

THE HIGH COURT AND INSURANCE LAW

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THE HIGH COURT'S APPROACH TO CONSTRUCTION OF THE ICA

Delivering the keynote address in 2013 at the *AILA* National Conference, Chief Justice Bathurst gave a view of the state of insurance law from the bench.¹ In 2016 Alex and I have been asked to give such an overview from a somewhat less august viewpoint, that of the practitioner and participant, looking up at the bench.

Justice Kirby has characterised a jaunt through the *Insurance Contracts Act 1984* (Cth) (**ICA**) as follows:

*I have ventured into a thorny wood created by intensely detailed legislative provisions introduced by the recently enacted amendments. Like Shakespeare's actor, I rend the thorns and am rent with thorns; I seek the way and am straying from the way. I strive desperately to find the open air. I torment myself to find the ICA's meaning. The new legislation is difficult and cumbersome. Above all it is extremely detailed. The old common law was anchored in broad conceptual principles, admittedly based on moral principles. True, they were unjust principles as the insurance market expanded beyond venturesome risky merchants to the whole big world of mass consumer laws. But the anchors of principle were at least reasonably clear and generally understood.*²

If such difficulties exist for one of the authors of the ICA, then we can be sure that they remain in the path of the intrepid traveller, lawyer or insurer, who descends into the dynamic and complex field of insurance law in 2016.

The purpose of this paper is to provide a broad overview of the approach of the High Court of Australia to contracts of insurance in recent cases and, in particular, to contracts of insurance falling under the ICA. We have also sought to identify potential issues that may find their way to that court, and an assessment of how such issues might be resolved. It also involves consideration of the High Court's approach to statutory construction generally and how that approach may be applied to contentious issues in insurance law.

As soon as such an exercise is identified, it becomes clear that without a crystal ball it is in fact very difficult to anticipate what the High Court will do in any particular case. After all, by the time a case reaches the High Court it must have sufficient complexity and importance to have passed through the filter of special leave. Such cases are unlikely to be straightforward and easy to advise about. After all, in each such case it can be assumed that lawyers on both sides have advised, perhaps with different degrees of confidence, that the appeal has reasonable prospects of success, or that it does not, or somewhere in between!

The most important thing to understand about likely appeals to the High Court on matters of insurance law is that they will be decided in accordance with the Court's approach to the construction of statutes generally and its approach to sections of the ICA as determined in earlier cases.

In the 32 years since the ICA was enacted, the High Court has considered a number of important provisions. However, it has by no means dealt with all the issues that have arisen in relation to the Act.

The starting point for the HCA's review of the ICA is *Antico v Heath Fielding Australia Pty Ltd* [1997] HCA 35; (1997) 188 CLR 652. The facts involved the failure of the insured, who was sued for breach of director's duties, to obtain the consent of the insurer prior to incurring defence costs. In that case the insured's relevant 'omission' was caught by s 54 of the ICA, preventing the denial of indemnity to the insured.

If such difficulties exist for one of the authors of the ICA, then we can be sure that they remain in the path of the intrepid traveller, lawyer or insurer, who descends into the dynamic and complex field of insurance law in 2016.

The joint judgment of Dawson, Toohey, Gaudron and Gummow JJ suggested that s 54 was:

...remedial in character and its language should be construed so as to give the most complete remedy which is consistent with the actual language employed and which its words are fairly open ... the construction which we would give s 54 and its application to the present dispute involve not so much the giving of any generous reading to its provisions as the according to s 54 of the meaning it bears on its face.

It would be fair to say that this statement goes beyond a mere theoretical analysis of s 54 and has, in fact, informed insurers, insured persons and those that advise them as to the practical application of s 54. The 'remedial nature' of the section is at the forefront of those persons' minds in

considering the availability of indemnity in circumstances where there has been a relevant act or omission. It is this remedial nature that causes practitioners to refer to the ‘relief’ available under s 54, for example, when an insured is entitled to the ‘relief’ of being able to late notify a claim under a claims made and notified policy of insurance.

It might also be said, perhaps more controversially, that the remedial nature of s 54 goes not only to the question of whether an insurer is relieved of its obligations under a policy, but also informs as a matter of practice the other question under s 54, being the extent to which insurers have suffered prejudice as a consequence of the relevant act or omission. As a matter of practice, insurers tend not, for example, to seek to reduce their liability under a policy to nil by reason of prejudice unless the prejudice is readily identifiable and can be proved in any coverage dispute. To adopt any other approach would be to undermine the remedial nature of that section.

The High Court’s construction of s 54 as outlined in *Antico and Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33; (2014) 252 CLR 590 (discussed further below), demonstrates that contracts of insurance are unique creatures and cannot be construed solely as commercial contracts. While it may be that the law of construction of other commercial contracts at common law is settled, there remains scope for the High Court to opine further on the operation of the ICA and other relevant legislation, and therefore provide further guidance to the industry and practitioners on the operation of those Acts and the construction of policies of insurance (as it did in *Antico*).

THE HIGH COURT’S APPROACH TO STATUTORY INTERPRETATION GENERALLY

It is therefore relevant to consider whether there are any special rules about the construction of the ICA. Or has its interpretation been subsumed into a general approach to statutory construction?

The High Court re-iterated its approach to statutory construction in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47]. Four members of the Court (Hayne, Heydon, Crennan and Kiefel JJ) stressed that the starting point in the process is a consideration of the text itself. They added that historical considerations and extrinsic materials cannot be used to displace the clear meaning of a statutory provision. However, this did not amount to the Court rejecting any regard being paid to either extrinsic matters or to the legislative history of a provision. It remains a commonplace in statutory construction cases for the Court to consider the legislative history of a section. Courts are entitled to look at such a

history; *Beckwith v The Queen* [1976] HCA 55, (1976) 135 CLR 569 at 578-83; *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28 (2005) 221 CLR 249 at 256-60, 262-63.

The High Court has recently considered the role that legislative history plays in modern day statutory construction. In *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4. (2016) 328 ALR 375; the High Court considered the *Gambling Regulation Act 2003* (Vic). The issue was what was meant by the deceptively simple sounding phrase ‘grant of new licences’. More particularly, was a new ‘gaming machine entitlement’, or ‘GME’, the grant of new licences for the purpose of payments to be made to Tabcorp.

The High Court (French CJ, Kiefel, Bell, Keane and Gordon JJ) gave the phrase a construction that was based upon ‘reference to the plain and ordinary meaning of the text’ as well as ‘its context, including its legislative history’. Their Honours applied the High Court’s earlier decisions in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]-[71], *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [51] and *ICAC v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 at [57], [62].

The Court in *Tabcorp* started with the facts and the legislative history; [10]. It is occasionally put that it is not permissible to look at such history, certainly not as a first step; however, their Honours traced the regulation of gaming machines back to the *Gaming Machine Control Act 1991* (Vic), prior to which such machines were illegal.

Early in the life of the ICA the question arose whether the court could, or should, look to the general law of insurance in order to inform its construction of the ICA. In authorities such as *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* [1989] HCA 22; (1989) 166 CLR 606, the High Court rejected that approach, describing the Act as a ‘statutory code’ which replaced the common law. This question was answered definitively in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)* [2003] HCA 25; (2003) 214 CLR 514. In determining whether the insured had breached its obligations of disclosure to the insurer, the majority, McHugh, Kirby and Callinan JJ, considered whether the common law assisted in the construction of s 21 of the ICA. The appellants submitted that the phrase ‘the risk’ within that section had a settled meaning in common law, which should be applied in construing the Act. In rejecting that submission, their Honours concentrated on the language of the ICA, had some regard to the Second Reading Speech and Explanatory Memorandum and also considered the ‘ameliorative’ nature of the ICA. After adopting that approach, at [32] their Honours said:

The words may have a long settled meaning at common law. That does not however mean that the Act was an enactment of it. The common law was generally concerned with materiality. This Act is concerned with relevance.

Interestingly, their Honours went on to say that the section focussed on the risk (being the ‘particular insurance hazard’) and not upon ‘the much broader question of the commercial willingness of the insurer to accept the risk, still less emotional or individual reactions to that question ... The Act focuses on the particular risk of the insured propounded.’ This would tend to suggest that the High Court would be reluctant to place too much weight on commercial considerations. However, authorities such as *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579 have made it clear that in construing policies of insurance, the Court must consider their commercial context; must read the policies as a whole (including endorsements); and must give the policies a ‘businesslike interpretation’.

Kirby J suggests that even when adopting a ‘businesslike interpretation’, the end result is that the contract will in any event be construed contra proferentem. This approach sits well with the legislative history and purpose of the ICA as an ameliorative, remedial Act primarily enacted for the protection of the consumer.

In a dismissal of a special leave application a year later than *Permanent Trustees v FAI* [2003] HCA 25; (2003) 214 CLR 514, Kirby J made obiter comments which suggested that it would be open, for example, in applying the ICA, for a Court to give consideration to commercial issues such as whether an insured is commercially sophisticated. This has caused us to consider whether such commercial considerations in future could inform a Court as to the extent to which the ICA is to be remedial in relation to a particular contract of insurance.

Rich v CGU Insurance Ltd [2005] HCA 16 concerned a D&O policy and its efficacy in the litigation following the liquidation of One Tel. The Court held that special leave should be revoked, as the reformulated separate question was found to have no utility. The majority judgment of Gleeson CJ and McHugh and Gummow JJ held the policy was not intended to provide a form of up front indemnity for defence costs to the directors where the claim which caused those costs to be incurred by the directors was brought about by, contributed to or involved, inter alia, a dishonest act or omission on the part of the directors.

Callinan J would have adopted the insured’s interpretation of the policy. In terms of general principles of statutory

construction, Kirby J, although he agreed generally with the reasons of Callinan J, did not adopt the contra proferentem reasoning posited by Callinan J. His Honour suggested that it was not an appropriate construction of the policy given the level of commercial sophistication of both parties.

Callinan J, drawing from North American jurisprudence (although noting that he did not intend to endorse American jurisprudence on insurance in its entirety) suggested at [59] that any ambiguity was to be construed strictly against the insurer thereby endorsing a policy of contra proferentem. Kirby J, on the other hand, described this rule of construction as ‘an interpretive tool of last resort, where analysis of a contested text does not otherwise yield a satisfying conclusion’. However, his Honour went on to say, at [25]:

Considerations such as the commercial object of the instrument, the consequent operation of the document read as a whole, and the purposive approach now adopted in the ascertainment of the meaning of contested language usually lead to the same result as the contra proferentem rule in the construction of disputed insurance policies.

This comment is of some interest, because Kirby J goes beyond re-stating established rules of construction of insurance contracts (as stated in authorities such as *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579 at [22] (Gleeson CJ), [73]-[74] (Kirby J)), and suggests that even when adopting a ‘businesslike interpretation’, the end result is that the contract will in any event be construed contra proferentem. That is, as insurers ordinarily have the greater commercial power (or, perhaps more accurately, because insurers are assumed to have the greater commercial power), the general application of established rules of construction of contracts often results in an interpretation which favours an insured over an insurer. This approach sits well with the legislative history and purpose of the ICA as an ameliorative, remedial Act primarily enacted for the protection of the consumer.

RECENT HIGH COURT CASES

Section 54 ICA

To engage in understatement, s 54 has engendered a considerable amount of litigation. The High Court had earlier expressed the view that the meaning of the section is not free from difficulty; *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* [1993] HCA 5; (1993) 176 CLR 332 at 339.

The preclusionary effect of the section makes it of particular importance to insurers. An act or omission of an insured counts for nothing unless it could be seen, by a standard of reasonableness, as causing or contributing to the relevant loss. The section is found in Part V, Division III of the ICA. That division was considered by the High Court in *Antico*.

The statutory purpose of s 54 was to prevent the operation of remedies available to insurers at common law that were unfair or inappropriate in light of the actual breach or omission by an insured. The ICA aims at striking a fair balance between the insured's interests and those of the insurer, and the recognition of that statutory aim underlies the Court's approach to its interpretation; *East End Real Estate Pty Ltd t/as City Living v C E Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400.

The section's scope and operation was recently considered by the High Court in *Maxwell*. In that case, the appellant insurer raised two issues. First, whether the WASCA had impermissibly extended s 54(1) by characterising the insured's failure to comply with a term of the endorsement to the policy as an act or omission, thus engaging s 54, rather than as 'manifesting an inherent restriction or limitation' on the scope of cover provided. Secondly, did the WASCA fall into error in regarding the reasoning of the QCA in *Johnson v Triple C Furniture & Electrical Pty Ltd* [2012] 2 Qd R 337, (2010) 243 FLR 336 as either wrong (McLure P) or to be distinguished from the case before the court in *Maxwell*.

The policy in question was an occurrence based policy covering the trucking operations of the respondent. By an endorsement, no indemnity was provided when the respondent's trucks were being driven by a driver who, inter alia, did not have a prescribed 'PAQS' (People and Quality Services) driver profile score. The PAQS score, at least according to the insurer, was a driving test under controlled conditions to determine a driver's aptitude for long-haul East-West runs. The respondent argued that it 'had no relevant value for driver or operating safety'.

Claims were made for two accidents involving drivers who were not PAQS qualified. The trial judge, Corboy J, applied s 54(1) to prevent the insurer from denying liability. The WASCA dismissed the appeal to that Court. Special leave was granted on the s 54 point.

The appellant argued that the High Court's decision in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38; (2001) 204 CLR 641 represented the high water mark on the reach of the section. It relied on paragraphs [40]-[41] of the judgment of McHugh, Gummow and Hayne JJ in that case for the proposition that the section 'cannot be permitted to allow the insured to circumvent deficiencies in a claim that result in it being outside the scope of cover'.

The High Court unanimously dismissed the insurer's appeal and, in so doing, disapproved of the more conservative approach of the QCA in *Triple C Furniture*; [28].³ The failure of the trucking company, therefore, only to use drivers who satisfied the PAQS test was properly to be characterised as an 'omission' for the purposes of s 54(1).

What is clear, however, is that there is a very limited role for 'drafting techniques' in the wording of policies in determining whether s 54 applies.

Despite the High Court's decision, questions still remain about the operation of s 54(1) and such questions can be expected, in due course, to once again engage the High Court's attention. In particular, the issue of determining when restrictions on cover are 'inherent' in the claim and when they define the scope of cover remains unclear.

What is clear, however, is that there is a very limited role for 'drafting techniques' in the wording of policies in determining whether s 54 applies. The express approval, in *Antico*, of the approach of Gleeson CJ in *East End Real Estate Pty Ltd t/as City Living v C E Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400, means that the operation of s 54 does not depend upon matters of

form, but rather the substantive effect of the provision in question.

The impact of *Maxwell* can be illustrated by the judgment of Foster J in *Pantaenius Australia Pty Ltd v Watkins Syndicate 0457 at Lloyds* [2016] FCA 1; (2016) 19 ANZ Insurance Cases 62-090. The case concerned the loss of a yacht, the *Froia II*, after it ran aground off Cape Talbot in WA. The issue was whether cover could be denied because the owner had not cleared Australian Customs and Immigration before the grounding.

The issue was thrown up in a contribution case between two insurers. Insurer A paid out the claim by the owner. Insurer B resisted contribution, on the basis that its policy provided that, in the event that the yacht intended to enter foreign waters, all cover under the policy would be suspended between the time when the vessel cleared Australian Customs when leaving Australian waters and the time when it cleared Australian Customs on return. When the yacht grounded, it had not yet cleared Australian Customs on its return from Bali.

Insurer A successfully relied on section 54, as interpreted in *Maxwell*. Insurer B's argument that the clause, which was under the heading 'geographical limits' and which provided that cover was only provided if and when customs was cleared on a return journey, was rejected. The Court's reasoning was encapsulated as follows (at [77]-[78]):

The respondent did not agree to cover Mr Phillips for loss or damage to the vessel wherever it sailed: There were geographic limits on the cover provided. Those limits constrained the scope of that cover.

However, the provision suspending cover when the insured vessel cleared Australian Customs for the purpose of leaving Australian waters was almost always going to come into effect well before the insured vessel actually left Australian waters. Usually, as was the case here, the suspension period would commence while the insured vessel is in its home port—here, Fremantle WA. The suspension provision was in the nature of an exclusion and did not operate as one of the contractually prescribed elements of the geographic limits on the scope of cover itself.

Contribution

An important contribution case came before the High Court in *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31;(2011) 244 CLR 72. The Commonwealth established a scheme, managed and administered by a trustee, to assist insured persons affected by the insolvency of HIH. It appropriated \$640 million to provide financial assistance to insureds under the *Appropriation (HIH Assistance) Act 2001* (Cth). If a claim for assistance was accepted by the scheme trustee, the

insured would receive a payment of at least 90% of the amount it would have been paid by the insolvent insurer. The insured had to assign all rights to receive benefits under any other policy to the trustee.

An insured, who held a policy of liability insurance with HIH, applied for and received payments under the scheme in respect of his liability to a third party. He was also insured for that liability by another insurer. The insured would not have been eligible for assistance under the scheme if he had first been indemnified by the other insurer, but the payments by the trustee discharged the other insurer's obligations under its policy. The trustee sought equitable contribution from the other insurer.

Where there are co-ordinate liabilities to make good a loss, such persons must share 'the burden' pro rata. But, the nature of the obligations said to be common is critical.

The trustee failed at first instance and in the Victorian Court of Appeal. In the High Court the trustee submitted that the normal rules relating to insurance contribution should apply to it and the other insurer (at [26]):

On appeal, the central submission which the appellant made was that it 'effectively stood in the shoes of HIH', thus replicating the circumstances where two insurance policies responded to a shared liability and orthodox principles of equity imposed a duty of contribution between the two insurers.

The trustee took issue with the finding below that an insuperable obstacle in the way of contribution in equity was that the two liabilities (trustee and insured; second insurer and insured) were the equivalent of 'double insurance' of the type considered in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* [1969] HCA 55; (1969) 121 CLR 342.

The plurality (Gummow ACJ, Hayne, Crennan and Kiefel JJ) set out the relevant principles of equitable compensation; [36] & ff. Such principles were based upon ensuring equality between those who were 'obliged in respect of a common obligation'. Where there are co-ordinate liabilities to make good a loss, such persons must share 'the burden' pro rata. But, the nature of the obligations said to be common is critical; [37]. An example is where two insurers have liability for the same risk.

The plurality held that the trustee was not entitled to equitable contribution on the ground that the obligations of the trustee and the other insurer were not of the same nature and to the same extent, hence were not co-ordinate

liabilities, which was essential for the operation of the doctrine of equitable contribution; [49]-[56].

It was not determinative that the scheme was voluntary, but as the scheme was designed to avoid double indemnification this argued against there being the necessary equity for contribution. Equally, the obligations of the trustee to the insured and by the second insurer to the insured were not of the same nature or of the same extent; [51]. This was illustrated by considering the position of the second insurer:

If the respondent had paid [the insured] under its insurance policy before the [trustee] formed the contract between it and [the insured] by making payment under the scheme, [the insured] would not have been an eligible person...for assistance under the scheme.

The plurality therefore held that the fact that the trustee had paid 90% of the insured's liabilities did not call for the intervention of equity; [56].

Heydon J dryly observed, at [60] that:

The litigation exemplifies the teachings of ordinary litigious experience that insurers who are able to meet the liabilities which they have agreed to meet are often unwilling to do so, while those who are willing to meet them are often not able to do so.

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His Honour also noted that normally where an insured was insured by two insurers, the insolvency of the first would operate adversely to the insurer's interests. But, in the present case the insolvency of HIH resulted, in effect, in the second insurer having no liability, either to pay the insured or contribute to the amount paid out by the trustee. The respondent did not dispute that had HIH made the payment to the insured, it would have had to contribute. The scheme was, according to his Honour, a 'stroke of good fortune' arising from the Federal Government's scheme.

It was important to Heydon J that had the insured proceeded against the respondent first, the respondent would have had no right to seek contribution from the trustee; [68]. Had it satisfied the insured's claim, it would have borne 100% of the loss. The trustee could not overcome 'this mutuality difficulty'. The novelty of the position did not justify awarding contribution (at [70]):

...the law should not be developed so as to benefit the appellant in the circumstances in which it finds itself. To do so would not be to develop the law in relation to contribution, but to revolutionise it. It would be a revolution having the tendency to produce idiosyncratic and uncertain results.

The lesson to be learnt here is that in any atypical commercial arrangement, even if apparently involving an extant and solvent insurer, there is no guarantee that contribution is available. The related lesson is that often in complicated transactions the order in which steps are taken can be critical.

Blakeley v CGU

In February of this year the High Court considered how and when insurers could be joined in an action. *CGU Insurance Ltd v Blakeley* [2016] HCA 2; (2016) 327 ALR 564 concerned a claim by the liquidator of Akron Roads Pty Ltd (**Akron**) against former directors of and the company Crewe Sharp Pty Ltd (**Crewe Sharp**). Crewe Sharp had acted as a consultant to Akron. The liquidators alleged that Crewe Sharp was a 'director' of Akron within s 9 of the *Corporations Act 2001* (Cth). Crewe Sharp made a claim on its insurer under a professional indemnity policy. The insurer denied the claim. Akron sought to join the insurer as a defendant in the proceedings, seeking a declaration that the insurer was obliged to indemnify Mr Crewe (one of the directors) and Crewe Sharp. The order sought was made. The Victorian Court of Appeal upheld the trial judge's decision, as did the High Court.

French CJ, Kiefel, Bell and Keane JJ stated the question for the Court as being whether federal jurisdiction was invested in the VSC so that it could entertain the action for the declaration against the insurer; [1]. The cause of action by the liquidator against the directors and Crewe Sharp was for insolvent trading, contrary to s 588M (2) of the *Corporations Act*.

The liquidators relied on s 562 of the Act:

Application of proceeds of contracts of insurance

562 (1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.

Their Honours referred to s 117 of the *Bankruptcy Act 1966* (Cth) as being an analogous provision for individuals, vesting the bankrupt's right to indemnity in his or her trustee.

The liquidators relied on r 9.06 of the VSC's rules to support the insurer's joinder. That rule provides a discretionary power in the Court to join persons whose presence is necessary to ensure all questions were completely determined or where there was a question between a party and the person to be joined which it was 'just and convenient' to determine in the proceedings.

The liquidators' points of claim pleaded the policy and sought a declaration that:

A declaration that the Fifth Defendant is liable to indemnify the First and Fourth Defendants in respect of any judgment herein obtained by the Plaintiffs against the First and Fourth Defendants and in respect of any sums (including legal costs) which the Court may order the First and Fourth Defendants to pay to the Plaintiffs.

CGU filed a defence relying on exclusion clauses in the policy, and that the policy did not attach to the liability asserted by the liquidators against the directors and Crewe Sharp; [22].

The plurality observed that had Mr Crewe and Crewe Sharp brought third party proceedings against the insurer, there would have been a 'matter' under federal law; [32]. Was the claim by Akron such a claim? Their Honours found that the liquidators' claim for a declaration met the subject matter requirement for the exercise of federal jurisdiction; [34]. The next question was whether such a claim enlivened the judicial power of the Commonwealth invested in the VSC, which depended on whether the claim involved 'a justiciable controversy'.

Their Honours noted different approaches to the question of granting declarations involving insurers at the level of intermediate Courts of Appeal; [37] & ff. They preferred the approach of Davies JA, in dissent, in the QCA decision of *Interchase Corporation Ltd (in liq) v FAI General Insurance Company Ltd* [2000] 2 Qd R 301. In contradistinction to the majority, Davies JA had regarded joinder of the insurer as having utility, as 'it would be an abuse of process for the insurer or the insured to litigate the question determined by the declaration in later proceedings'; [41]. Their Honours accepted Davies JA's view that such a question was not hypothetical:

It reflected a recognition of the reality of the plaintiff's interest which was not to be confined by a requirement that the plaintiff demonstrate a claim for vindication of an existing legal right against the insurer.

On this analysis, the claim against the insurer fell within the scope of a justiciable controversy and was a matter for the purpose of federal jurisdiction.

The liquidators relied on s 562 for Crewe Sharp, but for Mr Crewe had to argue that if they were successful he would become a bankrupt; [5]. The insurer resisted joinder on the bases that:

- There was no claim against it by its insured.
- Section 562 did not confer a right of action on a liquidator to enforce insurance policies.
- Mr Crewe's potential bankruptcy was hypothetical and contingent; [51].
- In the Court of Appeal, that the Courts 'have no jurisdiction at the suit of a stranger to grant declaratory relief as to the meaning and effect of a private contract between parties who will not pursue any claim relating to rights or duties under that contract'; [53].

The plurality stressed that, in the High Court, the only ground of appeal focussed solely on the question of the existence of jurisdiction, although noting that the submissions filed 'did not draw a clear distinction between jurisdiction, power and discretion'; [59].

A justiciable controversy existed as, despite there being no suit between the insureds and insurer, the insurer had declined a claim by Crewe Sharp, and both Crewe Sharp and Mr Crewe disagreed with that decision; [65]. Their Honours pointed out that Mr Crewe had consented to the joinder of CGU. As such, the liquidators' claim did not 'depend upon any incursion upon principles of contract law or privity of contract'; [67]. They were not claiming as parties, or as persons entitled to the benefit of that contract. The reality was, however, that it was the liquidators, not Mr Crewe or Crewe Sharp, that stood to benefit from the making of the declarations sought.

Their Honours noted that the declaration would bind the liquidators and the insurer. Where the insureds were also parties it was 'unlikely' that they or the insurer would be permitted to relitigate, in subsequent proceedings, issues which could properly have been raised, and should have been raised, in the proceedings against the insurer; [68].

Nettle J delivered a separate judgment; [71] & ff. His Honour characterised the core of the justiciable controversy as the liquidators' claims against the directors, but also that the controversy between the directors and insurer formed part of the 'single controversy arising out of the liquidators' claims against the directors'; [90].

His Honour then considered the insurer's privity arguments, before concluding that in a case involving s 562 and s 117, which gave rights to be paid in priority out of the proceeds of an insurance policy, the plaintiff was not an 'outsider'; [96].

Nettle J dealt with the issue that, at joinder, the ultimate result of the proceedings would not, of course, be known (at [101]):

Although it may not be known until the conclusion of the trial whether the circumstances which afford the liquidators a right of priority in relation to the proceeds of the insurance policy have occurred, that is not to say that those events have not yet occurred. The purpose of allowing CGU to be joined as a defendant to the proceeding is so that the claim for a declaration may be determined at the same time as and on the basis of the same evidence as the liquidators' claims against the directors.

His Honour raised a procedural matter, namely that the declaration sought was only between the liquidators and the insurer; [112]. To ensure that the directors were bound and 'equally to ensure that the directors are entitled to assert the benefit of the declaration as against' the insurer, the claim should be amended to make it clear that it was both against the insurer and the directors.

Finally, Nettle J found that the liquidators' joinder of the insurer should not be seen as a 'manoeuvre' in any pejorative sense; [115]. On the contrary:

The joinder is designed to overcome the kinds of manoeuvres which are sometimes employed by parties in CGU's position – to delay and deter the final adjudication of liability – by ensuring that all issues are dealt with at once in the one proceeding in a manner that binds all parties to the proceeding.

It would 'disaccord' with the 'contemporary imperatives of cost-effective and efficient judicial management of commercial litigation' for the Courts not to do as much as they can to ensure that issues which are common are determined once and for all; [115]. Having said that, however, Nettle J conceded that it was impossible to assess the extent to which the insurer would be estopped in any subsequent proceedings; [119]. As a consequence of joinder, the insurer would have every right to defend the liquidators' claims against the directors as well as defending the liquidators' claims against the insurer.

One of the important matters that comes from *Blakeley* is that it is not a case that simply gives *carte blanche* to joining insurers to proceedings. The key factors in this case were those relating to s 562 and s 117. There is also a deliberate leaving open of the precise effect of insurers being joined to such proceedings.

It may be that the issue of joinder of insurers, in a more general sense, is one which will interest the High Court

in the future. Where there is a clear 'matter' involving the insurer, it is easier to determine the appropriateness of joining insurers to litigation of the underlying claim. For example, where there is a right of direct relief against an insurer of an insolvent insured such as under section 601AG of the *Corporations Act*. However, there are claims where it might be generally desirable to join insurers so as to avoid inconsistent findings in relation to an underlying claim and separate coverage proceedings.

One area where this more general question might arise is the application of exclusions, such as dishonesty and fraud exclusions, which are often expressed to operate only when there is a finding of dishonesty on 'final adjudication'. It is unclear whether an insurer could be joined in such circumstances, but such a joinder would answer the concerns expressed by Nettle J in *Blakeley*. In *Rich*, CGU had been named as a defendant in proceedings brought by the insureds, who sought declarations as to CGU's obligations to advance defence costs in separate ASIC proceedings. The dishonesty exclusion clause upon which CGU relied upon was subject to 'final adjudication'. As indicated above, the special leave application was dismissed, as the appellants accepted that the insurers were entitled to have an adjudication upon on the appellants' conduct. In *McCann*, the claim was settled. In neither instance did the High Court have to consider the meaning of 'final adjudication' and whether that phrase is limited to litigation of the 'Claim' or whether it also means adjudication of a coverage dispute. The High Court also did not have to consider whether there was any basis for insurers to be joined to the relevant 'adjudication' process. However, if the meaning of 'final adjudication' is confined to the 'Claim' proceedings, insurers would, at least theoretically, have an interest and therefore grounds to be joined to such proceedings.

Advocates immunity – the latest

Although not a case dealing directly with insurance, we consider the High Court's recent decision in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 as having such significant ramifications for the insurance industry that it should be discussed.

Attwells involved a claim in the SCNSW against solicitors for professional negligence in relation to settlement of an action under a guarantee. The NSW Court of Appeal held that the solicitors' advice fell within the test for advocates' immunity laid down in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 and *Giannarelli v Wraith* (1988) 165 CLR 543. By a majority (French CJ, Kiefel, Bell, Gageler and Keane JJ; Nettle and Gordon JJ dissenting) the NSW Court of Appeal was reversed. The High Court held that the separate question posed for determination at first instance, being

whether the solicitors were immune from suit by virtue of advocate's immunity should have been answered 'No'.

In the proceedings against the solicitors Mr Attwells alleged that the firm had been negligent in advising guarantors to settle the earlier proceedings by advising them to consent to judgment in the terms entered and in failing to advise them of the effect of consent orders entered by the SCNSW.

The matter got to the High Court via appeals from a separate question, on agreed and partly hypothetical 'facts'. The issues of negligence, causation and loss were not dealt with. The majority noted that Senior Counsel for the appellants accepted that there was 'a measure of opacity...on the issues of negligence and causation'; [22]. It is not at all clear what loss the appellants claimed to have suffered.

The Court declined to reconsider *Giannarelli* and *D'Orta*. However, as the majority put it, *D'Orta* stated a rule that had as its rationale 'the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State'; (emphasis added) [30]. In short, since out of court settlements, or settlements made in the course of a trial, did not involve a resolution of the dispute by the court, the rationale for immunity did not attach. The protection afforded to advocates was as officers of the court, assisting it, by the exercise of judicial power, to quell a controversy; [33], [34].

The majority specifically found that the immunity was not based upon any 'general concern that disputes should be brought to an end'; [34]. The rule is based upon the public policy of finality of judicial determination of disputes.

The decision of the majority did not reflect the tide of authority at first instance and intermediate court of appeal level on the question of the immunity and settlement. Most of the cases that considered such an issue found that the immunity did apply; see eg. *Goddard Elliot (A Firm) v Fritsch* [2012] VSC 87; *Young v Hones* [2013] NSWSC 1429.

The High Court spoke in terms, however, of 'extending the immunity to compromises'. They referred to McHugh J's observation in *D'Orta* that the immunity did not extend to the negligent settlement of proceedings; [38]. Their Honours rejected the view expressed in New Zealand in *Biggar v McLeod* [1978] 2 NZLR 9 (whilst the immunity was still part of New Zealand law) that the immunity would apply to settlements; [40]-[41]. In their Honours view, conduct by counsel resulting in settlement is not conduct which affects the judicial determination of the case.

It is now clear that advice given in relation to settlement is not protected; [41]. To permit such protection would be to 'decouple the immunity from the protection of the exercise of judicial power against collateral attack'; [41].

Advice not to settle

The respondent sought to rely on an asserted anomaly, whereby the immunity did not extend to negligent advice leading to an unfavourable compromise, but would apply to a negligent advice not to settle, which led to an unfavourable judicial determination worse than a rejected compromise; [47]. The Law Society, intervening, supported this argument.

The majority rejected the premise to the respondent's argument as 'unsound'; [48]. Their Honours said that:

It is difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much less how such advice could shape the judicial determination of the case.

If a compromise is rejected, and the judicial determination involves a worse result, the High Court made it clear that the advocate who is then sued cannot impugn the correctness of the judicial decision in his/her defence; [51]. First, the question would only be whether the advocate's conduct was reasonable. Secondly, 'if the judgment were erroneous, one would expect that this would be demonstrated on appeal'; [51]. The latter point will be cold comfort to the advocate, who cannot of course appeal the decision in question.

If a compromise is rejected, and the judicial determination involves a worse result, the High Court made it clear that the advocate who is then sued cannot impugn the correctness of the judicial decision in his/her defence; [51].

The majority rejected the Law Society's submission that the immunity should extend to settlements because its existence might encourage lawyers to advise their clients to settle; [52]. Their Honours emphasised, however, that the public policy justifying the immunity has nothing to do with the desirability of the settlement of disputes, but only with the finality and certainty of judicial decisions.

Finally, the majority rejected the argument that because the compromise was embodied in orders made by the Court leading to a consent judgment that the immunity applied; [54] & ff. The consent order reflected an agreement by the parties, where no judicial determination led to the terms of the settlement; [62].

Justice Nettle dissented, for the reasons given by Gordon J. His Honour added some comments on the reasoning of the majority. His Honour accepted that when a matter is settled ‘wholly out of court’, the settlement does not ‘move the litigation toward a determination by the court, so that advice to enter into such a settlement is not protected; [67]. But, where such a settlement involves terms providing for the court to make orders, by consent, determining the parties’ rights and obligations, the same ‘plainly does move the litigation toward a determination by the court’.

Gordon J regarded the answer to the question whether the solicitors were protected by the immunity lay in recognising that there was a final quelling of the controversy between the parties by the order of the court; [104]. Her Honour also took the view that Mr Attwells inevitably had to impeach the consent judgment given in favour of the ANZ Bank, which was impermissible; [111]. Her Honour also held that advice not to settle a proceeding which proceeds to judgment was protected; [129].

It is trite that professional indemnity insurance for legal practitioners in Australia extends to advice relating to settlement, effect settlement or rejecting offers. Attwells is therefore a case of great significance to insurers who write such policies.

For those involved in professional negligence litigation involving legal practitioners it has long been part of the landscape that disappointed litigants will endeavour to cast their case so as to avoid the application of the immunity, if only to avoid summary judgment, a strike out or the determination of a UCPR Part 28 separate question against them. The rationale advanced in cases upholding the immunity, including in relation to settlement, was that it is not much of an immunity if the legal practitioner has to await the determination of lengthy and expensive proceedings to find out if he/she is covered by the immunity or not. Equally, insurers have an interest in such early determination of the scope of the immunity.

It can be expected, in our view, that the litigant disappointed or aggrieved by the outcome of a court case and willing to blame their legal representatives will now, no doubt, seek to characterise the negligence as a failure to (a) advise that an offer should be made and what its terms should have been (b) advise that an offer made by the other side should have been accepted or a positive act of negligence in advising that an offer should be rejected.

Category (a) above was not expressly dealt with by the High Court. However, their Honours’ rationale of the immunity and its inapplicability in the circumstances

of Attwells would apply with equal force to a failure to advise that a matter should be settled as the court case proceeds, or prior to the door of the court.

Such assertions will not be able to be determined on a summary basis. We can expect, if disappointed litigants re-focus on settlement issues, that there will be more matters going to trial and, indeed, more actions against legal practitioners. This is an issue which is not solely relevant to insurers of legal practitioners. The insurance industry relies heavily on early resolution of claims on commercial and final terms. We imagine insurers in a more general sense would be loathe to have such settlements re-visited, even in the limited context of a suit against the practitioner involved.

One proactive step that insurers can take is to provide advice to legal practitioners as to the pitfalls involved in settlement. Such advice may seem obvious, but experience shows it has value. Lawcover is already taking such steps.⁴ One problem identified by Ms Herbert-Lowe is that:

In many cases barristers do not keep records of settlement discussions and they return or destroy the brief.

This sort of problem can and should be addressed by proper record keeping.

A ‘sleeper’ in Attwells

The appellants argued that the immunity should only extend to ‘those decisions which a lawyer may make in the conduct of a case ‘without the specific instructions of the client’; [42]. The majority expressly reserved that question; [45]. We can expect that litigants seeking to sue their lawyers will not miss this ‘sleeper’.

ISSUES THAT ARE RIPE FOR SPECIAL LEAVE

Forecasting what matters may get special leave is akin to long-range weather forecasting. However, as well as the issue of joinder (as discussed above), some potential issues that the High Court may want to consider are as follows.

The statutory ‘charge’ on insurance moneys – s 6

In our view, a prime candidate for special leave to appeal to the High Court is the proper construction and application of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The section creates a statutory ‘charge’ on insurance moneys in certain circumstances. Of course, as always, we must wait for the appropriate vehicle to arrive to carry such issue into the court.

In *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212; (2013) 302 ALR 101 the NSWCA considered the rights created by the ‘somewhat enigmatic’ provisions of s 6 of the and the so-called statutory charge created by that section. Five judges determined the separate questions posed for the Court, including the Chief Justice and the President of the Court of Appeal.

The context for the decision was litigation in Victoria and WA against executives of the collapsed Great Southern Group. The executives were insured with the plaintiffs in the NSW proceedings. The executives were insured for liability and legal expenses.

The separate questions posed for the Court of Appeal related to the question whether the operation of s 6 gave priority to the ‘GS claimants’ (those suing the executives and a Great Southern company for damages for various breaches of statute, the ‘GS defendants’) over the GS defendants. The precise questions are set out at paragraph [66] of the judgment.

The Court’s approach to s 6 was that:

- It creates a ‘so-called’ charge when the liability for damages or compensation arises, on insurance moneys then payable in respect of the liability for which the

insured is indemnified and on all insurance moneys that may become payable thereafter; [52]-[64].

- It applies to both claims made and occurrence based insurance; [72]-[87].
- It applies at the moment the insurance contract is made and thereafter, up until the time of the happening of the relevant event and at those times the insured is indemnified against liability to pay damages or compensation; [88]-[100].
- It did not extend to moneys payable under the insurance contract for defence costs and the like before any judgment, award or settlement in favour of the GS claimants.
- If an entitlement to such payment arose before such judgment, award or settlement s 6 did not apply to such payments and would be a valid discharge to the insurers if the payments were made before such judgment, award or settlement; [105]-[135].

The relevant policies covered the legal expenses of the GS defendants. The policies were all claims made policies. The GS claimants asserted a priority over the GS defendants’ legal expenses via s 6; [10]-[11].

The Court considered the approach of the NZCA in *Steigrad v BFSL 2007 Ltd* [2012] NZCA 604; [2013] 2 NZLR 100. There is a certain symmetry in this, as the origin of s 6 was s 42 of the *Workers Compensation Act 1908* (NZ); [53].

The Court did not express admiration for the wording of s 6 (at [55]):

The language of s 6 has been described as ‘undoubtedly opaque and ambiguous’: NSW Medical Defence Union v Crawford (1993) 31 NSWLR 469 at 479D; 11 ACSR 406 at 414. It has also been said that its ‘ambiguity may be its only clear feature’: McMillan v Mannix (1993) 31 NSWLR 538 at 542B. Section 6 should be repealed altogether or completely redrafted in an intelligible form, so as to achieve the objects for which it was enacted.

The wording of the section ignores the distinction between legal and equitable assignments or presently existing or future choses in action; [62]. It creates a new right and associated remedy. The only way in which s 6(1) can be enforced is in an action by a claimant against the insurer; [59].

Of course, from the insurance companies’ perspective the critical question was whether they could safely pay any insurance moneys for legal costs and the like once on notice of the statutory charge under s 6; [68]. Payment of such costs would be at the insurer’s risk if the liability to the GS claimants exceeded the amount available under the

policies when the amount of such liability was determined by judgment, award or settlement.

The Court rejected one of the insurers' principal construction arguments, that s 6 simply did not apply to claims made policies; [81]. The argument rested on three premises:

- Claims made contracts of insurance were rare in 1946 and the NZ and NSW legislatures could not have intended them to be within s 6 and its predecessors.
- Applying s 6 to such claims created anomalies.
- Claims made contracts were not contracts by which a person was indemnified against liability to pay damages or compensation as they only indemnified persons against claims made during the policy period.

The first and third arguments were rejected because of the generality of the wording of s 6 and the absence in the text or context of any legislative intention to limit the types of insurance contracts covered.; [84].

The anomaly argument rested on the decision of the NSWCA in *Owners – Strata Plan No. 505530 v Walter Construction Group (in liq)* [2007] NSWCA 124; (2007) 14 ANZ Ins Cas 61-734; [85]. In *Walter* the Court held that a charge under s 6 was not available:

where the contract of insurance did not come into existence until after the event triggering the operation of s 6. If that proposition be correct, s 6 applies in respect of some claims made contracts, namely, where the event occurs and the claim is notified in the same policy period, but not others, namely, where the claim is notified in a subsequent policy period.

Notwithstanding this anomaly, however, the Court rejected the insurers' argument, as the fact that there was an anomaly did not mean that such anomaly would be cured by further restricting the contracts to which the section did apply; [86].

In considering the next question, Question 3, the Court dealt with an argument that *Walter*, said to have created the anomaly, was wrongly decided. In *Walter* the Court adopted the construction that s 6 had no application to a contract of insurance that came into existence after the event giving rise to the claim. It rejected the alternative construction, that the section 'speaks as at the time of adjudication'. On this approach the statutory charge ([90]:

Is fixed, in the case where insurance moneys are payable at the time of the relevant event, and floating, in respect of insurance moneys that may become payable, and do in fact become payable, at a later date. In relation to the latter, it is immaterial that the insurance moneys become payable pursuant to an insurance contract entered into after the relevant event. Thus, once

insurance moneys have in fact become payable in respect of the liability, the charge fixes upon them.

The Court in *Chubb* outlined criticisms that could be made of the decision in *Walter* ([95]-[97]) but did not reach the 'strong conviction that the earlier decision was erroneous' that would justify not following it; [98]-[99]. The Court found that the reasoning in *Walter* could not be described as 'plainly wrong' (again, the opaque nature of the wording in s 6 made such a conclusion difficult).

There is nothing to suggest that the purpose of s 6 is to prevent insurance moneys being paid to discharge other obligations that an insurer may have to an insured under a contract of insurance.

The Court then turned to the issue of defence costs and multiple claims (separate questions 4 and 5); [105]. The Court took the view that the statutory charge only applied to moneys payable in respect of the liability of the insured to pay damages or compensation to the claimant, the charge was not expressed 'to catch all moneys that might be payable under the contract of insurance' (citing *Steigrad* at [25]). Although the relevant policies gave no break-down, by amount, as to payments to claimants, as against defence costs, the latter payments did not amount to an impermissible diversion of the funds payable for the liability to claimants per se. The Court concluded ([121]), principally as a matter of construction of the section, that:

There is nothing to suggest that the purpose of s 6 is to prevent insurance moneys being paid to discharge other obligations that an insurer may have to an insured under a contract of insurance.

The Court recognised that if s 6 caught all moneys available when the charge arose, this would amount to a variation of the contract of insurance. The contractual right of the insured could not (at least safely) be honoured by insurers; [122]-[123].

For similar reasons the Court found that payment by insurers of compensation or damages to one group of claimants would be a valid discharge if made before the judgment, award or settlement in relation to other claimants against the insured; [135].

The applicability of the doctrine of strictissimi juris

There is a difference of opinion between the Federal Court and the Supreme Court of NSW in relation to whether or not the doctrine of *strictissimi juris* applies to the construction of insurance policies, so that any doubt

as to the proper construction of such policies should be resolved in favour of the insurers.

The Full Court, in *Todd v Altera at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* [2016] FCAFC 15; (2016) 239 FCR 12. In their joint judgment Allsop CJ and Gleeson J considered the wording of a financial services errors and omissions insurance policy underwritten by some of the respondents. The trial judge found that the policy did not respond to losses suffered by the applicant's clients. The applicant gave investment advice to those clients. Mr Todd settled with those clients, leaving the only live issue the liability of the insurers.

The Court noted that the debate centred around the 'deceptively simple terms' of the insuring clause, cl 11, when read with two further provisions, Endorsement No.11 and Endorsement No.002, the latter being agreed after the entry into the policy. That wording was:

Underwriters will pay on behalf of the Insured the Loss which the Insured is legally liable to pay in respect of a Claim alleging an act, error or omission of the Insured in the performance of financial planning encompassing advice on approved investment products and life insurance products.

Endorsement No.002 contained an exclusion clause entitled 'RG126 NON-APPROVED PRODUCTS EXCLUSION'. This was found to be a reference to ASIC's guide for insurance arrangements for Australian Financial Services licensees. The clause sought to exclude liability for advice relating to funds or products not approved by the Named Insured.

The only contentious issue as to the proper approach to construction was the insurers' submission that any doubt about the meaning of a policy of indemnity insurance should be resolved in favour of the insurers. The insurers relied on High Court authority said to support that proposition; *Ankar Proprietary Limited v National Westminster Finance (Australia) Limited* [1987] HCA 15; 162 CLR 549 at 561; *Chan v Cresdon Proprietary Limited* [1989] HCA 63; 168 CLR 242 at 256; *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; 217 CLR 424 at 433-437 [17]-[23] and 452-453 [68]-[71]; and *Bofinger v Kingsway Group Limited* [2009] HCA 44; 239 CLR 269 at 292 [53].

The insurers relied on a decision of the Supreme Court of NSW (Rothman J) that accepted the proposition that in relation to insurance contracts being indemnity contracts particular rules of construction applied; in *Miskovic v Stryke Corporation Pty Ltd (No 2)* [2010] NSWSC 1495; (2011) 16 ANZ Ins Cas 61-873 at [12]-[13].

Allsop CJ and Gleeson J disagreed with Rothman J; [25]. The fact that 'indemnity' was a notion present in many contracts of insurance did not make insurance contracts

the subject of the High Court's observations in the cases referred to above. Their Honours concluded that:

The kinds of classes of contracts to which the principle in Ankar, Chan, Andar and Bofinger is concerned are of a different character to insurance, including indemnity insurance. They concern making good a creditor by way of secondary or primary financial accommodation.

Thus, the rule of strict construction only applied to 'contracts of suretyship'; [27]. Their Honours did not cavil with the application of the strictissimi juris principle in such cases. They took the view that the High Court had not given any consideration, in *Ankar* or *Andar* to 'the proper interpretation of an insurance contract; [32]. In disagreeing with Rothman J, the Court noted that 'the nature or character of a contract of insurance is 'elusive' to define'; [35]. Their Honours concluded that (at [36]):

The categorisation or characterisation of contracts of guarantee, of indemnity and of insurance, requires, above all, an understanding of their purpose and nature. All, at one level, contain an element of indemnity; all can be said at one level of abstraction to be contracts of indemnity... But each has a relevant difference from the other; and contracts of guarantee and indemnity, for the operation of the principle in Ankar, are to be categorised and characterised as quite different from contracts of insurance.

There was thus no reason, and no precedent, for according an insurer 'the tenderness accorded to guarantors and indemnifiers as reflected in *Bofinger*'.⁵ Equally, however, where there is no precedent, it cannot be assumed that the approach of the Full Court will quell the issue of the approach to construction of insurance contracts involving indemnities. We consider that this could potentially be an issue that the High Court might be interested in opining upon in due course, if an insurer is brave enough to run the point in that court.

Amendments to Insurance Contracts Act: Utmost Good Faith?

The recent amendments to the ICA effected some change in relation to duties of good faith. A failure to comply with the duty of good faith is now a breach of the Act and in related changes, the disclosure and misrepresentation provisions were amended and clarified. These amendments may be the subject of future special leave applications and decisions of the High Court.

In the explanatory note to the *Insurance Contracts Amendment Bill 2013* the amendments regarding the 'duty of good faith' were justified by the perception that the ICA provided inadequate remedy for an insured who is affected by systemic breaches of utmost good faith committed over time.

Section 14A has now been included in the Act and provides ASIC with the ability to vary, suspend and/or cancel an insurer's licence by reason of its failure to comply with the duty of utmost good faith. We anticipate that litigation may arise from this amendment in the form of judicial review of such determinations. In that context, the High Court may be persuaded to revisit its interpretation of the duty of good faith as provided in section 13 of the Act (and as considered in *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1).

A further significant amendment is s 55A of the ICA, which permits ASIC to apply to bring a representative action where insureds have suffered damage or there has been a breach of the ICA and where it considers it in the public interest to bring such an application. 'Public Interest' is not defined in the Act, and the High Court might, in future, consider it necessary to determine the proper construction of that phrase in the context of the remedial nature of the ICA and in the context of the terms of this particular section.

Another amendment of note is that ss 21A and 21B now puts the onus on Insurers to posit specific questions to the insured which are 'relevant to the insurer's acceptance of the risk'. Section 21A is relevant to disclosure on entry into an original contract of insurance and section 21B is relevant to renewal. Failure to comply with section 21A or section 21B means that the insurer is deemed to have waived the insured's compliance with the duty of disclosure under section 21 of the ICA.

As the amendment has only been made relatively recently, it has not been the subject of much judicial consideration. There is a reasonable possibility that litigation will arise in relation to insurer's compliance with the section, but any such litigation might not reach the High Court. The terms of the section are clear, and, applying the High Court's established approach of treating the ICA as remedial in nature, as well as the established principles on statutory construction, it is difficult to see that there is much scope for the High Court to opine on this section. There is little scope for the High Court to consider the one phrase within the section that might be open to judicial interpretation, being whether the questions are 'relevant to the decision of the insurer whether to accept the risk, and on what terms'. In a recent case of *O'Farrell v Allianz Australia Insurance Ltd* [2015] NSWCA 48; [2015] 18 ANZ Insurance Cases 62-059 the NSW Court of Appeal upheld the District Court's application of the High Court's analysis of the meaning of 'risk' for the purposes of s 21 (as outlined in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd* (in liq) to the interpretation of s 21A (being that the issue is to be determined by objective assessment).

SPECIAL LEAVE APPLICATIONS

Y POL has prepared an analysis of special leave applications involving insurance law issues from 2011 to date. That analysis is attached to this paper as Annexure A.

Having identified a number of matters in this paper that interest us as practitioners, and on which we consider it would be useful to have some guidance on from the High Court, we are not so certain that these issues will whet the appetite of the High Court. Since 2011, the High Court has rejected 15 special leave applications on issues of insurance law. Of those 15 special leave applications, 11 involved questions of construction of specific clauses within the contract of insurance. The remaining 4 dealt solely with the application of the ICA.

This might suggest that the High Court views principles of construction of policies of insurance, and the application of the ICA to those policies, to be largely settled. However, from a review of the special leave dispositions, the majority of the dismissals involved confined questions on the meaning of very specific phrases in particular policies. For example, the question in *Ward v Metlife Insurance Ltd* [2014] WASCA 119 was whether the appellant was relevantly the meaning of 'occupation' within an income protection policy. It would appear to be more difficult to succeed on a special leave application which is confined to the construction of a specific term of insurance. What would most likely be required are broader questions under the ICA, and otherwise issues that go beyond the application of the Act (such as joinder).

CONCLUSIONS

It has been said that the ICA brought Australian insurance law 'out of the chaos',⁶ but there are still issues yet to be decided. Even after Maxwell, the final word on s 54 has yet to be delivered by the High Court. Insurers and legal practitioners can rest assured that there has been no 'end of history' moment, difficult questions of interpretation and policy will continue to find their way to Canberra for resolution.

From a practitioner's perspective, there is scope for the High Court to provide further guidance on principles

of construction of policies of insurance in light of the potential tension between construing those contracts commercially but at the same time having due regard to the remedial nature of the ICA. This is particularly so in circumstances where insured entities are increasingly sophisticated and have the benefit of their own insurance departments and experienced brokers. That said, an overall review of recent special leave dispositions would suggest that the High Court is likely to be reluctant to revisit the principles of construction that it has previously outlined in cases such as McCann.

There would also be some scope for litigation arising out of the amendments to the ICA. Whether any such litigation raises questions which are appropriate for the High Court to determine, however, is difficult to predict and remains to be seen.

(Endnotes)

- 1 Bathurst T, 'Insurance Law – A view from the Bench' (2014) 25 *Insurance Law Journal* 216
- 2 The Hon Michael Kirby AC CMG, 'Insurance Contract Law Reform – 30 years On' (2014) 26 *Insurance Law Journal* 2735
- 3 For a defence of the decision in *Triple C*, see Newton G, Hickey M 'Section 54 – where are you?' (2011) 22 *Insurance Law Journal* 110. They make the point that the High Court refused special leave from the decision in May 2011. See also Monteith D, 'The 'first limb' of s 54(1) of the *Insurance Contracts Act* 1984 (Cth)' (2015) 26 *Insurance Law Journal* 132.
- 4 Herbert-Lowe S, 'Implications of the High Court's decision on advocate's immunity' (2016) *Law Society Journal* 72.
- 5 For an extra-judicial discussion of some of the relevant public policy issues, see Allsop J, Dargan L, 'The central role of insurance in modern society and the development of the law' (2013) 24 *Insurance Law Journal* 1.
- 6 Kirby M. 'Australian insurance contract law: out of the chaos – a modern, just and proportionate reforming statute' (2011) 22 *Insurance Law Journal* 1

YELDHAM PRICE O'BRIEN LUSK

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Annexure A

DATE HEARD	DECISION	PARTY NAMES	FIRST INSTANCE CASE CITATION	FIRST INSTANCE COURT	FIRST INSTANCE SUBJECT
2016					
Friday, 12 February 2016	Special leave refused with costs. [2016] HCA Trans 34	<i>Sgro v Australian Associated Motor Insurers Ltd</i>	[2015] NSWCA 262	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - whether vehicle stolen – trial judge not satisfied on balance of probabilities that vehicle stolen INSURANCE – <i>Insurance Contracts Act</i> 1984 (Cth) s 56 – dishonest intent to induce false belief in insurer for purpose of obtaining benefit INSURANCE – <i>Insurance Contracts Act</i> 1984 (Cth), s 56 – specific finding of fraud required
2015					
Friday, 19 June 2015	Special leave refused with costs [2015] HCA Trans 155	<i>Prepaid Services Pty Ltd v Atradius Credit Insurance N.V</i> (S15/2015)	[2014] NSWCA 440	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - single buyer credit insurance - misrepresentations as to buyer's payment history - whether fraudulent because officer of insured recklessly indifferent to truth of answers in proposal - need to address whether officer consciously indifferent to truth or otherwise of answers - primary judge erred in holding misrepresentations fraudulent <ul style="list-style-type: none"> ▪ application of <i>Insurance Contracts Act</i> 1984 (Cth), s 28(3) ▪ application of <i>Insurance Contracts Act</i> 1984 (Cth), s 27 ▪ application of <i>Insurance Contracts Act</i> 1984 (Cth), s 21 ▪ insurance contract - credit insurance - insured supplied buyer under contract containing credit terms different from those described in proposal and policy schedule - whether policy indemnified against payment defaults other than under a contract on specified credit terms ▪ application of <i>Insurance Contracts Act</i> 1984 (Cth), s 54(1)
Friday, 19 June 2015	Special leave refused with costs [2015] HCA Trans 155	<i>Prepaid Services Pty Ltd v Atradius Credit Insurance N.V</i> (S15/2015)	[2014] NSWCA 440	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - trade credit insurance - <i>Insurance Contracts Act</i> 1984 (Cth) s 28(3) - respondent insurer rejected claim made by appellants under trade credit insurance policy indemnifying appellants against customer's insolvency - whether insurer entitled to reduce its liability to

DATE HEARD	DECISION	PARTY NAMES	FIRST INSTANCE CASE CITATION	FIRST INSTANCE COURT	FIRST INSTANCE SUBJECT
					nil due to appellants' failure to comply with duty of disclosure - whether insurer would have issued policy if non-disclosure had not occurred - whether insurer discharged legal onus of proof by calling ultimate decision-maker despite not calling subordinate employees to give evidence - whether primary judge acted contrary to principle in <i>Jones v Dunkel</i> by inferring that evidence of subordinate officers would have assisted insurer's case - content of insured's evidentiary burden under s 28(3) of the <i>Insurance Contracts Act</i> 1984 (Cth) - appeal dismissed
Wednesday, 4 November 2015	Application dismissed with costs [2015] HCSL 190	<i>National Transport Insurance (a Firm) v Hammersley</i> (H5/2015)	[2015] TASFC 5	Full Court of the Supreme Court of Tasmania	Insurance – Motor vehicles – Insurance of motor vehicles for loss or damage – Warranties and conditions excluding liability – Exclusion when vehicle overloaded unless overloading accidental – Exclusion when vehicle in an unsafe or unroadworthy condition – Exclusion when reckless non-compliance with regulations – Collision between excessively high load and overpass.
Thursday, 17 December 2015	Application dismissed with costs [2015] HCSL 250	Haddad v Allianz Australia Insurance Ltd	[2015] NSWCA 186	Supreme Court of New South Wales (Court of Appeal)	INSURANCE – renewal of home insurance policy – failure of insurer to give notice of expiry of insurance cover under s 58 of the <i>Insurance Contracts Act</i> 1984 (Cth) – nature of statutory policy for insurance arising under s 58
Thursday, 3 September 2015	Application dismissed with costs [2015] HCSL 150	<i>Guild Insurance Limited v Hepburn</i>	[2014] NSWCA 400	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - respondent claimed damages from former dentist for injury suffered as a result of allegedly wrongful advice and treatment - primary judge granted leave to join insurer as second defendant to proceedings under s 6 of <i>Law Reform (Miscellaneous Provisions) Act</i> 1946 (NSW) - whether arguable that insurer is liable to indemnify insured - whether arguable that insured was aware of circumstances that might give rise to a claim - whether arguable that insured will not be able to satisfy judgment against her - appeal dismissed

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2014					
Wednesday, 10 December 2014	Application Dismissed [2014] HCASL 215	<i>Preston v ALA Australia Ltd</i> (S139/2014)	[2014] NSWCA 165	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - accident insurance - appellant unable to work due to injured ankle - whether appellant's disability resulted from an accidental injury 'solely, directly and independently of a pre-existing condition' - effect of a previous injury to both ankles INSURANCE - accident insurance - whether insurer admitted it had accepted the appellant's claim under the policy
Friday, 14 November 2014	Special leave refused with costs [2014] HCATrans 255	<i>Metlife Insurance Ltd v Ward</i> (P25/2014)	[2014] WASCA 119	Supreme Court of Western Australia (Court of Appeal)	INSURANCE - Income protection policy - Whether appellant was 'Disabled' under the policy - Meaning of 'Occupation'
Friday, 15 August 2014	Special leave refused with costs [2014] HCATrans 180	<i>Siegwerk Australia Pty Ltd (In Liquidation) v Nuplex Industries (Aust) Pty Ltd</i> (M11/2014)	[2013] FCAFC 130	Full Court of the Federal Court of Australia	INSURANCE – Broadform liability policy – Indemnity in respect of claim for property damage as defined caused by an occurrence in connection with insured's business – Obligation to defend in insured's name and on insured's behalf any claim against insured seeking damages for property damage as defined – Whether liability of insured in respect of property damage – Whether loss of use of tangible property not physically damaged but caused by physical damage to other tangible property – Whether sudden and accidental physical damage to insured's products – Whether product recall exclusion applied – Whether property damage as defined resulting from active malfunctioning of insured's products
Friday, 20 June 2014	Special leave refused with costs [2014] HCATrans 136	<i>Commonwealth of Australia v Vero Insurance Limited</i>	[2013] FCAFC 152	Full Court of the Federal Court of Australia	INSURANCE – construction of contract – meaning of property – limitation period
Tuesday, 13 May 2014	Application Dismissed with Costs [2014] HCASL 93	<i>Mabony v Queensland Building Services Authority</i> (B64/2013)	[2013] QCA 323	Supreme Court of Queensland (Court of Appeal)	PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where the appellant contends that the provisions of s 71(1) of the <i>Queensland Building Services Authority Act 1991</i> required the respondent to prove that the claims arose through the fault of the

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					<p>appellant as an element of its recovery claim – where the appellant in their pleadings made a deemed admission to being a building contractor within the meaning of s 71(2)(a)(ii), (iii) and (iv) of the <i>Queensland Building Services Authority Act 1991</i> but denied being a person through whose fault the claim arose – where the respondent filed a notice of contention which contends that, on its proper construction, s 71(1) did not require the respondent to establish ‘fault’ on the part of the appellant under the second limb of the section – whether it was necessary for the primary judge to determine whether there was a triable issue concerning fault on the appellant’s part for the purposes of s 71(1), in order to give judgment for the respondent</p> <p>PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where the appellant contends that in a recovery proceeding under s 71(1), it is open to a defendant to defend the claim by challenging the legal efficacy of any step taken by the authority in the assessment of the claim – whether such matters are justiciable in s 71(1) recovery proceedings</p> <p><i>Judicial Review Act 1991 (Qld)</i>, s 4(1), s 20</p>
Friday, 14 March 2014	Stood over	<i>Moore & Anor v Chubb Insurance Company of Australia Limited & Ors</i> (S188/2013)	[2013] NSWCA 212	Supreme Court of New South Wales (Court of Appeal)	INSURANCE - separate questions to be decided by Court of Appeal based on statement of agreement facts - directors' and officers' liability insurance contracts - proper construction of s 6 <i>Law Reform (Miscellaneous Provisions) Act 1946</i> - territorial operation of s 6 – whether s 6 applies to claims made policies – whether s 6 applies where insured's alleged conduct giving rise to claim for damages or compensation happened before policy entered into - whether <i>The Owners - Strata Plan No 50530 v Walter Construction Group Limited</i> [2007] NSWCA 124, which held that s 6 does not apply where insured's alleged conduct giving rise to claim for damages or compensation happened before policy entered into, should be followed - whether Court of Appeal when constituted as a bench of five will more readily overrule its own

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					<p>decisions or only when decision plainly wrong - whether 'insurance moneys that are or may become payable' on which s 6 imposes charge include defence costs paid by insurer under policy before claimant's claim determined - whether insurer's payment in respect of insured's liability, excluding defence costs, is valid discharge to insurer if made before claimant's claim determined - whether insurers on actual notice of existence of charges under s 6 by reason of correspondence from claimants' solicitors</p>
<p>Friday, 14 February 2014</p>	<p>Stood over [2015] HCATrans 155</p>	<p><i>Atradius Credit Insurance N.V v Prepaid Services Pty Ltd & Ors</i></p>	<p>[2013] NSWCA 252</p>	<p>Supreme Court of New South Wales (Court of Appeal)</p>	<p>INSURANCE - single buyer credit insurance - misrepresentations as to buyer's payment history - whether fraudulent because officer of insured recklessly indifferent to truth of answers in proposal - need to address whether officer consciously indifferent to truth or otherwise of answers - primary judge erred in holding misrepresentations fraudulent</p> <p>INSURANCE - application of <i>Insurance Contracts Act 1984 (Cth)</i>, s 28(3) - holding that insurer entitled to reduce liability to nil - for such a holding, must be satisfied on balance of probabilities that insurer would not have issued a policy which would have provided any credit insurance of buyer's defaults - primary judge did not address that question and make such a finding - question remitted to primary judge for further hearing</p> <p>INSURANCE - application of <i>Insurance Contracts Act 1984 (Cth)</i>, s 27 - whether answers in proposal 'obviously incomplete' so could not give rise to misrepresentations - how that question to be addressed - answers not 'obviously incomplete'</p> <p>INSURANCE - application of <i>Insurance Contracts Act 1984 (Cth)</i>, s 21- insured alleged to have held certain opinions regarding buyer's creditworthiness at time insurance entered into - whether opinion a 'matter' required to be disclosed - evidence did not establish opinions held when contract entered into</p> <p>INSURANCE - insurance contract -</p>

DATE HEARD	DECISION	PARTY NAMES	FIRST INSTANCE CASE CITATION	FIRST INSTANCE COURT	FIRST INSTANCE SUBJECT
					<p>credit insurance - insured supplied buyer under contract containing credit terms different from those described in proposal and policy schedule - whether policy indemnified against payment defaults other than under a contract on specified credit terms</p> <p>INSURANCE - application of <i>Insurance Contracts Act</i> 1984 (Cth), s 54(1) - whether insurer entitled to refuse indemnity because insured supplied buyer other than under contract containing specified credit terms - whether, for purposes of application of s 54(1), effect of policy was that event insured against was any default by buyer or only default under specified contract – s 54(1) not apply to prevent insurer from refusing indemnity</p>
2013					
Friday, 13 December 2013	Special leave refused with costs [2013] HCATrans 327	<i>Galaxy Homes Pty Ltd as trustee of the Galaxy Homes Unit Trust v National Mutual Life Association of Australasia Ltd</i> (A18/2013)	[2013] SASCFC 34	Supreme Court of South Australia	INSURANCE - LIFE INSURANCE - THE POLICY - CONSTRUCTION
2012					
Friday, 7 September 2012	Special leave refused with costs [2012] HCATrans 20	<i>ACN 068 691 092 PTY LTD & ANOR v Plan 4 Insurance Services Pty Ltd & Ors</i> (A8/2012)	[2012] SASCFC 25	Full Court of the Supreme Court of South Australia	INSURANCE - GENERAL - POLICIES OF INSURANCE - RENEWAL, AFFIRMATION, RECTIFICATION OR NOVATION OF POLICY
Friday, 9 March 2012	Special leave refused with costs [2012] HCATrans 60	<i>CGU Insurance Limited v Major Engineering Pty Ltd</i>	[2011] VSCA 226	Supreme Court of Victoria (Court of Appeal)	INSURANCE – Appellant insured under contract of insurance – Incurred significant legal costs successfully defending claim made against it – Whether appellant entitled to recover costs under costs extension clause – Whether costs extension clause subject to exclusion clauses – Whether exclusion clauses applied – Appellant held to be entitled to recover costs – Appeal allowed.

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2011					
Friday, 13 May 2011	Special leave refused with costs [2011] HCATrans 12	<i>Triple C Furniture and Electrical Pty Ltd v Rural & General Insurance Limited & Anor</i>	[2010] QCA 282	Supreme Court of Queensland (Court of Appeal)	INSURANCE – CLAIMS GENERALLY – REFUSAL – STATUTORY RESTRICTIONS ON – where s 54 <i>Insurance Contracts Act</i> 1988 (Cth) prevents an insurer from refusing to pay a claim by reason only of an act or omission by the insured or some other person that did not cause or contribute to the loss – where respondent insured argued s 54 applied so that appellant insurer could not refuse to pay the claim – whether pilot’s failure to satisfactorily complete a flight review could properly be described as an ‘omission’ – whether the claim was in respect of a loss which the policy did not cover such that s 54 did not apply – whether the failure to satisfactorily complete a biennial flight review could reasonably have caused or contributed to the loss such that s 54 would allow the appellant to refuse to pay the claim