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INSURANCE LAW JOURNAL

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30 YEARS ON

The Hon. Michael Kirby AC CMG

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### *RETURN TO THE FOLD*

These remarks will be divided, like Caesar's Gaul, into three parts:

- \* First, because 2014 is the thirtieth anniversary year of the enactment of the *Insurance Contracts Act 1984* (Cth) (ICA), I will indulge in a little history and nostalgia about times past. I will remind you of how the ICA came about; what it replaced; and broadly, how it has operated in Australia;
- \* Secondly, I will look at times present and times still to come. In doing this, I propose to draw upon the assistance of Ian Enright and Rob Merkin. They are the co-authors of the new, updated and completely revised edition of the famous work on Australian insurance law first written by the doyen on that subject of my youth, Professor KCT Sutton, then of the University of Queensland.<sup>1</sup> For over 2 years I have had the privilege of working with them as a consultant and an admiring observer. The new book, entirely up to date, will be released soon. It provides a

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\* Address to the Australian Insurance Law Association, National Conference, 19 September 2014, Hamilton Island (Qld). Some parts of the opening section draw upon the author's address to the AILA Conference, Adelaide, October 2010. See (2011) 22 *Insurance Law Journal* 1. The author acknowledges the assistance and stimulation of Mr Ian Enright and Professor Rob Merkin and, in the opening section, of Mr James Morse, Mr Michael Gill and Mr Andrew J. Sharpe.

\*\* Foundation Chairman of the Australian Law Reform Commission (1975-83); Judge of the Federal Court of Australia (1983-4); President of the New South Wales Court of Appeal (1984-96); Justice of the High Court of Australia (1996-2009). Consultant to the authors (Mr Ian Enright and Professor Rob Merkin) of the new edition of Professor KCT Sutton's *Insurance Law in Australia*. AILA Insurance Law Prize, 2011.

<sup>1</sup> Ian Enright and Rob Merkin, *Sutton's Law of Insurance in Australia* (Thomson Reuters, Sydney, 4<sup>th</sup> ed., 2014) (forthcoming).

treasure house of insights into Australian insurance law, as that law continues to evolve; and

- \* Thirdly, I will refer in closing to the new report of the Law Commissions of England and Wales and of Scotland, which have tackled insurance law reform in a somewhat different manner.<sup>2</sup> As we meet, that report has resulted in a Bill that is passing through the legislative process of the United Kingdom Parliament by way of a new expedited procedure adopted in Britain for the implementation of proposals of institutional law reform. That procedure is itself something we could learn from and copy with advantage for law reform in Australia.

## ORIGINS OF THE ICA

Reform of Australia's insurance contracts law (and an earlier project on the liabilities of insurance agents and brokers<sup>3</sup>) were outcomes of the reference of insurance law reform to the Australian Law Reform Commission (ALRC) by the Federal Attorney-General, Robert Ellicott. The reference was given soon after the election of the Fraser Government in 1975.<sup>4</sup> I was then the inaugural Chairman of the ALRC. The objective of the reform was to utilise fully, for the first time, the substantial grant of legislative power to the Federal Parliament in the *Australian Constitution*.<sup>5</sup>

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<sup>2</sup> Law Commission of England and Wales and Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Law Com No. 353; Scot Law Com number 328), (July 2014, Cm 8898; SG/2014/131) (HMSO London) available: <http://lawcommisison.justice.gov.uk/areas/insurance-contact-law.htm>

<sup>3</sup> ALRC 16, resulting in *Insurance (Agents and Brokers) Act 1984* (Cth). Later re-enacted in *Corporations Act 2001* (Cth), Ch 7 by *Financial Services Reform Act 2001* (Cth).

<sup>4</sup> The terms of reference to the ALRC appear in the report: Australian Law Reform Commission, *Insurance Contracts* (ALRC 20) AGPS, Canberra, 1982, xv.

<sup>5</sup> *Australian Constitution*, s 51 (xiv): "Insurance, other than State insurance, also State insurance extending beyond the limits of the State concerned."

The ALRC was most fortunate to secure the appointment of Professor David St L Kelly of the University of Adelaide and he became commissioner in charge of the insurance law project. Leading the research team, also from Adelaide, was a young lawyer, Michael Ball. He later became a significant Sydney lawyer and in 2010 was appointed a Judge of the Supreme Court of New South Wales. They, and those working with them, were a formidable team. Excepting perhaps the astonishing company of lawyers and others who worked as consultants on the reform of federal evidence law, the assembly of consultants on the insurance contracts project was without peer. Ken Sutton was one of them. Those who knew best the old law and practice of insurance in Australia helped us shape the new.

I entered upon the ALRC's work on insurance law reform with enthusiasm because, as a young clerk and lawyer, my life had been repeatedly engaged in insurance contract disputes. As I have said elsewhere,<sup>6</sup> the body of applicable law in Australia, at the time I first came upon it, was chaotic. Much of it was governed by common law judicial decisions, mostly from England. A collection of Imperial, Federal and State statutes on mostly narrow and specific subjects added to the complexity of this field of law. Federal legislation had been basically restricted to life and marine insurance and even this gave rise to anomalies and uncertainties.<sup>7</sup> Quite apart from the obscurities and challenges which this situation presented to specialist lawyers like myself, struggling to understand and find the applicable law, the difficulties were even greater for the vast array of clerks, agents, brokers

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<sup>6</sup> M.D. Kirby, "Australian Insurance Contract Law: Out of the Chaos – A Modern, Just and Proportionate Reforming Statute" (2011) 22 *Insurance Law Journal* 1at 2.

<sup>7</sup> ALRC 20, [16].

and claims managers in the Australian insurance industry. How managers trained employees in those days to address, with accuracy, legal disputes over insurance liability is a source of wonderment.

Apart from the uncertainty, the applicable law, when found, was usually tipped very heavily in favour of the insurer.<sup>8</sup> Perhaps for this reason, at first, the Australian insurance industry was almost unanimous in its opposition to any change. The ALRC had a major task to persuade them, and the legal profession, to the advantages of a single statute: offering uniformity, clarity and modernity in its text. By a most careful process of consultation, discussion, debate and statutory drafting, the ALRC was able to bring the project to conclusion in its report on *Insurance Contracts*<sup>9</sup> published in 1982. It tackled many of the vexed areas of the law, including fraudulent exaggeration;<sup>10</sup> non-disclosure;<sup>11</sup> requirements of good faith;<sup>12</sup> and how the various interests of the relevant stakeholders could be balanced justly and efficiently for an industry important to insurance consumers but also vital to the national economy.<sup>13</sup>

Soon after the ALRC report was tabled, the Opposition in the Federal Parliament (ALP) committed itself to its implementation, if returned to government. With the election of the Hawke Government in March 1983, the ALRC experienced a stroke of luck. The incoming Attorney-General, Senator Hon. Gareth Evans QC, was a former part-time ALRC commissioner. In the critical period after the election and before the

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<sup>8</sup> ALRC 20, citing comments of Mr John Gayler MP, Member of Leichhardt, House of Representatives, 4 June 1984.

<sup>9</sup> ALRC 20, above n. 4.

<sup>10</sup> See (2011) 22 *Insurance Law Journal* 1 at 6.

<sup>11</sup> *Ibid* at 7.

<sup>12</sup> *Id*, 9.

<sup>13</sup> *Id*, 10.

Government's legislation was drafted, he telephoned me and asked if there were a Bill, attached to an ALRC report, which was ready for introduction. Naturally, I pressed the merits of the *Insurance Contracts Bill*. It had been drafted by the in-house legislative drafter, then a key person on the staff of the ALRC (Stephen Mason), with the brilliant assistance of Mr John Ewens QC, a part-time commissioner and long-time First Parliamentary Counsel of the Commonwealth. In drafting its reform measure, the ALRC was able to rely on big guns.

There are various criticisms of the Bill when it arrived in Parliament. They were mostly addressed to the recommendations for a process of adjustment in recovery for some cases of non-disclosure and misrepresentation.<sup>14</sup> In the end, the *Insurance Contract Bill* 1984 (Cth), as amended in Parliament, received the Royal Assent on 25 June 1984. It did not come into operation until 1 January 1986. This was more than 85 years after section 51 (xiv) of the *Australian Constitution* had come into force. A major program of educative seminars was held throughout Australia to ready the insurance industry and the legal profession for new law.

In 2003, during the Howard Government, a review panel was created to undertake a comprehensive federal re-examination of the ICA. All stakeholders were consulted. Generally they acknowledged that the Act had been operating satisfactorily to the benefit both of insureds and insurers.<sup>15</sup> Thus, the National Insurance Brokers' Association stated:<sup>16</sup>

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<sup>14</sup> *Id.* 12-13.

<sup>15</sup> A. Cameron and N. Milne, *Review of the Insurance Contracts Act 1984: Final Report on Second Stage: Provisions other than S 54*, June 2004, AGPS, Canberra, iv.

<sup>16</sup> National Insurance Brokers' Association, *Insurance Contracts Act: Issues other than Section 54*, 1.

“By all accounts the [ICA] has operated well since its commencement in 1984 (sic) and while it is appropriate that all legislation be reviewed from time to time, having regard to judicial interpretation as well as developments in products and regulation, only minor modifications would appear necessary in the case of the [ICA].”

Various proposals were recommended by the review panel. However, they ran into problems because of the dissolution of Parliament; a change of government; and other priorities.

Nevertheless, when I last surveyed the achievements of the ICA in 2010, I was able then to reiterate an assessment made 5 years earlier, in 2005:<sup>17</sup>

“The notion of ever going back to the chaos and uncertainty of the previous law is unthinkable. Patching and updating are doubtless necessary... But one of the great virtues of having this single Federal Act on insurance contract law is that it makes it easier to teach lawyers and claims managers the basic principles of insurance law. This is itself a contribution to fairness and balance. It is also a contribution to knowledge of rights and duties and to economic efficiency in the operation of a vital national industry.”

I believe that this assessment is still accurate. It was substantially borne out by the numerous occasions, during my service on the High Court of Australia, when that court had the obligation to construe provisions of the ICA and to apply them to the facts of more than ten cases in a

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<sup>17</sup>M.D. Kirby, *Annual Review of Insurance and Re-Insurance Law: Launch of the 2004 Volume*, Sydney, 23 February 2005. See further M.D. Kirby, Foreword to D. Kelly and M. Ball, *Principles of Insurance Law in Australia and New Zealand* (Butterworths, Sydney, 1991).

decade.<sup>18</sup> As a general evaluation, I believe what I said 5 years ago is also true:<sup>19</sup>

“[T]he chaos is now over. The previous injustice and disproportion have been reduced. In Australia, the rule of law means more than the law of rules. It means the law of just rules that adapt and change to the needs of new times and new circumstances. The Australian insurance industry now does this. And so does the reformed Australian law on insurance contracts for which the ALRC and the Australian insurance industry must together share the credit.”

### *A NEW EDITION OF SUTTON*

Professor Ken Sutton was fine scholar, teacher and writer. Born in New Zealand, he taught law there, in England, Canada, Hong Kong and Australia. He also served as a Commissioner of the New South Wales Law Reform Commission, on secondment from his duties as Professor in the Faculty of Law of the University of Queensland. He wrote his greatly admired book *Insurance Law in Australia and New Zealand* in 1980. It went through three editions. For lawyers like me, who were raised on *Sutton*, there was a great demand for a revised and updated edition. Especially after the passage of the ICA and consequent cases. And increasingly after Ken Sutton’s death.

To this call, two outstanding lawyers have now responded. I refer to Ian Enright and Rob Merkin. Ian Enright is an experienced Australian practitioner, company director, scholar, teacher and professional leader.

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<sup>18</sup> The cases are set out in footnote 125 at (2011) 22 *Insurance Law Journal* 1 at 23.

<sup>19</sup> (2011) 22 *Insurance Law Journal* 1 at 24-25.

His work on Professional Indemnity Insurance won the BILA prize for insurance works in 2008 and his independent report on the *General Insurance Code of Practice* was published in 2013. Rob Merkin is the Lloyds Professor of Commercial Law at the University of Exeter and holds numerous other academic appointments, including at the University of Auckland, the University of Hong Kong, the University of Sydney and the University of Queensland: all places that Ken Sutton knew well. In 2010, this Association awarded him a prize for his contributions to insurance law. In England, he is now the author of *Colinvaux and Merkin's Insurance Contract Law*. The co-authors draw on their international experience in their work on the new *Sutton*.

The authors have taken on the task of effectively rewriting the *Sutton* book. They kindly involved me in their project; although my admiration for both of them put a brake on my interference. Although their labours have built on the accumulated virtues of the first three editions, it is now a very different work. Its approach is modern, more accessible and aspires to have a continuing authority.

I will tell this audience of specialists a little about the approach of the new edition. My aim is to whet your appetites so that, when it becomes available in November 2014, you will rush to add it to your shelves. Australia has been well served by texts on insurance contract law since 1986. However, the new *Sutton* will be entirely up to date. It will have the advantage of the perspective of nearly 30 years experience as the new Australian approaches to insurance contract law have taken root, been understood and been accepted and applied.

The new *Sutton* follows, through its chapter headings and sections, the recognised way of thinking of the modern insurance consumer and the contemporary commercial insurance policy. For example, it examines such topics as parties, premium, duration, risks and claims. There are new and substantial chapters on key concepts for insurance that are deployed throughout the book, such as indemnity, continuity of human life and accident. There are comprehensive chapters on regulation and intermediaries. The material on 'utmost good faith' merits its own chapter. The chapters on disclosure, representations and illegality are substantially rewritten; such is the amount and complexity of change, both in statute law and in judicial elaboration since the last edition.

The extensive material contained in the last edition of *Sutton* on workers' compensation and compulsory third party motor vehicle insurance have been substantially removed. This is because the detail and volume of the law in those specialist areas would now require extremely lengthy treatment, beyond the framework of the new volume, dealing as it does with general insurance law. There is an entirely new part that covers, in some detail, and with both commercial and legal depth, the five main types of insurance addressed in the book. These are: property, marine, liability, life accident, and reinsurance. The background and experience of the authors of the new volume has been substantially in professional, industry and academic encounters with insurance. These backgrounds are reflected in the content and interests of the new edition. It takes the new volume somewhat beyond the focus of the original structure as written by Ken Sutton.

One of the key features of the new edition of *Sutton* is its approach to the interaction of much new Australian legislation and the common law.

Because the first edition of *Sutton* was published in 1980, it was substantially concerned with the common law. By the time of the second edition, the ICA had been enacted. Much of the earlier material had therefore been superseded. This was even more true by the time of the third edition in 1999. However, much of the original material was retained in the belief that it would provide a helpful background to understanding the objectives and operation of the ICA. The new edition has been more ruthless in excising old case law. Although fascinating, it is now increasingly redundant to the ascertainment of the presently applicable law in Australia. As the High Court has repeatedly and unanimously insisted in recent decades, where the law has been reduced to the language of a valid Australian statute, the proper place to commence an understanding of the law must always be the text of the statute. Not the pre-existing common law. And not foreign analogies, however distinguished.<sup>20</sup> The adoption of this approach in the new *Sutton* has rendered the analysis sharper.

The ICA is undoubtedly the widest ranging measure of substantive insurance law reform that has been achieved on the subject in the worldwide jurisdictions of the common law. Especially when contrasted to more timid reforms ventured elsewhere, the achievement of the ICA was remarkable. Nevertheless, that statute was not intended to be all encompassing, to the entire exclusion of the common law upon some subjects. Moreover, the ICA was itself written against the background of the common law and sometimes to remedy a particular mischief that was seen to exist in the pre-1984 state of the common law. Over the past 30 years, the market in insurance has also changed. New insurance

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<sup>20</sup> *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (Vic) (2001) 207 CLR 72 at 77 [9], per Gaudron, Gummow, Hayne and Callinan JJ. [9] and *Central Bayside General Medical Practice v State Revenue* (Vic) (2006) 228 CLR 168 at 198 per Kirby J. See footnote 86 in that case.

products have developed. Technology has altered the mechanisms of business dealing. New legal issues have emerged. In this way, the common law, as well as filling the gaps left in the fields of general insurance continues to apply in the areas of marine insurance, and reinsurance. It remains a vital backdrop to the whole law of insurance.

These are the reasons why appropriate (but not excessive) attention has been given in the new edition of *Sutton* to the state of the common law, both in Australia and elsewhere. The authors of the new edition of *Sutton* hope that the modern and commercial structure that they have adopted; the conceptual approach to the principles that they have identified; and the particular attention that they have given to the detail of insurance law will make the new volume an even better resource for Australian insurance lawyers than was the case in the earlier editions. I commend the new edition of *Sutton* to your attention. No Australian insurance lawyer's Christmas stocking will be complete without a copy from Santa or, alternatively, from one of Santa's tax deductible helpers.

### *UTMOST GOOD FAITH*

It is now appropriate to turn to some of the important changes that have been introduced into Australian insurance law by amendments enacted by the Australian Federal Parliament in 2013. This audience will be familiar with these changes so I do not intend to discuss them in detail. However, some of them demonstrate the very long way we have come in understandings of the basic law of insurance since the general statement made by Lord Mansfield in 1766 in *Carter v Boehm*.<sup>21</sup>

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<sup>21</sup> *Carter v Boehm* (1766) 3 Burr 1905.

That great judge then said that insurance contracts were contracts “of good faith”. The adjective “utmost” was added later. The statement was designed to protect a fledgling London insurance market from the asymmetry of information as between insurer and insured. Back in 1766, individual merchants, enjoying the delightful aromas of Lloyd’s Coffee House in London, had been issuing policies for 40 years. Insurance companies other than the two chartered companies (Royal Exchange and London Assurance) were illegal under the *Bubble Act* 1720 (Imp). Later, the concept of utmost good faith became all-embracing for all policies of insurance. It regulated the conduct of insureds; but came also to apply to the conduct of insurers as well.

A peculiarity of the common law<sup>22</sup> was its recognition of a generalised duty of utmost good faith. However, the specific examples of that duty<sup>23</sup> were originally confined to pre-contract presentation of the risk by the insured. Furthermore, the sole remedy for the breach of duty was avoidance. This was incongruous for post-contractual breaches and of little or no use to an insured. The insured’s objective was to make financial recovery and not to walk away from the contract. During the last 30 years, the English courts (and indeed those of New Zealand, albeit unaided by any statutory codification of Lord Mansfield’s words) have been creative in seeking to delimit the nature of the respective duties of the parties and in constructing alternative remedies for the breach.

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<sup>22</sup> Including as codified in ss 23-26 of the *Marine Insurance Act* 1909 (Cth).

<sup>23</sup> As explained in *Marine Insurance Act* 1909 (Cth), ss 24-26.

A major and innovative feature of the ICA was the creation of an implied term of utmost good faith<sup>24</sup> on the part of the insurer. That provision has been cited in numerous Australian decisions. It has played a significant part in promoting the understanding that insurers must operate fairly and transparently, taking account the interest of policyholders alongside their own. The duty has been particularly important in shaping the processes adopted by insurers when handling claims or exercising discretions belonging to them. The general duty so imposed was supplemented by a specific examples contained in the ICA,<sup>25</sup> whereby failure to act with the utmost good faith, in relying upon a policy term and in particular a term that had not been clearly notified to the insured, precluding reliance on that term.

The amendments introduced into the ICA in 2013 have given even greater force to these measures. Thus, the new section 13(2) ICA, treats a failure to act with the utmost good faith as a contravention of the requirements of the ICA. This triggers the possibility of intervention by the Australian Securities and Investments Commission (ASIC). Secondly, a new sub-section of the ICA<sup>26</sup> lays down a specific remedy where the insurer's breach of utmost good faith, owed to the insured, relates to "the handling or settlement of a claim or potential claim under the contract". In such a case, ASIC may exercise its powers under the *Corporations Act 2001 (Cth)* to vary, suspend or cancel a licence of the insurer to provide financial services and to ban persons from providing financial services in breach of the obligation. Although such a sanction would be used most rarely, the very possibility ensures the general implementation of protective procedures and outcomes.

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<sup>24</sup> ICA, s.13.

<sup>25</sup> ICA, s.14.

<sup>26</sup> ICA, s.14A.

All of this shows how far the reciprocal duty of utmost good faith now operates in the Australian legal context.

### *NON-DISCLOSURE AND MISREPRESENTATION*

The law of insurance, as the ALRC found it in 1978, was in a parlous state. An insurer was entitled to avoid a policy for any false statement or failure to disclose, if the fact in question would have been of interest to (even if not necessarily likely to have altered the underwriting decision of) a prudent underwriter. The state of mind of the insured was irrelevant. The impact on the insurer seeking to avoid the policy was also irrelevant.

The ICA implemented in this regard most, but not all, of the recommendations of the ALRC. It separated out pre-contractual presentation from utmost good faith. A duty to disclose was mitigated by a provision<sup>27</sup> confining it to matters known by the insured, or by a reasonable person in the circumstances of the insured, to the decision of the insurer. Accordingly, the mythical “prudent insurer” ceased to be a relevant criterion.

Further, by another provision of the ICA,<sup>28</sup> the duty of disclosure was to be drawn to the particular attention of the insured. The law of misrepresentation was tidied up by requiring ambiguous questions to be construed in favour of the insured,<sup>29</sup> by abolishing ‘basis clauses’ that

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<sup>27</sup> ICA, s.21.

<sup>28</sup> ICA, s.22.

<sup>29</sup> ICA, s.23.

converted statements into unconditional promises;<sup>30</sup> by removing from the definition of misrepresentation statements made with reasonable belief;<sup>31</sup> or statements which the insured, or reasonable person, could not be expected to know were relevant;<sup>32</sup> and also silence or obviously incomplete statements.<sup>33</sup> In relation to both non-disclosure and misrepresentation, the ICA introduced<sup>34</sup> a notion of the inducement of the actual insurer.<sup>35</sup> It confined avoidance to cases of fraud and cases where the insurer would not have provided insurance at any price (but even then subject to the overriding discretion of the court to relieve the insured from that consequence).

It is important to remember that these rules did not draw a distinction between business and consumer insurance. They assimilated a commercial undertaking, advised by a professional broker and the most skilful lawyers, with the case of a private individual struggling unaided. A section added in 1998,<sup>36</sup> introduced such a distinction for the holders of domestic lines policies. In effect, it removed the duty of disclosure; but without saying so. It did so by the curious means of treating the duty as having been waived unless express questions were asked. The number of judicial decisions in this area revealed various weaknesses in the legislation. It is unnecessary for me to trace them here. It suffices to note how some of the problems, revealed in the cases, were addressed by the 2013 reforms. For example:

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<sup>30</sup> ICA, s.24.

<sup>31</sup> ICA, s.26(1).

<sup>32</sup> ICA, s.26(2).

<sup>33</sup> ICA, s.27.

<sup>34</sup> ICA, s.28.

<sup>35</sup> The common law has caught up with this development 10 years later.

<sup>36</sup> ICA, s.21A.

- \* Section 21 has been amended so that, in determining what might be expected to be known by a reasonable person, the court must have regard to the nature and extent of the cover to be provided and the class of persons who would ordinarily take out such cover. It seems doubtful whether any significant change is achieved by this provision. In particular, there is no switch to a subjective test based on the actions of a reasonable insured in the position of the actual insured;
- \* Section 21A has been amended to remove the possibility of an insurer asking “catch all” or general questions. A new section 21B has set out equivalent provisions for renewals (previously excluded from section 21A); and
- \* The obligation of the insurer to inform the insured of the duty of disclosure by section 22, has been enhanced.

These changes are to be welcomed. However, they are not free from criticism. The drafting of the amendments is sometimes cumbersome. The meaning is occasionally somewhat obscure. More significantly, the amendments appear to indicate a desire to abolish the duty of disclosure for domestic lines policies but at the same time a reluctance to take that final step more generally. A simple abolition would have removed the need for sections 21A, 22 and 22A.

### *NATURE OF INSURANCE*

The common law had a definition of insurance, derived from the earliest times. When the ICA came along, it omitted a statutory definition.

Effectively, this preserved the definition of the common law. The 2013 amendments, together with different approaches in legislation and delegated legislation, may create a risk of uncertainty and confusion on this point. Our very sense of what is, and what is not, insurance is under increasing challenge.

A number of recent Australian cases have appeared to expand the commercial circumstances in which an indemnity provision in a contract may lead to a characterisation of the contract as an ‘insurance contract’. Thus, in *Australian Health Insurance Association Ltd v Esso Australia Limited*.<sup>37</sup> It became necessary to examine, in the context of what purported to be an employment contract, whether Esso was carrying on business as a health insurer, in contravention of the *National Health Act* 1953 (Cth). A like problem arose in *Bayswater Car Rental Pty Ltd v Hannell*.<sup>38</sup> The agreement in question appeared to be a car rental contact. But under it, the owner agreed to indemnify the hirer against third party property damage, subject to the hirer’s paying a stated “excess”. The rental agreement was a contract of liability insurance. The question was whether the car rental agreement was a contract of liability insurance within the meaning of the ICA.<sup>39</sup>

In *Barclay MIS Group of Companies Pty Ltd v ASIC*,<sup>40</sup> the contract in question was, on its face, a rental guarantee agreement for premises. In it, there was a scheme whereby a person undertook to pay compensation for damages to premises and loss or damage to the

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<sup>37</sup> Referred to with approval in *Insurance Australia Ltd v HIH Casualty and General Insurance Ltd (in liq)* (2007) 18VR 528; (2007) 14 ANZ Ins Cas 61-747; [2007] VSCA 223.

<sup>38</sup> *Bayswater Car Rental Pty Ltd v Hannell* (1999) 10 ANZ Ins Cas 61-437; [1999] WASC CA 34. But c.f. *Webb v State of Herbert* (2006) 31 WAR 492; [2006] WASC CA 43.

<sup>39</sup> ICA, ss11(7) and 10(2).

<sup>40</sup> (2003) 12 ANZ Ins Cas 61-551 (FCA).

contents thereof due to the action of a defaulting tenant. The question arose as to whether this was also a contract of insurance.

Likewise, in *Marriott v Brine*<sup>41</sup> the contract in question was described as a “flight record tax invoice”. The injured passenger, who was the plaintiff in that case, argued for leave to amend a claim against a helicopter operator in order to plead a cause of action that the contract was in law an insurance contract. The relevant term in the contract stated that “passenger’s insurance is limited to \$5,000,000 combined single limit for passengers and third party liability”. There was also a further term that the hirer or hirer’s pilot also accepted that there was no personal insurance. The following clause, however, stated that the owner was responsible for hull insurance. Yet another clause said that, in the case of accident or negligence, the hirer was responsible to pay the “excess”. The court concluded that the argument was open that the hirer had promised, in return for money consideration (the premium), to provide the pilot a corresponding benefit upon the occurrence of one or more specified events. Accordingly, it was held arguable that the cross-hire agreement was an insurance policy that extended cover to the passengers on board the helicopter.

A difficulty with this line of reasoning (and the conclusions reached in the several cases) is that an indemnity term in another contract can thereby render a contract apparently for other purposes, unexpectedly because a contract of insurance. This is not to suggest that the reasoning or conclusion of the courts in any of the cases mentioned was incorrect. However, clearly the cases alert those bold spirits who draft such contractual terms, to the great care required in considering commercial

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<sup>41</sup> [2013] NSWSC 1589.

contracts that include indemnities. A clear trend appears to exist (doubtless encouraged by the prospect of discovering a source of recovery in a hard case) to expand the traditional common law definition of insurance.

### *EXEMPTIONS FROM THE ICA, S.9*

Section 9 of the ICA lists contracts that are exempt from the provisions of the Act. The 2013 amendment elected to exclude insurance against the employer's common law liability, even when appearing in the same policy or document as the insurance against employer's statutory liability. This distinction was considered by the High Court of Australia in *Moltoni Corporation Pty Ltd v QBE Insurance Limited*.<sup>42</sup> That was a case in which I participated judicially.

When one of Moltoni's employees was injured and was awarded damages at common law for negligence, the insurer refused to indemnify the insured on the ground that the insured had breached a condition precedent to liability in the policy in failing to give proper notice of the injury. Such a failure could be excused in certain circumstances pursuant to the ICA, s 54. However, in an attempt to avoid the protective provisions of that section, QBE argued that the contract of insurance was wholly outside the ambit of the Act. This was because it had been entered into for the purposes of a State law that related to workers' compensation. It was therefore expressly excluded by a provision of the ICA.<sup>43</sup>

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<sup>42</sup> (2001) 46 ALJR 337.

<sup>43</sup> ICA, s.9(1)(e)(i).

This argument was rejected by the High Court of Australia on the footing that the indemnity sought was for the insured's liability at common law, not for workers' compensation under the relevant State act. The judges (who included myself) held that the exception applied only to the State statutory compensation scheme. The reference to "a law" meant to a statutory provision that related to workers' compensation. The contrary conclusion would have resulted in a large area of insurance contracts being left outside the purview of the ICA.

Following a recommendation of the review of the ICA, concluded in 2004, the operation of *Moltoni* in the High Court of Australia has now been reversed by statute.<sup>44</sup> In the result, the ICA does not now apply to an insurance contact entered into, or proposed to be entered into:

1. For the purposes of a law (including a law of a State or a Territory) that relates to workers' compensation; and
2. To provide insurance cover in respect of an employer's liability under a rule of the common law that requires payment of damages to a person for employment-related personal injury.

The entire contract is exempt from the scope of the ICA in those circumstances. The report of the review committee described this as "unbundling". However, it has been extended by the market to an issue arising under section 10 of the ICA.

Time does not permit me to explore this further development.

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<sup>44</sup> ICA, s.9(1)(f) and (1B). For general insurance contracts entered into after 28 June 2013.

## *INSURANCE IN THE CORPORATIONS ACT*

The *Corporations Act* describes “insurance”, in effect, as a “contract for managing risk”. This description presents another dimension of the legal inquiry. Australia’s financial markets and their regulation pose even more demanding challenges for our understanding of the nature of an “insurance contract” in today’s world.

It is clear that prudential regulation since the Second World War (particularly since the late 1990s) has emphasised the need to measure, and provide capital against the risk of, regulatory or financial insolvency. Risk, for so long the specialty of the *insurance* markets, is now at the heart of Australia’s *financial* markets. When traded futures and options became popular in the 1980s, there were serious legal questions about whether the futures and options contracts might not be illegal under pre-existing gaming statutes and specific anti-gambling laws. As our financial markets calibrated their operations to control risk, the market for financial instruments to control risks deepened both in variety and complexity. When more financial instruments provided for payments on the basis of changes in the defined risk, the legal and practical differences between such instruments and an insurance contract diminished, almost to the point of disappearance.

It follows that experience with traded options and futures, as financial instruments, have risk at their centre. They produce serious legal questions about whether such financial instruments may be an insurance contract. This is a serious and important question because, the ICA implies, the effect of such contracts and their regulation may introduce legal consequences that are quite different from the

expectations of the parties to the financial transaction. I predict that these questions, arising at the outside boundary of arguable “insurance contacts”, will increasingly preoccupy the section of the legal profession that specialises in insurance law.

### *LIFE INSURANCE*

As this conference meets, the life insurance industry in Australia is facing unprecedented challenges because of disability claims. The crisis extends to income protection, monthly benefits and total and permanent disability lump sum products and payments. While the group market is the one mostly in the news, the causal issues presented to this branch of the insurance industry arise in the retail and individual markets as well. Claims in relation to mental illness are the subject of a number of difficult issues that arise in this connection.

Reinsurance markets have announced significant reserve strengthening. Direct life offices are reporting profit downgrades; asset write-offs and reserve strengthening for the same reasons. The next reporting periods for life insurance hold challenging prospects. The insured community is increasingly buying less life insurance and allowing the policies that have been written at higher rates to lapse. There is much concern about delay and unfairness in processing claims. This becomes an unfortunate context for considering the 2013 amendments to the ICA concerning remedies and cancellation. The transitional provisions, because of the long-term nature of life insurance contracts, mean that the legislation, in its earlier language, will remain applicable to many life insurance contracts in Australia for some time to come.

Again, time does not permit an analysis of the many questions that arise in this context or the intricate problems that are presented by the differential operation of the ICA section 29 relating respectively to misrepresentation and non-disclosure to the policies cancelled after 28<sup>th</sup> June 2013.

The review committee on the ICA considered, but rejected, the introduction of a new section<sup>45</sup> for life insurance contract cancellation. At one stage it was proposed that section 60 of the ICA should be deleted for life insurance, except for the power of cancellation for fraud. The reasoning leading to this concession was that life policies usually only have one claim (whether arising from the death, total and permanent disability or terminal illness of the insured). However, there are examples of multiple claims for traumas and different disabilities under such policies.

Until 28 June 2013, the ICA had no cancellation grounds for life insurance. However, the *Insurance Contracts Amendment Act 2013* (Cth) makes the ICA a complete code for the cancellation of life insurance contracts. It allows cancellation only for fraud<sup>46</sup>. The 2013 amendments apply to a contract of life insurance that is originally entered into after the commencement of the amendments. There is no right to cancel for any of the other grounds permitted for general insurance. For example, there is no clear (certainly no express) right to cancel even for non-payment of premiums. The *Life Insurance Act 1995*

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<sup>45</sup> Proposed new ICA s.59A. The Review Committee Report par [7.46]-[7.59].

<sup>46</sup> Schedule 5, para 4.

(Cth)<sup>47</sup> affords no salvation here. This is because it probably applies to investment life contracts only. The problem that is presented appears to be confirmed by the drafting of the new provisions of section 29 (10) of the ICA. Unfortunately, the explanatory memorandum is at least doubtful about this point.<sup>48</sup>

Life insurers often issue a policy that can provide multiple benefits in multiple circumstances. It is not the case that uniformly they pay only on death. The legitimate question is presented as to what are the appropriate grounds for the cancellation of a life insurance contract? It would seem appropriate that those grounds should be the same, or so far as applicable similar, to the grounds for cancellation of policies of general insurance. If that view were adopted, the harsh and unfair exception in section 59A(2-5) would also be removed; as there is no equivalent provision applicable to general insurance contracts.

In this section of my observations, 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 the thorns; I seek the way, and am straying from the way [W. Shakespeare, *King Henry the Sixth, Part III*, Act 3, scene 2]. 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 terribly detailed. The old common law was anchored in broad conceptual principles, admittedly based on moral principles. True, they were unjust

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<sup>47</sup> *Life Insurance Act*, s.210.

<sup>48</sup> Explanatory memorandum, par 1.124.

principles as the insurance market expanded beyond venturesome risky merchants to the whole big world of mass consumer needs. But the anchors of principle were at least reasonably clear and generally understood.

Similarly, the ICA, as first drafted, was blessed with the expert conceptual eye of one of the greatest legislative drafters Australia has seen: John Q Ewens. Now, as layer upon layer of detailed amendments, qualifications and supplements are added to the ICA, the pristine beauty of the original draft is in danger of being lost. In some respects, it is already lost so that we can be excused if we yearn to free ourselves from the current torment with a sharp and bloody reformer's axe.

Perhaps there is no solution to this quandary, at least until (in due course of time) it becomes necessary once again to reform the reformed law. And to try to get back to more conceptual principles which can be followed and applied by the wide variety of people who must live and work with the national Australian statute on insurance contracts law.

So this is precisely where the new edition of *Sutton* comes in. To lift our spirits: precisely because it is right up to date. To incorporate reference to all these new and sometimes puzzling provisions. To trace their statutory genealogy. To provide analysis that is both verbal, historical and policy-oriented. Just when we are thinking that insurance contracts law was returning to the impenetrable chaos that preceded the ICA 30 years ago, rescue is at hand. Not in the form of a bloody axe; but in the form of calm and sweet reason and legal analysis that we love and admire.

But are there lessons for us in the fact that the United Kingdom is now coming upon the statutory reform of its insurance contracts law, 30 years after our reforms in Australia? Can we look to the legislation now being moved through the British Parliament as a potential guide that will lead us back to a simpler age when the governing law on insurance contracts seemed clearer and plainer in its purpose and effect?

### *NEW UNITED KINGDOM LEGISLATION*

On 17 July 2014, the United Kingdom Government introduced into the Parliament at Westminster an insurance Bill containing clauses from a draft prepared earlier by the two Law Commissions. It excluded two clauses that were not considered sufficiently “uncontroversial” for the fast track legislative system now devised in the United Kingdom for simpler statutory reforms deemed uncomplicated and unlikely to upset the affected interest groups.<sup>49</sup> Those clauses related to the terms relevant to particular descriptions of the loss and to cases of late payment.<sup>50</sup>

As a background of the case for reform urged in the United Kingdom, the English and Scottish Law Commissions (acting jointly on this project) pointed out that the *Marine Insurance Act 1909* (Imp.), although appearing only to apply to marine insurance, incorporated principles that embodied the general common law rules on insurance. They explained that insurance had undergone many changes in the last 100 years.<sup>51</sup>

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<sup>49</sup> M. Partington, “Law Reform: The UK Experience” in M. Tilbury, Simon N.M. Young and L. Ng (eds) *Reforming Law Reform* (Hong Kong Uni. Press, HKG, 2014) 67 at 81-82.

<sup>50</sup> [United Kingdom] Law Commissions, *Insurance Contracts Law: Executive Summary*, 2[1.7].

<sup>51</sup> *Ibid*, 3 [1.11].

“A market which was initially based on face-to-face contact and social bonds has developed into one based on systems, procedures and sophisticated data analysis. The types of risks insured have widened and the volume of information available to market participants has grown exponentially. The law has failed to keep pace with these changes. It fails to reflect the diversity of the modern insurance market or the changes in the way the people communicate, store and analyse information. Nor does it reflect developments in other areas of commercial contract law.”

The United Kingdom report also concluded that the 1909 *Marine Insurance Act* had been substantially “insurer-friendly”. It conferred on insurers remedies that came to seem “out of proportion to the wrong done by the policyholder”.<sup>52</sup> The adoption of reforms in many other countries had left the United Kingdom “out of line with an international market place. If UK law were to lose its international reputation [in insurance law], it could take many years to rebuild.”<sup>53</sup>

One of the problems that also justified the reform of the law was market uncertainty:<sup>54</sup>

“Insurance buyers find it difficult to assess the quality of insurance when entering into a contract. They cannot tell if claims will be paid without difficulty, or whether the insurer will exploit loopholes in the law to delay payment and reduce the size of settlements. Unable to assess quality,

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<sup>52</sup> *Ibid*, 3 [1.12].

<sup>53</sup> *Ibid*, 3 [1.14].

<sup>54</sup> *Ibid*, 5[1.23].

policyholders tend to buy on price. The emphasis on price then puts greater pressure on insurers to reduce quality.”<sup>55</sup>

Originally, the United Kingdom Law Commissions started with an intension to codify the whole of the law of insurance. However, in the end, their reports focussed on utmost good faith; fraudulent claims; late payments; and conditions and warranties. The result was a 2012 Act on consumer duty of good faith. This has now been followed by the 2014 Bill on business utmost good faith, fraudulent claims and warranties. And this is as far as the reforms go.

The decision of the Law Commissions to return to the issue of insurance law reform in the present decade (which had been sidelined for 30 years) was obviously welcome. Apparently, it was largely the result of insurance industry pressure. The pending adoption of the second tranche of legislation is a distinct step in a direction obviously beneficial to insurers and insureds alike. Nevertheless, on the whole, the legislation now before the United Kingdom Parliament is much less bold and ambitious than that achieved when the ICA Act was proposed and enacted in Australia in 1984. The only parts of the field covered in Australia by the ICA of 1984 in the enacted and pending United Kingdom legislative are those in which, Australia, are covered by sections 21-31, 54 (past only if the term is a warranty) and 56. The rest of the ICA has not been the subject of the reforms introduced by the ICA. The United Kingdom measures are thus much less bold and substantially more modest.

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<sup>55</sup> The rise of price comparison websites provides some evidence of the phenomenon.

This is not the occasion for detailed analysis of the United Kingdom legislation. However, the limited category approach that has been adopted in the new measure rather suggests that there is not a lot of instruction to be derived for Australia for the new British initiative. The balance of contribution and example remains substantially one in which legal dividends will be paid by Australia to the United Kingdom for its great gift to us of the rule of law, constitutionalism and the common law.

In particular, the wider and bilateral principle of utmost good faith adopted in Australian insurance law has proved all-embracing. It is beneficial in the regulation of the conduct of insurers throughout the currency of policies.

Instead of approaching the matter in that way, the Insurance Bill 2014 (UK) proposes merely the repeal of that part of section 23 of the Imperial *Marine Insurance Act* that states that the remedy for breach of the duty of utmost good faith is avoidance. By repealing that provision, it is presumably hoped, and expected, that the way will be paved for judicial creativity so that the remaining “interpretative statement” in section 23 (that contracts of insurance are contracts of utmost good faith) will be construed to embrace utmost good faith on the part of insurers as well as on the part of insureds. However, the Law Commissions were not prepared to take the step of embracing the wider reciprocal statutory concept endorsed by the ICA in Australia. This is so, although in my view, this has proved beneficial in its own right in this country and, as elaborated and applied, is both correct in principle and advantageous in application. It has become a useful jumping off point in Australia for wider reciprocal principles set out in the further reforms enacted by the Australian Parliament in 2013. The United Kingdom law remains largely

hostage to the special interests of the insurance industry and the power of that industry's lobbying to defeat a broader measure of justifiable law reform.

In one respect only, the United Kingdom appears to be ahead of the legal situation in Australia. The *Consumer Insurance (Disclosure and Representations) Act 2012* (UK), has now been in force for some 18 months. It has abolished the duty of disclosure. It has replaced this with the duty on the insured to answer express questions honestly. Significantly, this measure was also passed through UK Parliament under the specially expedited procedure reserved for non-controversial bills. This proved possible because the proposed legislation had the support of the insurance market.

The fact that the 2012 Act had the support of the insurance market in the United Kingdom (which has otherwise proved more circumspect and resistant to reform than that of Australia) raises a legitimate question in Australia. Are Australian insurers less well equipped to know which questions to ask than their United Kingdom counterparts? On this theme, the examination of the Insurance Bill 2014 (UK) is instructive. It borrows from the earlier Australian reforms of statutory inducement tests. It replaces the all-or-nothing remedy of avoidance with a proportional approach. However, in the end, it does not appear that the United Kingdom legislature (or those who predict and manage its agenda) is willing to entrust its judges with the discretion to refuse avoidance in cases of fraud. In this respect, the United Kingdom has refused to follow the Australian lead provided by section 56 of the ICA by trusting the judges, where they consider it appropriate, to disregard insignificant or non-causative fraud in the making of claims. Fraud has

many faces. Minor dishonesty will not always justify the total defeat of a claim. At least it will not do so where that would be disproportionate to the circumstances. Views can, of course, differ on this as on most contested questions of significant legal policy. However, I venture to suggest that most Australian lawyers, expert in this field, would not now want to go back to the old absolute law. And the Australian insurance industry appears to be of the same view taking into account the actual operation of the proportionate operation of the ICA in practice.

Other differences remain between the approach in the ICA and that now envisaged for the United Kingdom. For example, the prudent insurer is still a protected species in the United Kingdom Bill. Responsibility for a broker is more extensive under that Bill than under Australian law. At least this is so in accordance with the interpretation of the ICA by a majority of the High Court of Australia in *Permanent Trustees Co v FAI Insurance*.<sup>56</sup> There has been no attempt to restrict relevant facts to those that relate to the risk itself. Instead, there is very broad guidance as to when a fact may (and may not) be relevant.

Obviously, it will be instructive for us in Australia to follow the experience that flows from the enactment of the new United Kingdom legislation. In the global market of insurance, our industry and consumer groups will be watching the operation of the British legislation just as, for three decades, their UK counterparts have been watching the operation of the ICA. The reforms now achieved in Britain are belated but welcome. I hope that it does not sound too much like self-praise to conclude that the comparative modesty of the recent UK reforms shows, in an even more

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<sup>56</sup> *Permanent Trustee Australia Ltd v FAI General Insurance Co. Ltd (in liq)* (2003) 214 CLR 514. McHugh, Kirby and Callinan JJ; Gummow and Hayne JJ dissenting.

vivid light, the significance and boldness of what the Australian Law Reform Commission and the Federal Parliament accomplished 30 years ago.<sup>57</sup>

Insurance law is interesting and ever presenting new and puzzling problems. The variety of fact situations is virtually infinite. The variety of insurance contracts is ever expanding. The sources of relevant data enlarges all the time. And even some contracts of indemnity, that the parties almost certainly never conceived of as insurance in character, may fall within the ambit of the ICA.

Of one thing we can be sure. Future conferences of the Australian Insurance Law Association will continue to address interesting and important questions of the law. Be sure that I will return in 5 years time for another assessment. And will continue to do so, like the convicts of old, for the term of my natural life.

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<sup>57</sup> The remedial character of the ICA was emphasised by Toohey, Gaudron and Gummow J in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 429, upholding the appeal from the Court of Appeal of New South Wales and endorsing the approach of the writer (in dissent) in that Court.