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ENRIGHT & MERKIN: SUTTONS LAW OF INSURANCE
IN AUSTRALIA

FRONTISPIECE

INSURANCE AND AUSTRALIAN LAW – A
RETROSPECTIVE

The Hon. Michael Kirby AC CMG

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Insurance and Australian Law – A Retrospective

Introduction

I congratulate Ian Enright and Rob Merkin on this new edition of *Sutton*. They have done a great service for lawyers, administrators and all those involved in the insurance industry in Australia. They have completed this new and wholly revised edition of the famous work first written by the doyen of the subject in my youth, Ken Sutton, long-time Professor of Law in the University of Queensland.¹

For over 4 years I have had the privilege of working with Ian Enright and Rob Merkin as a consultant and an admiring observer. This new book, entirely up to date, provides a treasure house of insights into Australian insurance law, as that law continues to evolve to serve insurers, insureds and the general Australian community.

Professor Ken Sutton was fine scholar, teacher and writer. Born in New Zealand, he taught law there and 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. He first published his book *Insurance Law in Australia and New Zealand* in 1980. It went through three editions. From lawyers like me, who were raised on *Sutton*, there arose a demand for a revised and updated edition. Especially so after the passage of the *Insurance Contracts Act 1984* (Cth) (ICA) and subsequent amendments and cases. The calls for a new work increased after Ken Sutton's death. To these requests, two outstanding lawyers have now responded. Ian Enright is an experienced Australian legal practitioner, company director, scholar, teacher and professional leader. His work on Professional Indemnity Insurance² won the British Insurance Law Association prize for insurance works in

* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-1996); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-84); Australian Insurance Law Australia Award 2013. [CHECK TITLE OF AWARD]

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

² Full title and Digby XXX [INSERT REFERENCE]

2008. His independent report on the *General Insurance Code of Practice* was published in 2013. Robert Merkin is the Lloyd's Professor of Commercial Law at the University of Exeter in England. He holds numerous other academic appointments, including in 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, the Australian Insurance Law Association awarded Rob Merkin 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*.

Ian Enright and Rob Merkin have assumed the task of effectively rewriting the *Sutton* book from scratch. Although they kindly consulted me, my admiration for them both put a brake on my interference. Although their labours have built on the accumulated virtues of the first three editions of *Sutton*, it is now a very different work. Its approach is more modern and more accessible. It aspires to have a continuing authority. **Modernity, accessibility and authority were all themes of the work of the Australian Law Reform Commission which resulted in the ICA. The authors invited me, in this Frontispiece, me to offer some personal reflections on my involvement in insurance law; to describe the context of the ALRC's work; and to provide some observations on the evolution of some of the main principles in Australian insurance law, as it operates today.**

Beginnings

In response to their request I must return to my early days in the law. In 1958, after two years in the Arts Faculty on the main campus of the University of Sydney, I began my legal studies. They were undertaken in a shabby collection of buildings that then housed the University's Law School. Sandstone was out. Large impersonal lecture halls in Phillip Street, in the legal precinct of Sydney, were in. The following year, 1959 was the first year of my articles of clerkship. Daily life settled into a new routine. During the day, I was 'instructing' counsel in trials before a wide range of courts. In the early morning and late afternoon, I would attend lectures and tutorials at the law school. It was in that year that my fellow student Murray Gleeson and I agreed to share lecture notes and the writing up of cases and research. Thus began a joint enterprise that was only finally terminated by his retirement from Australian judicial office in August 2008, followed by my own in February 2009.

In 1962, I had just graduated from the Sydney University Law School. With my brilliant school results and excellent university record, I was looking around for a worthwhile future in the law.

Out of the blue, a letter arrived inviting applications from new law graduates for appointment as a starting solicitor. I made an application and was asked to come to the premises of Mr John Bowen, solicitor. His office was in an old building, since demolished, commanding a grand vista of Bridge Street in Sydney. Engraved on the door in gold (or was it brass?) was the legend 'Ebsworth & Ebsworth'. Showing great judgment, Mr Bowen selected me. He promised me an exciting career in admiralty and maritime law. My youthful imagination conjured up images of mighty ships and ancient precedents. I felt that I was being piped aboard a vessel that would sail me forward into a life of calm and prosperous waters.

Imagine my surprise when, soon after, an urgent letter arrived from Ebsworths asking me to call again on their office. A great misfortune had occurred. It was as if the Lutine Bell was being sounded for the sinking of my professional ambitions, so full of hope. The Hon Fred Osborn CMG, DSC, VRD, Federal Minister for the Navy in the Menzies Government, Member for Evans, had lost his seat in Federal Parliament. These things have an unpleasant way of happening in elections. He was a partner in Ebsworths. Unexpectedly, he had to be received back into the fold. In consequence, there was no space for the aspiring new recruit.

The offer of a lifetime in admiralty and maritime law was summarily, and unilaterally, withdrawn. With heart shattered, I stumbled out into the sunlight of Bridge Street, my decks awash with tears. My great ambition had come to a shuddering halt, before even leaving the harbour. I would never thereafter recapture the dreams of expertise in admiralty and maritime law. In idle moments, in intervening years, I have pondered whether, due to approximate infancy at the time, I could obtain an extension to sue for damages for this horrible breach of contract and the psychological damage it caused. Who knows what might have become of my career, if only Mr Osborn had won his seat?

I then worked as a solicitor in a large Sydney firm, Hickson, Lakeman and Holcombe. There, I developed a practice in insurance litigation. On a day-to-day basis, I battled for and against, insurers. I engaged with countless problems relating to insurance. This was no burden. I became fascinated with these problems.³ It was something of a game at times.⁴ Often in that game, I won. I liked winning. Still do.

I was admitted to the New South Wales Bar in July 1967. A good part of my practice at the Bar concerned insurance. In November 1974, I was asked to join the Australian Conciliation and Arbitration Commission. I was 35 years of age. I agreed and was welcomed to the office of Deputy President in December 1974. My commission dated from 1 January 1975. At an early age, I therefore enjoyed the rank, title and salary of a federal judge. Only Mary Gaudron, appointed a year earlier, was younger. At my welcome ceremony, the President of the New South Wales Bar Association, Mr T.E.F. Hughes, QC, praised me on behalf of the Bar. He claims that he said that I was noted for my “urbanity”. The official transcript of the ceremony records that my stated reputation was for “vanity”.

Soon afterwards, in early February 1975, I accepted secondment to be the first Chairman of the Australian Law Reform Commission (ALRC). Strange but true, I accepted that appointment with reluctance.⁵ Like many lawyers at that time, I doubted that law reform was really necessary. After all, weren't things already bad enough? Obviously, others disagreed with this approach. The ALRC had been established on 1 January 1975. My time as its Chairman between 1975-1984 changed my life. The insurance reference came to the ALRC in 1976. Because this new *Sutton* appears in 2014, the thirtieth anniversary of the ICA, I want to recall the state of insurance law as we discovered it in 1976. It was, to say the least, something of a mess.

Insurance Then

³ See further, Kirby, Michael, *Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume*, Sydney, 23 February 2005.

⁴ *Ibid*, *Loc cit*.

⁵ See further, Kirby, Michael, 'ALRC, Law Reform and Equal Justice Under Law', Speech to the Australian Law Reform Commission 25th Anniversary Dinner, 19 May 2000.

In 1976, insurance contract law was not so much a moveable feast, as a gorgonzola. Insurance contracts were subject to a bewildering variety of laws.⁶ They included the common law and statutes of the Imperial, Colonial, State and Federal Parliaments.

The common law was, frequently, very unfriendly to the insured. Most of the principles adopted in Australia were (except for minor variations) identical with those earlier developed in the United Kingdom.⁷ Issues specific to Australian experience had never really been addressed systematically, still less nationally. There were significant gaps in the coherence of the law.

Additionally, a few Imperial Acts still applied in Australia. They were generally expressed in archaic and obscure language.⁸ Often they addressed problems of a by-gone era. They largely overlooked many questions that had arisen from widespread consumer insurance. State law, in particular, had been piecemeal and sporadic in Australia, commonly limited to particular types of transactions or attempting to deal with specific insurance problems.⁹ Federal legislation had been substantially restricted to the fields of life and marine insurance. This approach had given rise to anomalies and uncertainties.¹⁰ In combination, these features of Australia's insurance law meant that the insurance industry was subjected to a great deal of legislation. Put simply, the legal landscape presented a kind of chaos. Apart from the uncertainty, the applicable law, when found, was usually weighted very heavily in favour of the insurer.¹¹

As a young lawyer, it was sometimes difficult for me to navigate my way through these confusing, and at times inconsistent, provisions and authorities, let alone the many long-winded policy provisions. Many insurers, particularly those with overseas principals, held firmly to terms drafted in the distant past and written far away. For some, this attitude derived from a sense of tradition or out of deference to their overseas principals. Others acted in this way because the antique language, although possibly confusing to a lay

⁶ ALRC 20 at [16].

⁷ Merkin, Robert, *'Reforming Insurance Law: Is There A Case For Reverse Transportation?'*, A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [2.1].

⁸ ALRC 20 at [16].

⁹ ALRC 20 at [16].

¹⁰ ALRC 20 at [16].

¹¹ ALRC 20, citing comments of Mr John Gayler MP, Member of Leichardt, House of Representatives, 4 June 1984.

insured, had what they hoped were “settled meanings”. Still others adhered to old policies and fine print out of sheer administrative inertia.¹²

Although words are the lawyer’s tools of trade,¹³ I have always supported Montesquieu’s view that the language of law should, wherever possible, be simple: using direct expression in preference to elaborate “elegance”.¹⁴ Those who write as they speak tend to express themselves in shorter sentences. They use more Anglo Saxon than French-derived words. The language of the kitchen rather than that of the drawing room. As it stood in 1978, the Australian law of insurance presented a very large challenge for educating those who had to use it. This created a self-perpetuating tradition where lawyers, like many in the insurance industry itself, struggled to understand the proper legal analysis of the insured’s actions (or the legal ramifications of their actions or omissions).

All this is not to say that the Australian insurance industry was breaking down. It was active, dynamic and generally competitive.¹⁵ Those who had been involved in the industry for a number of years had created ways of ensuring that new and emerging issues did not cause too many obstacles for efficient and effective practice. Often, this took the form of stepping back and assessing matters objectively, striving to achieve “the right outcome” based upon ethical standards of “best practice” and a commercial or “business” approach.

As a young lawyer, I often worked for hours, considering statutes and countless court decisions to formulate well-reasoned legal advice, outlining with precision the various ways in which my insurer client could properly refuse a claim. Yet I was met with a response such as: *“We really appreciate your advice. But we just don’t think that refusing this claim would be the right thing to do”*. Considerations of goodwill, honour and customer relationships generally reigned supreme.¹⁶ Although it is always unnerving when clients reject one’s

¹² See further, Kirby, Michael, Foreword to Marks, Frank and Balla, Audrey, *Guidebook to Insurance Law in Australia*, 2nd edition.

¹³ Lord [Alfred Thompson] Denning, *The Discipline of Law*, Butterworths, London, 1979 at 5.

¹⁴ Baron Charles de Montesquieu, *L’Esprit des Lois [The Spirit of the Laws]*, 1748 (Translated by Thomas Nugent), Hafner Press, New York.

¹⁵ See further, Kirby, Michael ‘Insurance Law Reform’, Australian Society of Accountants, Victorian Division, Annual State Congress, 17 November 1982.

¹⁶ See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, *Principles of Insurance Law in Australia and New Zealand*, Butterworths, Sydney, 1991.

recommendations, actions like this gave me a respect for the Australian insurance industry. It is a respect that I retain.

Anyone who has acted for insurers will know that, whatever the law may say on a point, decent conduct and a sense of obligation are commonly living forces in the daily life of insurance companies. Of course, I have no real way of knowing whether those features of insurance practice, which were in part a reflection of the then dominance of the Australian industry by English underwriters, have survived into the present age. Even in the early 1970s, there was some evidence of change. But because the *legal* scales were usually tipped significantly in favour of the insurer,¹⁷ this fact occasionally had devastating effects for an insurance consumer.

Was it not curious, in these circumstances, that the great body of law relating to insurance in Australia was not found in an Australian statute? Federal legislation had been basically restricted and even this gave rise to anomalies and uncertainties.¹⁸ Quite apart from the obscurities and challenges that this 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 and claims managers in the Australian insurance industry. How they trained employees in those days to address, with accuracy, legal disputes over insurance liability is a source of puzzlement.

Before *Sutton*, and before the ICA, the bulk of the private law of insurance in Australia was to be discovered not in the Public Acts of the Parliaments of the Commonwealth or the States but in English text books and in a jumble of cases. I say “English” text books, without a hint of xenophobia, a charge to which I plead not guilty. The fact remains that Australia’s Founders may have had doubts about various matters. Our Constitution may be less than perfect. But they had no doubts that the Federal Parliament should be empowered (save for State insurers operating outside interstate business) to enact general laws in respect of insurance. Yet this had not been done. The Founders offered a potential head of legislative power to support a comprehensive and more modern law of insurance. They realised,

¹⁷ See also the comments of Mr John Gayler, Member for Leichhardt, House of Representatives, Hansard, 4 June 1984.

¹⁸ ALRC 20, [16].

adapting later comments made by Lord Devlin in another context, that it was not much point telling insurance personnel to obey the law if it took a day's research to find out what the law are.

If, like me, the reader can recall the quagmire that was the Australian law of insurance contracts in 1976, they will remember the nearly impossible task it was in those days for consumers to make sense of the applicable law. Insurance was already a large and diverse industry,¹⁹ representing significant economic resources and influence. It was contracting directly with individuals who often knew little or nothing about the meaning and effect of the agreements that they were entering into.²⁰ These realities caused widespread misunderstanding.²¹

In insurance, a customer purchased from an insurer a set of promises which, it was hoped, would never be called on.²² Commonly, the insured did not even try to understand the terms of the contract, unless and until the unfortunate day of necessity arrived. Once that day did arrive, it was a common occurrence that the insured would quickly discover that the contract they had purchased (or at least the legal effect of it) was not as expected. One person in the legal profession, whose practice primarily involved representing consumers, expressed to me a view that seeing insurers conduct business at that time, was like watching sharks prowl in dirty waters²³.

Comments like this reflected the pervasive dissatisfaction that existed among insurance consumers in Australia, especially amongst those insureds who had made claims under their contracts only to have them rejected. This produced a reaction. The insurer became a kind of fair game. In Parliament, it was said that "*ripping off insurance companies [was] as Australian as afternoon tea used to be once upon a time. [It was] part of our national life*".²⁴

¹⁹ ALRC 20 at [4].

²⁰ See further, Kirby, Michael, Foreword to Kelly, David and Ball, Michael, 'Principles of Insurance Law in Australia and New Zealand', Butterworths, Sydney, 1991.

²¹ ALRC 20 at [19].

²² ALRC 20 at [19] and [23].

²³ ALRC 20 at [17].

²⁴ Mr John Spender, Member for North Sydney, House of Representatives, Hansard, 4 June 1984.

By the 1970s, the level of complaints against insurers in Australia was increasing, not just in absolute terms, but also in proportion to the total number of all complaints made to consumer authorities.²⁵ Moreover, this was so although not all consumer dissatisfaction resulted in formal complaints. This may have been because some insureds were convinced, or persuaded by the insurer, that their claim had no legal basis. Alternatively, some insureds may have failed to pursue their complaint because of their ignorance or uncertainty about the available means of redress. Some insureds simply decided that the unequal battle was not worth the time, risk and cost.²⁶

ALRC Insurance Reference

The insurance reference to the ALRC in 1976 is to be understood in this context. Critics and scholars asked why the law of Insurance “should continue to rest mainly on a jumble of unjust precedents”. It became the task of the ALRC to address itself to that law. Armed with wide constitutional powers, the ARLC was recruited to help the Federal Parliament to develop an indigenous Australian approach to the law of insurance contracts. Ought that law to remain the preserve of the initiated few with access to the then leading English textbooks (the first edition of *Sutton* was published during the currency of the ALRC reference in the 1980s)? The ALRC’s insurance reference provided the occasion for robust answers to these questions.

To consider its recommendations, the ALRC assembled a large, representative and conscientious team of consultants from all major branches of the Australian insurance industry: an unprecedented aggregation of experience in the operation of insurance law in Australia.²⁷ All of them volunteered their services without fee. Their reward became that of contributing to an important national objective - clarifying, simplifying and re-expressing insurance contract law in Australia. There were consultants chosen from the offices of the Insurance Commissioner, the Life Insurance Commissioner, the Federal Treasury, the Trade Practices Commission, the Queensland Insurance Commissioner and various industry bodies – both large and small. In addition, the ALRC engaged consultants who put forward the viewpoint of insurance consumers. The ALRC remained focused, at all times, on securing the

²⁵ ALRC 20 at [17].

²⁶ ALRC 20 at [17].

²⁷ ALRC 20 at (xx).

views and experience of relevant industry stakeholders. Its aim was to achieve a balanced outcome for all stakeholders and for the entire community.

I pay a tribute to my colleagues in the ALRC. They played the key parts in preparing the original draft of the Bill for the ICA, appended to ALRC 20. I pay a particular tribute to Professor David St.L. Kelly, then of the University of Adelaide Law School. He became the ALRC Commissioner in charge of the insurance contracts project. He was supported by an outstanding team of commissioners, consultants and staff. The tendency of a training in the common law is to look at all the bits and pieces. There is an old jest. The law, it is said, sharpens the mind by narrowing its focus. David Kelly was a person whose mind was extremely sharp but whose focus was far from narrow. He saw the grand mosaic. He never lost sight of principles and concepts. He was alert to our legal history. But he was also sensitive to changing social, technological and economic circumstances. He was no legal automation. To the contrary, everyone who had anything to do with him will confirm that he was a most charming and hospitable colleague. He was the right man to lead the first major review of insurance law that had ever been undertaken in Australia. In his hands the law governing this vital and strategic national industry was entirely safe.

Professor Kelly did not operate alone. On the Division of the Commission working towards insurance law reforms were lawyers of the highest talent: Professor Alex Castles also of the University of Adelaide, three Queen's Counsel no less – leaders of the Bar, including Mr Brian Shaw QC, then Chairman of the Victorian Bar. In addition, the Commission had the participation of Mr John Ewens, a man with unrivalled knowledge of federal legislation. Over nearly thirty years, John Ewens had drafted most of the federal Bills, eventually as First Parliamentary Counsel of the Commonwealth. He served as a Commissioner of the ALRC. He afforded us his unrivalled experience.

Much of the praise for the original provisions of the ICA belongs to John Ewens; but credit also belongs to Stephen Mason, then an officer of the ALRC and a trained legislative draftsman. Another member of the ALRC staff was the young Michael Ball, another graduate of the Adelaide Law School. In 2010 he was to be appointed a Judge of the Supreme Court of New South Wales. Ken Sutton was one of the most influential of the consultants. Those

who knew best the *old* law and practice of insurance in Australia helped the ALRC to shape the *new*. I reproach myself that no photographs were taken of the many meetings at which we laboured over the reports in their various drafts and over the draft legislation. I doubt if there has ever been collected in a single room in Australia such a concentration of the top talent of knowledge of insurance law. I tremble to think of the special premium the Law Reform Commission should have paid – but did not – against the exigencies of national loss that would have suffered had a bolt from Heaven struck us all down in the midst of our labours. We were to survive. Our progeny, the ICA, was to flourish.

ALRC Work and Reports

Despite much general dissatisfaction, for the good reasons described above, the Australian insurance industry in 1978 remained nearly unanimous in the view that, regardless of any problems that “may” have existed at that time, it was not appropriate to undertake, or even attempt, reform.²⁸ Much like Adam Smith’s “invisible hand” of the market, it was repeatedly asserted that the insurance industry itself was capable of solving many of the problems. It could do so at lower cost than legislative change might impose.²⁹ Insurers typically claimed that reform was not justified. They claimed that it would impede competition. It would prejudice market efficiency.³⁰ It might even harm the industry itself.³¹ Further, it was suggested that seeking to balance the interests of insurers and insureds could result in fewer claims being rejected, thereby increasing the overall cost of obtaining insurance.³² This, so it was said, would result in the honest insured subsidising the dishonest.³³

Industry resistance was not the sole obstacle to achieving law reform. There was a great deal of hostility at that time both towards the ALRC and to the very idea of law reform. Sir John Young, then the Chief Justice of Victoria, although a very capable judge, was unwelcoming to institutional law reform.³⁴ He condemned what he saw as the professional commitment of law reformers always to find faults in the legal system. He pointed out that they were paid to do so. He promoted an opinion that the wisest and most experienced

²⁸ ALRC 20 at [20] to [30].

²⁹ ALRC 20 at [20].

³⁰ ALRC 20 at [20].

³¹ ALRC 20 at [20].

³² ALRC 20 at [20].

³³ ALRC 20 at [20].

³⁴ Young, John, ‘The Influence of the Minority’ (1978) 52 *Law Institute Journal* (Victoria) 500.

lawyers knew that it was generally best to leave the law alone. This was a view that was shared by many people in legal authority at that time.³⁵

Still, the ALRC had its reference. And the chaotic state of the law on insurance contracts called forth the “bold spirits” of law reform³⁶.

The fundamental need for reform was appreciated by the Commission. The basic law of insurance had been laid down 200 years earlier. This had been before the advent of the consumer insurance market and technology of today. Rules were necessary to apply the law to a very different market of parties, in a much more equal bargaining position. The need for a review of the law against the realities of contemporary insurance methods was generally acknowledged. The need, in a vital national industry, for a single Australia-wide law was also generally agreed. It was unreasonable to persist with the confusing mixture of Imperial, Colonial, State and Federal laws and judicial decisions. The achievement of a single and fairly brief national statute, laying down fair insurance practices, should help the insurance industry to know, and uphold, high stands in dealings with its customers.

The reference was provided to the ALRC soon after the election of the Fraser Government in 1975.³⁷ The objective of the reform was to utilise fully, for the first time, the substantial head of legislative power in the *Australian Constitution*.³⁸ The reference came from the Federal Attorney-General, Mr Robert Ellicott QC. He was one of the finest lawyers in the nation and a past Commonwealth Solicitor-General. The reference required the ALRC to provide a report on the adequacy of the law governing contracts of insurance having regard to the interests of the insurer, the insured and the public. It also required the ALRC to recommend what, if any, legislative or other measures were required to ensure a fair balance between the interests of the insurer and those of the insured.³⁹

³⁵ See further, Kirby, Michael, ‘More Promises of Law Reform - An Antipodean Reflection’, Speech to the Law Reform Commission of Ireland, Dublin Castle, Dublin Ireland, 17 July 2007; and Kirby Michael, ‘50 Years in the Law: A Critical Self-Assessment’, based on an address to the legal profession of the Northern Territory in the Supreme Court, Darwin, 16 January 2009 and at the State Supreme Court and Federal Court Judges’ Conference, Hobart, 26 January 2009.

³⁶ *Chandler v Crane Christmas Co* [1951] 2 KB 164 at 178 per Lord Denning.

³⁷ The terms of reference to the ALRC appear in the report: Australian Law Reform Commission, Insurance Contracts (ALRC 20) AGPS, Canberra, 1982, xv.

³⁸ *Australian Constitution*, s 51 (xiv): “Insurance, other than State insurance, also State insurance extending beyond the limits of the State concerned.”

³⁹ See ALRC 20, Terms of Reference at (xv).

The reference resulted in the production of two ALRC reports namely ALRC 16 (*Insurance Agents and Brokers*)⁴⁰ and ALRC 20 (*Insurance Contracts*). The ALRC 20 report afforded a detailed scrutiny of the adequacy and appropriateness of the principles and statutes governing insurance contracts, as they then stood.⁴¹ The report involved a thoroughgoing investigation of the law of insurance contracts. It covered virtually every aspect of that discipline,⁴²

The ALRC's views on the balance to be struck were stated initially in a discussion paper, published in 1979.⁴³ This was given widespread publicity. It was followed by a series of public hearings and seminars organised by Australian Insurance Institutes in conjunction with the ALRC. At these hearings, community and industry viewpoints were put directly to the ALRC, as well as expressed in seminars and in public submissions. The ALRC also had the benefit of a detailed submission from the Australian Treasury. That submission was given very careful consideration because of the potential economic implications of any changes to insurance contracts law.⁴⁴ The cost of reform was a major argument raised by those who were opposed to change. The ALRC obviously needed to address criticisms in formulating its final recommendations.

Because of the foregoing procedures of consultation, the ALRC was well placed to propose an appropriate balance between the interests of the insurer, the insured and the public. Although the word "balance" (or a derivative of it) appears 31 times in the course of ALRC 20, it is a word of malleable meaning - rather like 'moving forward' or 'paradigm'. In the end, each decision in the project had to be assessed against the background of relevant considerations of legal history, authority, policy, principle and economic as well as empirical data, insofar as these were available to the ALRC.

⁴⁰ ALRC 16 was implemented by the *Insurance (Agents and Brokers) Act 1984* (Cth), which has now been repealed and re-enacted as Chapter 7 of the *Corporations Act 2001* (Cth) under amendments made by the *Financial Services Reform Act 2001* (Cth).

⁴¹ ALRC 20 at (xix).

⁴² Merkin, Robert, 'Reforming Insurance Law: Is There A Case For Reverse Transportation?', A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, at [2.2].

⁴³ ALRC Discussion Paper 7, *Insurance Contracts*.

⁴⁴ ALRC 20 at (xxi).

Because of the initial opposition of the insurance industry, 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 the careful process of consultation, discussion, debate and statutory drafting, the ALRC was able to bring the project to conclusion in 1982, with the publication of its report on *Insurance Contracts*.⁴⁵ It tackled many of the vexed areas of the law, including fraudulent exaggeration;⁴⁶ non-disclosure;⁴⁷ requirements of good faith;⁴⁸ 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.⁴⁹

ICA 1984

The report, ALRC 20, was tabled in the Australian Parliament on 14 December 1982. The then Australian Labor Party Opposition in the Federal Parliament announced that, if elected to government, it would give “immediate priority” to the consideration of the ALRC proposals, with a view to the early implementation of the major recommendations.⁵⁰

A federal election took place in March 1983. It resulted in the defeat of the Fraser Government and the return of the Hawke Labor Government. The new Federal Attorney-General, Senator Gareth Evans QC (himself formerly a Commissioner of the ALRC), approached me to ask if any proposals had been drafted by the ALRC, in the form of legislation, that could be considered for immediate introduction into the Parliament. This was in the interval before the new Government's own legislation was ready. I recommended the Insurance Contracts Bill, annexed to ALRC 20⁵¹. This demonstrated once again the advantage of annexing draft Bills to ALRC reports - as was the invariable ALRC practice in those days. Doing this helped both to refine our recommendations and to hasten their passage into law.

⁴⁵ ALRC 20, above n. 4.

⁴⁶ See (2011) 22 *Insurance Law Journal* 1 at 6.

⁴⁷ *Ibid* at 7.

⁴⁸ *Id*, 9.

⁴⁹ *Id*, 10.

⁵⁰ See the Australian Labor Party Policy Speech dated 16 February 1983 and the Australian Labor Party's Business Regulation Policy Launch Speech dated 24 February 1983.

⁵¹ See further, Kirby, Michael, 'Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume', Sydney, 23 February 2005.

On 1 December 1983, Senator Evans introduced the Insurance Contracts Bill 1983 (Cth) into the Parliament. The Government allowed the Bill to lie on the table for three months to permit still further industry and public comment.⁵² It then scheduled the second reading debate to take place in March 1984. At the Opposition's request, that debate was adjourned until May 1984. In April 1984, representatives of the Attorney-General and the Treasurer met with the Insurance Council of Australia to discuss their proposed amendments.

By 30 April 1984, a number of (primarily minor) amendments had been drafted and presented to the Opposition. Further debate then occurred in the Australian Senate on 2 and 7 May 1984, and in the House of Representatives on 29 May and 4 June 1984. *Hansard* records that some Parliamentarians used this opportunity to take issue with the contents of ALRC 20. A few did so, immaterially, because the reforms did not deal with particular areas of insurance law of interest to them (such as reinsurance, workers' compensation, compulsory third party insurance, aircraft insurance, etc). However, these subjects had been excluded from the reference, in some cases because of a lack of constitutional power. Some critics remained skeptical. They suggested that the proposed legislation would only serve to provide a feast for lawyers.⁵³

At this stage, the path was made rockier by an attack on the Bill by the Insurance Council of Australia. In 1983, it published a comment: '*ALRC Fuelling Dishonesty?*'. This comment claimed that:

"[t]he ALRC ... proposes changes to insurance contracts which would be in a policy owner's favour to the extent that the validity of the policy would be upheld whether or not there be obvious cases of misrepresentation or non-disclosure. ... What the ALRC is saying, in effect, is that it doesn't matter if insurance customers provide untruths or withhold essential information when applying for an insurance policy. The attitude seems to be that while fraud is not on, being a 'little bit' fraudulent is".

⁵² See further, Kirby, Michael, 'Australia: Major Reforms of Insurance Law', *International Association for Insurance Law Newsletter* May June 1984, March 1984.

⁵³ See, for example, the comments of Mr John Spender, Member for North Sydney, and Mr Ian Wilson, Member for Sturt, House of Representatives, *Hansard*, 4 June 1984.

The ALRC sought to counter this criticism by repeating, in the public domain, the arguments that had been explained in private and in ALRC 20.⁵⁴ Fortunately, these criticisms did not deflect the Government from its purpose, which was to implement the ALRC's proposals without delay.

A number of strong supporters of the reforms began to emerge. They explained that the reforms went a long way towards ensuring that the industry and consumers in Australia would secure a more professional and modern relationship by providing a basis for insureds to appeal to the courts to contend that they had been treated unfairly or harshly by the insurer.⁵⁵ The mutuality of the obligation to act towards each other in accordance with the principles of the utmost good faith was also recognised. Although some amendments were made to the Insurance Contracts Bill during the course of Parliamentary consideration, they were mostly of limited significance. They were principally addressed to the recommendations for a process of adjustment in recovery for some cases of non-disclosure and misrepresentation.⁵⁶ The Insurance Contracts Bill 1984 (Cth), as amended, eventually passed through all parliamentary stages and received the Royal Assent on 25 June 1984. It emerged in a form that followed very closely the draft legislation annexed to ALRC 20.⁵⁷ In 1983, I was transferred from the Arbitration Commission to the Federal Court of Australia and in 1984 I was appointed President of the New South Wales Court of Appeal. However, by then the ALRC work on the insurance contracts reference was concluded.

Before the commencement of the ICA, numerous well-attended seminars, workshops and conferences were held throughout Australia to ready the insurance industry and the legal profession for application of the new law.

In February 1985, the Business Law Education Centre held a workshop on "*The New Insurance Contracts Act*". This was led by leading professional experts, Michael Gill and Geoff Masel. In May and June 1985, the Australian Insurance Law Association (AILA) offered

⁵⁴ See further, Kirby, Michael, 'Insurance Reform: Getting it Right', The Insurance Institute of Queensland, Luncheon Meeting, 26 July 1983.

⁵⁵ Ibid.

⁵⁶ Id. 12-13.

⁵⁷ *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd* (2003) 214 CLR 514 at [46] per Gummow and Hayne JJ.

a series of lectures on the ICA. Those were presented by Mr John Brownie QC, an experienced barrister (later a judge). Such was the popularity of this lecture series that it bankrolled many of AILA's later ventures. This is just another way of demonstrating that law reform often makes good economic sense.

The ICA commenced operation on 1 January 1986.⁵⁸ That was nine years, three months and twenty three days after the ALRC received its reference. But it was more than eighty five years after section 51(xiv) of the *Australian Constitution* had been adopted, envisaging that the Federal Parliament could enact a general law to govern insurance. The journey of law reform is often a slow and painstaking one. In the case of the ICA the involvement of AILA and the insurance industry was to prove critical for the next chapter of the story. In a diverse industry, translating law reform reports, and even enacted legislation, into substantive reforms constituted a major challenge. This too was surmounted and a project of practical change was gradually undertaken.

Later ICA Amendments

Since its original enactment and proclamation, the ICA has been amended on twenty two occasions. The majority of the amendments have been minor in nature. However, there were two substantive amendments worthy of mention. They were on the issues of non-disclosure in relation to eligible contracts, and of insurable interest.

Non-disclosure in relation to eligible contracts

The *Insurance Laws Amendment Act 1998* (Cth) introduced section 21A into the ICA. That provision related to disclosure of specified matters in relation to eligible contracts of insurance.⁵⁹ This section was in response to an opinion that simply warning insureds of the duty of disclosure was not sufficient, in actuality, to enable them to appreciate its scope and significance. What was required, it was argued, was a provision that placed the onus on insurers to ask specific questions rather than relying upon non-disclosure by the insured. Failing a request, the duty of disclosure was to be treated as having been waived.

⁵⁸ *Gazette 1985*, No S487 at 1.

⁵⁹ See also regulation 2B of the *Insurance Contracts Regulations 1985* (Cth).

Section 21A drew a distinction, for the first time in the context, between consumer and commercial insurance. It applied only to an “eligible” contract of insurance.⁶⁰ It followed that, if no specific questions were asked by the insurer, there can be no duty of disclosure at all. Insurers are thereby discouraged from simply asking generalised or open-ended questions requiring disclosure of “any other matters” that the insured may think relevant to the insurer’s decision of whether or not to accept the risk.

This amendment was generally conformable with the spirit of the ICA. It was designed to improve the real flow of communication between insureds and insurers and to acknowledge that some insureds “lack the knowledge and awareness to fully understand those issues which may be of significance to an insurer”.⁶¹ A question arises as to why this section was added to the ICA only to safeguard those insureds whose intrinsic circumstances meant that they lacked the requisite knowledge. And why the same consideration of the insured’s circumstances was not accepted more generally, as necessary for the purposes of section 21. These issues fell for consideration in the further amendments to the ICA in 2013.⁶²

Insurable interest

Section 16 of the ICA abolished the necessity for an insurable interest at the inception of certain contracts of insurance, excluding life insurance. This followed the majority recommendation appearing in ALRC 20.⁶³ However, life insurance was subsequently brought into line with this reform by the repeal of section 16(2) of the ICA and the insertion of a revised version of section 18 in the ICA.⁶⁴ So much followed once it was accepted that the general law of gaming and wagering was sufficient to ensure that the insured had an interest of some kind in the life insured, so as to render the contract a valid one. This belated reform reflected my dissenting opinion in ALRC 20.⁶⁵ Naturally, it is always good to see one’s dissents given effect by the Parliament. It should happen more often.

⁶⁰ See, generally, *the Insurance Contracts Regulations* 1985 (Cth).

⁶¹ See Explanatory Memorandum to the *Insurance Laws Amendment Bill* at [117], as well as the Insurance Council of Australia’s ‘Submission on Second Stage Issues Paper – Review of the *Insurance Contracts Act* 1984’, April 2004.

⁶² See *infra*, Chapter 7, paras. 000.

⁶³ ALRC 20 at [145].

⁶⁴ See also *The Life Insurance (Consequential Amendments and Repeals) Act* 1995 (Cth).

⁶⁵ ALRC 20 at [146].

The retention of the requirement of “insurable interest” had earlier introduced an unnecessary distinction between life and general insurance. I acknowledge that this amendment did not meet with universal approval. Recently, the English and the Scottish Law Commissions have stated:

*“There is an instinctive dislike of allowing strangers complete freedom to take out a policy on another individual’s life. ... Individuals are uncomfortable at the thought that people who do not wish them well can take out policies on their lives. Taking out an insurance policy on someone’s life could be used as a threat”.*⁶⁶

I understand this view; but I do not agree with it. Nor, in the end, did the Australian Parliament.

Judicial Examination of the ICA and Follow-up

In this chronology, I now reach the time by which I was to leave the ALRC and to return to a full-time judicial role. In accordance with convention, I shall restrain my natural desire to revisit cases in the New South Wales Court of Appeal and in the High Court of Australia in which I was in the majority (pointing to my own wisdom and to that of my colleagues). I shall leave alone cases in which I felt obliged to dissent, refraining to reargue battles long ago and far away.

After my appointment to the High Court of Australia in 1996, I participated in 9 decisions concerned with the meaning and operation of the ICA.⁶⁷ Construing the comparatively clear and conceptual provisions of the ICA was a more pleasant task than embarking upon the meaning of much federal tax legislation in Australia and the particularly distasteful statutes on superannuation.⁶⁸ The business of the law today, including in courts of appeal and in the High Court of Australia, mainly involves statutory interpretation. Most of the decisions on the ICA fell out in ways that upheld the basic objectives of ALRC report 20. The shift by the

⁶⁶ English and Scottish Law Commissions, ‘Issues Paper 4: Insurable Interest’ at *7.39+ and *7.40+.

⁶⁷ *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *Moltoni Corp Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149; *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* (2003) 214 CLR 514; *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (2003) 214 CLR 604; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; *Rich v CGU Insurance Ltd*; *Silbermann v CGU Insurance Ltd* (2005) 214 ALR 370; *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 and *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103.

⁶⁸ For example *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 118-119 [67].

High Court of Australia by to a greater emphasis upon the purposive construction of legislation assisted in securing this outcome.⁶⁹ Several cases mentioned in this new edition of *Sutton* illustrate the importance of this new approach as it has been applied in the context of insurance law. Once the governing law was changed from common law principles and superseded Colonial, State or earlier Federal legislation, the commencing point for legal analysis necessarily became the new legislation (ICA). It was not the previous law. Upon this matter, the High Court of Australia has repeatedly and unanimously expressed itself in the most emphatic of terms. This is why earlier editions of *Sutton* have necessarily been overtaken by the enactment of the ICA. It is why this new edition is invaluable. Particularly because it is up to date, including the growing body of case law together with the text of fresh amendments of the ICA and the expanding decisional law on that Act.

One development which is noted and examined in this new edition concerns the slow process of reviewing the ICA after 1998, and how that Act had operated in Australia's insurance market in the first 20 years. In 2003, a committee of inquiry constituted by Mr Alan Cameron and Ms Nancy Milne, examined the legislation and reviewed the ICA under several headings.⁷⁰ On the whole, the review accepted the beneficial operation of the ICA in Australia.⁷¹ The result has been the enactment of a number of highly specific legislative amendments on particular sub-topics of the relevant law.

I will not pause to examine now the merits and operation of the reforming legislation. This is examined and explained in this book. Of course, there is a danger that tinkering with, and altering, the text of the ICA by statutory amendments, will reduce the conceptual clarity of the ALRC's design. In a parliamentary democracy like Australia, no area of the law stands still, least of all the law governing a dynamic industry such as insurance - of great importance to the national economy. Least of all where technology, consumer expectations and economic consequences combine to produce voices demanding further reform. Having

⁶⁹ *CIC Insurance Ltd v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Insurance Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78].

⁷⁰ See, for example, Cameron, Alan and Milne, Nancy, Review of the Insurance Contracts Act. See also Insurance Council of Australia, 'Submission in respect of Review of the Insurance Contracts Act 1984 – Issues Paper on Section 54, Letter to Senator Coonan and Ross Cameron MP dated 28 May 2004 at 2.

⁷¹ Cameron, Alan and Milne, Nancy; 'Review of the *Insurance Contracts Act* 1984 Final Report on second stage: Provisions other than section 54', June 2004 at (iv).

revived, in this volume, the *Sutton* text, it must be expected that the authors (and in due course their successors) will keep a watchful eye on still further statutory amendments and decisions. Doubtless these will demand new supplements and new editions.

The recent amendments to the ICA, enacted by the Federal Parliament in 2013, require an up to date text. This is where the new edition of *Sutton* comes to our aid. It lifts our confidence, precisely because it is right up to date. It incorporates reference to all the new and sometimes puzzling provisions of the recent amendments. It traces their statutory genealogy. It provides analysis that is verbal, historical and policy-orientated. Just when we were thinking that insurance contracts law was at risk of returning to the impenetrable chaos that preceded the ICA 30 years ago, rescue is at hand. The authors provide their insights and analysis. Sweet reason is restored. At least it is restored until further amendments demand fresh work on the exposition.

A Law to Cherish

Insurance law is interesting and intensely practical. It is constantly presenting new and puzzling problems. The variety of fact situations is virtually infinite. The variety of insurance contracts is ever expanding to meet new industry markets. The sources of relevant data enlarge all the time. Even some contracts of indemnity, that the parties almost certainly never conceived of as having an insurance character, may fall within the textual ambit of the ICA.

In my own legal journey, I have always cherished my early associations with insurance law, the insurance industry and the lawyers who advise and challenge it. I did so as an articled clerk; as a young legal practitioner; as a law reformer; and as an appellate judge. It is an area of the law with a most interesting history and not a few colourful characters. It addresses an industry of great economic importance. It now boasts a substantial and national reforming statute containing innovations that work well and of which Australians can be proud. It has continued to witness a constant flow of challenging,

puzzling and professionally remunerative cases reaching our highest courts. It serves people in moments of great need. What more can one ask for in the law?

Sydney

1 October 2014

M.D. Kirby