



## ***Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33***

In *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33, the High Court of Australia (HCA) found that section 54 of the *Insurance Contracts Act 1984* (Cth) applied in circumstances where an exclusion under the relevant contract of insurance otherwise applied. In the judgment delivered on 10 September 2014, the HCA confirmed that it was appropriate to take a simple, literal approach to the elements of section 54 in considering whether section 54 is activated in different circumstances, rather than to focus on the form of the contractual term.

### **Background**

Highway Hauliers Pty Ltd (**insured**) entered into a policy with certain underwriters at Lloyd's (**insurers**). The policy stipulated that the insured would be covered for 'loss, damage or liability...occurring during the period of insurance, subject to the terms of the [P]olicy...'. This cover, however, was qualified by an endorsement which provided that indemnity would not be extended in relation to 'B Double' vehicles, unless the drivers had achieved a PAQS<sup>1</sup> (or equivalent, approved program) driver score of at least 36.

The insured claimed on the policy in relation to two motor vehicle accidents involving B Double vehicles owned by it. The insurers refused to pay the claims because, when each of the accidents occurred, 'there was an absence of relevant cover...by virtue of the fact that the vehicle was driven by an untested driver'.

### **Litigation history**

At trial, the insurers accepted that the fact that the drivers had not undertaken a PAQS test could not reasonably be regarded as being capable of causing or contributing to the loss claimed by the insured and did not result in any prejudice to the insurer.

The insured was successful in proving that the insurers were obliged to indemnify the insured, on the basis that section 54 was to be interpreted 'within the confines of the actual language employed'. The Court also found that the insurers' refusal to indemnify the insured amounted to a breach of the policy. This decision was appealed by the insurers but ultimately upheld by the Western Australian Court of Appeal.

### **Issues before the HCA**

In light of the terms of the endorsement to the insurance contract, it was necessary for the HCA to consider whether section 54 is activated in this situation and to consider the proper application of section 54, to determine whether the insurers were correct in refusing to pay the insured's claim.

The insurer argued that section 54 refers only to claims for insured risks, and that the insured's claims fall outside the scope of cover because the wording of the endorsement in question provides that the loss is not insured as the vehicles were driven by untested drivers.

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<sup>1</sup> Defined by the Policy as People and Quality Solutions Pty Ltd, a company which undertook psychological testing of drivers' attitudes towards safety.

## The law prior to the HCA decision

The decision of the Western Australian Court of Appeal reflected the law regarding the interpretation of section 54 in Western Australia, which is akin to the position held in New South Wales (in *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2013] NSWCA 252). The positions of the courts in Western Australia and New South Wales can both be contrasted with the position of the Queensland Court of Appeal in *Johnson v Triple C Furniture & Electrical P/L* [2010] QCA 282, which was rejected by both the Western Australian and New South Wales Courts of Appeal.

### *Johnson v Triple C Furniture & Electrical P/L*

This case involved a third party personal injury claim pursuant to an aviation insurance policy, made by a passenger who was injured as a result of a plane crash.

When the claim was forwarded by the insured owner of the aeroplane to its insurer, the insurer denied liability on the basis that the pilot was prohibited from flying the aircraft, as he had not completed a flight review in the two years preceding the accident, and was thus in breach of the Civil Aviation Safety Authority 'communications' (which included civil aviation regulations).

The insurance contract stipulated that the policy does not apply in circumstances where the aircraft is operating in breach of the Civil Aviation Safety Authority communications.

The Court held that section 54 did not apply and the insurer was not required to pay the passenger's claim as:

- there was no relevant 'act' (or omission) in these circumstances, describing the fact that the pilot had not completed a flight review as a 'state of affairs', given that satisfactory completion of the review was an assessment to be made by a third party. During the existence of this 'state of affairs', cover was suspended;
- for the purpose of section 54, an act or omission is the performance or non-performance of some activity which the contract of insurance requires, allows or contemplates. As the omission in question was not something provided for by the contract, the insured could not make a claim for loss arising from the omission; and
- the fact that the pilot had not completed a flight review could reasonably be regarded as capable of causing or contributing to the loss (activating section 54(2)).

## Decision

Returning to the decision in *Maxwell*, the HCA dismissed the appeal, upholding the decision of the Western Australian Court of Appeal and finding that the insurers were required to pay the insured's claim. The HCA found that the Queensland Courts in *Johnson* had erred, and that the case should not be followed.

The HCA concluded that it is not necessary to consider the form of a term limiting policy coverage in an insurance contract in determining the application of section 54. The HCA decided that section 54 should be interpreted literally and that the only requirements for the activation of section 54 are:

- the presence of an act or omission (in this case, the 'act' was the fact that the insured did not ensure that the vehicles were driven by drivers who had completed the requisite testing);
- that the act occur during the period of insurance and after the contract of insurance was entered; and
- that the nature of the act be such that but for section 54, the insurer could refuse indemnity under the policy.

## Implications for insurers

The HCA decision in *Maxwell* provides further clarity on the application of section 54 and its interpretation which is of particular importance in circumstances where there were differing interpretations of national legislation by different states.

Further, the HCA's ruling that section 54 is to be interpreted literally further reduces the circumstances under which an insurer may refuse to pay a claim, and the circumstances under which insurers may rely upon terms excluding coverage. This may create some uncertainty with respect to the limits of cover.

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This article was prepared by Jacqueline Cassar.

For further assistance with policy coverage matters, please contact Simon Lusk, Director (t: 9231 7017, e: [slusk@ypol.com.au](mailto:slusk@ypol.com.au)) or Jacqueline Cassar (t: 9231 7050, e: [jcassar@ypol.com.au](mailto:jcassar@ypol.com.au))

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LEVEL 2, 39 MARTIN PLACE  
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000

F: +61 2 9231 7005

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