the Registrar carries on business in the Republic.

(ii) New approach

The item is re-arranged to allow also for claims against, and for stocks or shares in, a body corporate which is not incorporated and registered in the Republic, but which in the opinion of the Registrar carries on business in the Republic.

(iii) Reasons

The amendment is necessary since—

- unintended consequences resulted from the present wording, such as a claim against a stock or share of a body corporate;
- only claims are allowed as an asset in terms of the current wording; and
- claims against, and stocks or shares in, a body corporate described above should be allowed as an asset as they were allowed in the Insurance Act, 1943.

3.21 Clauses 23 and 24: Repeal of Schedule 2 to Act 52 of 1998, and substitution of Schedule 3 to Act 52 of 1998**General comment***(a) Current position*

Schedule 2 to the Long-term Insurance Act regulates the method of calculation of the value of a long-term insurer's assets and liabilities for the purposes of section 30 of that Act (maintenance of a financially sound condition), on what was commonly known as the "prescribed valuation method". Part I of the Schedule deals with the valuation of assets and Part II deals with the valuation of liabilities. The valuation of liabilities is also used for purposes of section 31 of that Act (spreading requirements).

The prescribed valuation method is a prescriptive basis. It has, however, become increasingly outdated because of the following:

- The basis is static, which holds little or no resemblance to current market conditions, thereby making its results artificial or unrealistic;
- the method does not distinguish between different risk profiles of different insurers, thereby making it an inflexible and often inappropriate method;
- for most modern new long-term insurance products the method is not relevant and therefore no prescriptions exist; and
- the method requires different approaches to the valuation of the assets and the liabilities of a long-term insurer, thereby making the values inconsistent with each other.

In contrast, the method of valuation proposed in Schedule 3 is a realistic basis that takes into account current economic factors, the expected experience of a long-term insurer, the actual risk profile of each insurer and the ability of its management to

manage these risks. The method values both assets and liabilities, thereby ensuring consistency, and it is in line with current actuarial practice.

Schedule 3 to the Long-term Insurance Act regulates the method of calculation of the value of a long-term insurer's assets and liabilities for the purposes of section 30 of the Act (maintenance of a financially sound condition), on what was commonly known as the "financial soundness valuation method". This method has been developed by the Actuarial Society of South Africa and has been in use for the past 6 years.

(b) New approach

In future the method of valuation in Schedule 3 will be the only method of valuation to be used for purposes of section 30 of the said Act (maintenance of a financially sound condition). Schedule 3 is to be replaced by a new Schedule, adjusted to incorporate all the requirements, which are deemed necessary to replace the prescribed valuation, after which Schedule 2 can be repealed.

For the purposes of section 31 of the Act (spreading of the assets backing the liabilities), the change is a consequential one because of the repeal of Schedule 2 to the Act.

(c) Reasons

From a regulatory perspective, the method of valuation in Schedule 3 is a much more informative method, it is more applicable to current types of long-term insurance business and it is in line with actuarial practice.

Specific comment as regards paragraphs of new Schedule 3

- (i) Par 1: the definition of "approved reinsurance policy" is taken over from paragraph 5 in Part II of the existing Schedule 2 where it occurs for the purposes of that Part dealing with the valuation of a long-term insurer's liabilities, where such a policy is important as it may be deducted from the amount of the liability; subparagraph (a)(i)(bb) of the definition, dealing with foreign insurers, provides that if reinsurance is placed with another insurer approved by the Registrar, such reinsurance will be approved reinsurance; the new approach is to amend these provisions to provide that the Registrar may grant approval subject to conditions, for the reasons that—
 - (aa) in certain circumstances the Registrar needs to restrict the percentage of business placed with a particular foreign insurer;
 - (bb) the Registrar needs to approve the kind of risks that may be reinsured with a particular foreign insurer; and
 - (cc) it is necessary to require the foreign insurer to provide the local insurer with the necessary security.
- (ii) Par 2: the Registrar is now empowered to prescribe the basis of the calculation of values of assets, liabilities and capital adequacy requirement.
- (iii) Par 3: the effect of reinsurance was covered in par 6 of the existing Schedule 3.
- (iv) Par 4: the provisions relating to amounts that must be disregarded have been streamlined and, inter alia, it has been made clear that negative reserves will not be allowed as assets although they may be deducted from liabilities.
- (v) Par 5: these provisions were covered in subparagraphs (c) and (d) of paragraph 3 of the existing Schedule 3.
- (vi) Par 6: the Registrar is empowered to take action where the valuation of assets, contingent liabilities or capital adequacy requirement by means of the method of valuation in Schedule 3 does not result in acceptable and proper values.
- (vii) Par 7: the provision has been taken over from subparagraphs (1) and (2) of paragraph 15 of the existing Schedule 2.

3.22 Clause 25: Amendment of Arrangement of Sections of Act 53 of 1998

Effects changes to the Arrangement of Sections of the Short-term Insurance Act consequent on the insertion of a new section in that Act, and other amendments.

3.23 Clause 26: Amendment of section 1 of Act 53 of 1998 (Definitions)

(a) (i) *Clause 26(a): Current position*

The definition describes a Lloyd's underwriter to only include an underwriting member.

(ii) *New approach*

The definition is expanded to also include a non-underwriting member of Lloyd's.

(iii) *Reasons*

Under the legal provisions relating to Lloyd's it is possible for an underwriting member to be on risk in a particular year and to then become a non-underwriting member in the next year although his or her liability regarding the previous year continues. It is for this reason that a non-underwriting member has to be included in the definition.

(b) *Clause 26(b):*

This proposed amendment corresponds with that in clause 2(d) of the Bill relating to the Long-term Insurance Act: see the motivation in paragraph 3.2 above in this Memorandum.

(c) *Clause 26(c):*

(i) *Current position:*

Under the Long-term Insurance Act a "representative" can mean both a natural person and a body corporate. In the Short-term Insurance Act the statutory definition differs as denoting only "employed" persons who can only be natural persons.

(ii) *New approach:*

It must be made clear that the intention is that a "representative" in the Short-term Insurance Act only denotes natural persons.

(iii) *Reasons:*

The current definition in the Short-term Insurance Act has caused uncertainty and an appropriate amendment is necessary in order to achieve legal certainty.

3.24 Clause 27: Amendment of section 4 of Act 53 of 1998

This proposed amendment corresponds with that in clause 3 of the Bill relating to the Long-term Insurance Act: see the motivation in paragraph 3.3 above in this Memorandum.

3.25 Clause 28: Amendment of section 8 of Act 53 of 1998

General:

The deletion of words in section 8(6) is necessary as the words are already contained in section 17 of the Short-term Insurance Act.

As regards the added wording:

(a) *Current position*

The Short-term Insurance Act is silent on whether a short-term insurer may refer to a policy as a "funeral policy" or "burial policy".

(b) New approach

Section 8(6) is amended to prohibit short-term insurers from marketing and calling or referring to a short-term insurance policy (which is in any case defined in the Short-term Insurance Act) as a funeral policy or burial policy.

(c) Reasons

The inclusion is necessary since—

- assistance business, which provides for funeral and burial benefits, is one of the classes of long-term insurance business which only a registered long-term insurer may underwrite;
- the repealed Insurance Act, 1943, prohibited short-term insurers from referring to any of their policies as a funeral policy and allowed long-term insurers to use the word “funeral”; and
- assistance business is exclusively long-term insurance business and should be kept in that realm.

3.26 Clause 29: Insertion of section 15A in Act 53 of 1998

The proposed amendment corresponds with that in clause 6 of the Bill, relating to the Long-term Insurance Act: see motivation in paragraph 3.6 of this Memorandum, above.

3.27 Clause 30: Amendment of section 17 of Act 53 of 1998

This amendment to section 17(b) of the Short-term Insurance Act corresponds with that in clause 4 of the Bill relating to the Long-term Insurance Act: see the motivation in paragraph 3.4 above in this Memorandum.

3.28 Clause 31: Substitution of section 18 of Act 53 of 1998

The reason for the substitution of section 18 of the Short-term Insurance Act is the same as that applying to the corresponding amendment of the Long-term Insurance Act in clause 7 of the Bill (see paragraph 3.7 of this Memorandum).

3.29 Clause 32: Amendment of section 23 of Act 53 of 1998

This amendment to section 23 of the Short-term Insurance Act corresponds with that in clause 8 of the Bill relating to the Long-term Insurance Act: see the motivation in paragraph 3.8 above in this Memorandum.

3.30 Clause 33: Amendment of section 25 of Act 53 of 1998

This amendment corresponds to the amendment in clause 9 of the Bill, relating to the Long-term Insurance Act: see paragraph 3.9 of this Memorandum, above.

3.31 Clause 34: Amendment of section 33 of Act 53 of 1998

This addition corresponds with that of clause 14(a) of the Bill relating to the Long-term Insurance Act: see motivation in paragraph 3.12 of this memorandum.

3.32 Clause 35: Amendment of section 47 of Act 53 of 1998

To be in line with the requirement in the Long-term Insurance Act, this section is amended to entitle a policyholder to obtain a copy of his or her policy free of charge.

3.33 Clause 36: Amendment of section 53 of Act 53 of 1998

The amendment of section 53 of the Short-term Insurance Act corresponds with that in clause 19 of the Bill relating to section 59 of the Long-term Insurance Act: see the motivation in paragraph 3.17 above in this Memorandum.

3.34 Clause 37: Amendment of Schedule 1 to Act 53 of 1998

This amendment of Schedule 1 to the Short-term Insurance Act corresponds with that in clause 22 of the Bill relating to the Long-term Insurance Act: see the motivation in paragraph 3.20 above in this Memorandum.

3.35 Clause 38: Amendment of Schedule 2 to Act 53 of 1998

(a) Current position

Paragraph 1(a) in Part I of Schedule 2 determines which assets shall be disregarded in the calculation of the value of the assets of an insurer. One of the amounts to be disregarded is the amount representing a negative liability.

(b) New approach

Paragraph 1(a)(v) is amended to delete “a negative liability” and to allow for a claim against a reinsurer in terms of a reinsurance contract to be regarded as an asset.

(c) Reasons

The amendment is necessary since—

- the term “negative liability” does not have a clear meaning in the accounting profession; and
- it makes clear that reinsurance placed with a non-approved reinsurer will be disregarded in valuing the assets the short-term insurer holds.

3.36 Clause 39: Amendment of Schedule 3 to Act 53 of 1998

(a) Clause 39(a): The amendment rectifies textual errors in paragraph 6(2) of Schedule 3.

(b) Clause 39(b):

(i) Current position

The proviso to paragraph 8(1) of Schedule 3 provides that the transitional provisions contained in that paragraph shall cease to apply if obligations under a Lloyd’s policy are reinsured and the Registrar and Lloyd’s so agree.

(ii) New approach

The amendment makes it clear that the transitional provisions will cease to apply in the event of either the one or the other occurrence.

(iii) Reasons

The new proposed wording clarifies the original intention of the proviso.

3.37 Clause 40: General clause effecting textual improvements

This clause follows, as regards the Short-term Insurance Act, the amendments set out in clause 21 of the Bill as regards the Long-term Insurance Act (see paragraph 3.19 of this Memorandum, above).

3.38 Clauses 41 and 42 of the Bill deal with incidental matters.

4. CONSULTATIVE PROCESS

The following persons were consulted, and they responded as follows:

1. Parties who supported the Bill as circulated:

African Peoples' Organisation Burial Society (Pty) Ltd.

2. Parties who made no comment on the Bill

Most registered Long-term and Short-term Insurers including reinsurers.
 Actuarial Society of South Africa
 Afrikaanse Handelsinstituut
 Assistance Underwriters Association
 Association of Law Societies
 Banking Council of South Africa
 Black Brokers Association
 Consulting Actuaries Society of Southern Africa
 Deloitte & Touche Management Consultants (Pty) Ltd
 Director-General: Finance
 Eastern Cape Dept of Environmental and Tourism Affairs
 Faculty of Economic and Management Sciences — University of Pretoria
 FEDSAL
 Financial Intermediaries Federation of South Africa
 Free State Department of Finance, Expenditure and Economical Affairs
 Gauteng Department of Economic and Finance Affairs
 Institute of Retirement Funds of Southern Africa
 Insurance Law Department: Unisa
 Insurance Brokers Council of SA
 Insurance Institute of SA
 Kwazulu-Natal Dept of Economic Affairs, Trade and Industry
 Lavanya Dunray
 Law Division: Old Mutual
 Lloyd's of London
 Master of the Supreme Court
 Mercantile Law Department: Unisa
 Micropal SA
 Minister and Deputy Minister of Finance
 Mpumalanga Dept of Consumer Affairs
 NACTU
 National Consumer Affairs Office
 National Black Consumers Association
 NEDLAC
 North West Dept of Finance and Economic Affairs
 Northern Cape Dept of Finance, Economic Affairs and Tourism
 Northern Province Department of Finance and Expenditure
 Ombudsman for Long-term Insurance
 Ombudsman for Short-term Insurance
 Public Accountants and Auditors Board
 Quest Insurance Advisory Service (Pty) Ltd
 Randse Afrikaanse Universiteit
 Registrar of Companies
 Registrar of Medical Schemes
 Registrar of Banks
 SA Institute of Chartered Accountants
 SA Reinsurance Offices Association
 SA Law Commission
 SA Revenue Service
 SA Insurance Brokers Association
 South African Co-ordinating Consumer Council
 South African Reserve Bank
 South African Chamber of Business
 Western Cape Dept of Finance and Environmental Affairs

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill does not have any financial implications for the State.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the National Treasury are of the opinion that the Bill must be dealt with in accordance with the procedure set out in Section 75 of the Constitution, since it contains no provision to which the procedure set out in Section 74 or 76 of the Constitution applies.