GUIDEBOOK TO INSURANCE LAW IN AUSTRALIA

BY FRANK MARKS AND AUDREY BALLA

FOREWORD TO THE SECOND EDITION

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The Hon. Justice Michael Kirby CMG
President of the Court of Appeal of New South Wales

Portia, Lord Mansfield and English Insurance Law

As the authors point out in the opening chapter, forms of insurance appear in the historical records of ancient times. Insurance as we now know it began to flourish in Italy from the 14th Century. The English have long been fascinated by gambling and wagering, as many early cases and statutes show.[1] Perhaps it was this feature of English culture (which we have certainly inherited in Australia) which explains the early world-wide adventures of the English, out of which grew the British Empire. Perhaps it helps to explain the early predominance of the English in the entrepreneurial activities which followed the first Industrial Revolution. It is surely one of the reasons why insurance, copied from the Italian precursors, took root and flourished in the City of London. To this day the City of London profoundly affects a world wide industry. Its influence on the insurance market of Australia remains dominant. With its practices and traditions have come a jurisprudence largely developed in the English courts over 200 years. The beginning of that jurisprudence commenced even before Lord Mansfield's time as any reader of Shakespeare's Merchant of Venice will know. Portia, it will be remembered

demonstrated vividly that Shylock's insurance bond was to be construed contra proferentem:

> PORTIA: Tarry a little: - there is something else -
> This bond doth give thee here no jot of blood;
> The words expressly are, a pound of flesh;
> Then take thy bond, take thou thy pound of flesh;
> But, in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the State of Venice."

There would, of course, have been other legal problems were a modern Bassanio to negotiate a similar insurance contract with a latter day Shylock Inc. I will not tarry to explore these. Portia's famous plea has entered the consciousness of English-speaking people. This book provides an elaboration of the modern rules which govern in Australia the contemporary relationships of insurers and insureds.

Two reforming Australian statutes

The occasion for the second edition is the enactment by the Australian Federal Parliament of two statutes which will necessarily have a profound effect on the insurance industry and insurance law in Australia. I refer to the Insurance Contracts Act 1984 (Cth) and the Insurance (Agents and Brokers) Act 1984 (Cth). These two statutes arise out of reports of the same name published by the Australian Law Reform Commission respectively in 1982 and 1980. At the time of their publication, I was the Chairman of that Commission. I took an active part in the processes of consultation which led to the two reports, with their draft legislation which have now, substantially, passed into Australian law. The principal credit for this notable achievement in national law reform must go to Professor David St.L Kelly, one of Australia's foremost legal

scholars. It is doubtless because of my participation in the Australian Law Reform Commission's projects that I have been asked to offer this foreword. It is because of my long association with one of the authors that I agreed to do so.

Frank Marks was, in fact, the first person in the law with whom I worked closely on a daily basis. We were articled clerks together. He was there, with a year's experience under his belt, on the very day I arrived to commence my articles of clerkship. Conscientiously he set out to teach me "the ropes". Because of the nature of our masters' legal practice, we were soon embroiled in insurance disputes - and disputes with many insurers. It would be easy, in middle years, with successful professional practice behind one, to settle down to respectability; company directorships and a few days in the law alternating with sailing and golf. Not so for Frank Marks and his wife Audrey Balla. They have put together this compilation of basic principles of insurance law. They have revised their earlier text thoroughly to take into account the provisions of the two new Federal statutes. Such a thorough revision is necessary because, as this edition demonstrates, the changes which have been introduced, whilst not revolutionary, are substantial and most pervasive. There is scarcely a nook or cranny of insurance law which has not been invaded by the reformers' scrutiny.

Were it not for the beneficial changes which the two reports and consequent legislation have introduced I would feel apologetic to my old friend for having taken my part in such a far reaching change which necessitated, effectively, the rewriting of this book. That there was a need for reform is

demonstrated beyond debate to any reader who cares to obtain copies of the two law reform reports referred to. Those books should themselves become best sellers. They should be companions to any practice book on insurance law. Indeed, their future in this regard is assured by the provision of Federal legislation which permits courts (whatever the position might otherwise be at common law[2]) to have regard to the law reform reports which preceded the reform statutes.[3] As I recently had occasion to point out[4], care must be taken in this connexion to note any changes introduced in the legislation, when compared with proposals put forward by the Commission. Numerous changes were introduced before the Federal legislation was finally introduced into Parliament, during its passage and even subsequently.[5] By the same token, the thrust of the reforms enacted reflect overwhelmingly the proposals advanced by the Law Reform Commission.

The Government was persuaded to act on the Commission's reports for the reasons given by the then Attorney-General Evans.[6] Although, as this book asserts, much still remains to be done to change practices, procedures and forms of the Australian insurance industry to accord fully with the new regime, the introduction of the new legislation has been remarkably smooth. This is doubtless a tribute to the painstaking consultation followed by the Law Reform Commission, the further consultation by the Government and the maturity and good sense of the insurance industry which could see in the reform package many beneficial changes and overdue reforms.

The flow of information and standard cover

The chief benefits of the new legislation are, as the

authors of this book point out, the insistence placed throughout the Insurance Contracts Act, in particular, upon the provision to the insured of information necessary for him or her to make informed decisions relating to insurance. The flow of information between insurer and insured has always been essential to a fair assessment of the risk and the setting of a premium by the insurer and a fair appreciation of the cover gained, and of the cost of it, by the insured. Even before the 1984 legislation in Australia, steps had been taken, under commercial pressure, within the Australian insurance industry to provide more information to insureds and to incorporate insurance contracts in so called "plain English" policies. But these moves were not universal. Many insurers, particularly those with links overseas, clung to policy terms of great antiquity. Some did so out of a sense of tradition or out of deference to their overseas principals. Others did it because the antique language, although confusing to a layman, had "settled meanings" ascribed to the words by decisions of courts over many years.[7] Still others adhered to old policies and fine print out of sheer administrative inertia.

One of the most important aspects of the Law Reform Commission's report on insurance contracts was the empirical survey of the differences in policy provisions demonstrated by a sampling of insurance policies collected from the major insurers in Australia. Variety and difference are valued attributes of a free society. Competition by reference to differential benefits is an important and often useful feature of a free market economy. But the Law Reform Commission's report showed so many small but important differences between

policies in areas of insurance which ordinary citizens frequently have recourse to, that the question arose whether insureds were conscious of the differences and sufficiently informed of the true scope of their cover. This empirical research led to what is probably the most distinctive feature of the Australian legislative reform. I refer to the establishment of "standard cover"[8] in six classes of common "consumer" insurance. Recognising that, whatever the law might say and insurers might do, many insureds will not read their policies, the Law Reform Commission proposed (and the legislation enacted accepts) that standard protection should be assured. Insurers may still compete by offering additionial protections and benefits. But they may only derogate from the standard, if they provide for the informed choice of the insured.

There are many other reforms introduced by the Insurance Contracts Act 1984 which are examined in this book. They relate to the duties of disclosure[9], consequences of fraudulent misrepresentation[10], the cancellation of policies[11], the operation of averaging[12], and the protection of third parties with an interest in the insurance.[13]

The continuing dynamic of legal change

The mention of third party rights draws attention to the recent decision of the New South Wales Court of Appeal in Trident General Insurance Co Limited v McNiece Bros Pty Limited.[14] There the Court held that the beneficiary of a liability insurance policy, although not a party to the policy, could sue at common law on the insurance contract. It was held that it was not necessary for the beneficiary to have given

legal consideration for it to succeed. That decision was made on the law as it existed before the Insurance Contracts Act 1984. The authors include a new chapter on third party interests. Doubtless there will be further developments in this field as the general law of contract continues to change and develop.

Within a week of the McNiece decision, another decision of the Court of Appeal in Barclay Holdings (Aust) Pty Limited v British National Insurance Co Limited & Anor[15] explored the common law test relating to the duty of an insured to disclose material facts to the insurer. This question is also examined in the present book.[16] The Barclay Holdings case demonstrates how, in insurance law, even long established principles when thrown up with new facts require careful re-examination, drawing on the fundamental principles of insurance law.

Although the two new Federal statutes, which have occasioned this new edition, require re-examination of many basic principles of insurance law, and the rewriting of substantial portions of this book, the reforms introduced are, in large part, an extension of, and not a departure from, our general insurance law inherited from England. As the McNiece and Barclay Holdings cases demonstrate, there will be plenty of room, even in the new regime, for legal ingenuity to tackle the language of the new statutes. So far there have been few cases in the courts to explore the new provisions.[17] Doubtless loopholes will be detected. Unintended consequences will be exposed as is inevitable with any major reforming legislation, no matter how carefully crafted.[18] But the provision of Australia's basic insurance law in national legislation,

operating uniformly throughout Australia will clearly have commercial advantages for an industry which is now substantially national in its operations. Federal legislation, including the provisions of the Insurance (Agents and Brokers) Act will facilitate the better organisation of the insurance industry throughout Australia. It may be hoped that the new legislation will enhance the training of insurance personnel and re-inforce the standards of honesty, integrity, fairness and solvency which must be attained by this uniquely important industry.

Achieving reform in practice

A noble Law Lord once said at a law conference that it takes at least a decade for major reforms to become known throughout the legal profession - such is the enduring impression which law school lectures leave on the collective mind of the practicising lawyer.The beginning of the process which will translate reform ideas from Law Reform Commission reports and statute books to the practice of every day life is the provision of up-to-date manuals which are available for ready consultation when a problem arises. This is where I see the present text fulfilling a useful function with its numerous references to the old law and case books and its incorporation of references to relevant provisions of the new Federal statutes. It should contribute to the education of the legal profession, the insurance industry and consumer groups throughout Australia. It may influence insurance law reform in New Zealand, where the industry is currently examining the Australian changes. It may even contribute to further reform in a dynamic field of the law.

The book contains a number of insights into insurance law which are novel. Reading it, I was transported back to that first day of my articles when Frank Marks contributed to my earliest instruction in legal practice. It is a good thing that he and his wife have continued their interest in the development of the law and in its exposition. In every branch of the legal profession, whether in the highest courts or in every day practice, what is important is not so much a detailed knowledge of applicable legal rules, helpful though that may be. Where necessary, such rules can be obtained from computers and text books such as this one. Rather it is vital that there be an understanding of the basic principles which have to be applied. When those basic principles are significantly changed by major reforming legislation, it is critical that the legal profession, and the other bodies and individuals most closely affected, should alert themselves to the thrust of the reforms made and have handy a well laid out text book which provides ready access to the new regime. This is what the authors have set out to do in this text. Because it will contribute to the process of actual reform of insurance law and practice which was begun in the Law Reform Commission nearly a decade ago, I congratulate the authors and thank them for their effort.

M.D. KIRBY

Court of Appeal, Sydney

8 June 1987

FOOTNOTES

1. Tahapi Pty Limited v Avery, (1986) 6 NSWLR 138, 152 ff.
2. Attorney-General v Maksimovich (1985) 4 NSWLR 300, 304 f.
3. See Acts Interpretation Act 1901 (Cth), s 15AB(2)(b). See below, para 301.
4. The Regional Director of Education & Ors v The International Grammar School Sydney Limited, unreported, CA 19 December 1986; (1986) NSWJB 4.
5. See Statute Law (Miscellaneous Provisions) Act (No 2) 1986 (Cth) and comment by D. St.L Kelly, "Amendments to the Insurance Contracts Act 1984 - Misuse of The Omnibus Bill Procedure" in A. Bus L Rev, forthcoming.
6. See below, para 301.
7. See Australian Casualty Co Ltd v Federico (1986) 66 ALR 99, 106 (Gibbs CJ); (1986) 4 ANZ Insurance Cases para 60-712 at p 74243.
8. See also below, para 1202.
9. See below, para 703.
10. See eg below, para 812.
11. See below, para 1207.
12. See below, para 1511.
13. See Chapter 16.
14. Trident General Insurance Co Limited v McNiece Bros Pty Limited, unreported, CA, 31 March 1987; (1987) NSWJB 51.
15. Barclay Holdings (Aust) Pty Limited v British National Insurance Co Limited & Anor, unreported, CA, 3 April 1987; (1987) NSWJB 50.
16. See below, para 705 ff.

17. See the decision of Beach J in Evans v Sirius Insurance Co Limited (1986) 4 ANZ Insurance Cases, para 60-755, noted below, para 708.

18. See eg the suggestions below, paras 519, 534.