

FOREWORD

PRINCIPLES OF INSURANCE LAW

IN AUSTRALIA AND NEW ZEALAND

BY DAVID ST L KELLY & MICHAEL L BALL

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*Principles of Insurance  
Law*

*In Australia and New  
Zealand*

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# Contents

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|  | <i>Page</i> |
|--|-------------|
| <i>Foreword</i>  | v           |
| <i>Acknowledgments</i>                                     | xii         |
| <i>Preface</i>   | xiii        |
| <i>Table of Cases</i>                                      | xv          |
| <i>Table of Statutes</i>                                   | xlv         |
| CHAPTER 1 — The Concept of Insurance                       | 1           |
| 2 — Insurable Interest                                     | 22          |
| 3 — Misrepresentation and Non-disclosure by<br>the Insured | 49          |
| 4 — Misrepresentation and Non-disclosure by<br>the Insurer | 147         |
| 5 — Agents and Brokers                                     | 181         |
| 6 — Terms of the Contract                                  | 229         |
| 7 — Construction of a Contract of Insurance                | 299         |
| 8 — Interests of Third Parties                             | 362         |
| 9 — Commencement, Lapse and Cancellation                   | 392         |
| 10 — Claims  | 418         |
| 11 — Subrogation   | 479         |
| 12 — Other Insurance, Double Insurance and<br>Contribution | 516         |
| 13 — The Regulation of Insurance                           | 545         |
| <i>Index</i>   | 589         |
|  | xi          |

# Foreword

The Hon Justice Michael Kirby AC CMG\*

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## *Rules for an Important Modern 'Game'*

Ambrose Bierce, in his book of irreverent definitions, described insurance as:

An ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he has beaten the man who keeps the table.

I have played this game both as a customer and as a lawyer. Its fascinations deepen with an extended acquaintance with the rules of the game. This is a book about those rules. It is written by two lawyers who played an important part in altering the rules in Australia. They are therefore singularly well placed to provide a book on insurance law. When it comes to the Insurance Contracts Act 1984 (Cth) the authors can truly say that they were 'present at the creation'.

The modern practice of insurance, and therefore the modern rules of law, grew out of the inescapable risks of sending and bringing goods across the sea. The perils of the sea, and its sturdy adventurers, and of the flimsy craft, as well as the ships of princes and pirates who ventured upon the sea, presented the circumstance from which grew an enormously important international industry. The hazards of nature and of human beings presented merchants with risks which they found unacceptable. When their ventures came home with bounty, they were rich indeed.<sup>1</sup> How to take the profits of the flimsy vessels which came home from the spice islands and other exotic far-away places yet at the same time to guard against the disastrous losses occasioned by shipwreck, disappearance, piratical savagery and encounters with unfriendly foreigners? The answer was insurance.

Because of England's early modern ascendancy, with the Netherlands, in trade in goods by sea, it was not surprising that the common law of insurance in England developed from decisions made on what we would now call marine

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1. Barbara W Tuchman, *The First Salute* 32-33, Cardinal, 1989.

insurance.<sup>2</sup> At first, the development of English insurance law had to do battle with a certain disinclination of the courts to lend their aid to adjudication upon what were seen by some as wagering contracts. Like Bierce, some of the early judges saw arrangements for insurance as a form of gambling. They complained about the waste of valuable judicial time. But gambling and wagering contracts were not, as such, prohibited by the common law. A wager was not illegal. It was justiciable. And therefore, often with bad grace, the courts would adjudicate upon insurance wagers and sometimes uphold their validity.<sup>3</sup> The Courts of Chancery, however, would sometimes cancel policies on proof that the participants had no interest in the subject matter.<sup>4</sup> Eventually the Marine Insurance Act 1745 forbade assurances without interest.

The modern English law of insurance thus developed by the inter-action of statutory provisions and common law decisions. With the flag which accompanied the fleet that built the British Empire, went trade. With that trade came the common law of insurance. If Egypt was the gift of the Nile, the common law of the Empire was an abiding gift of British imperial and trading interests. This book concerns the modern adaptation of that gift and the establishment of the new relationship between the common law and reformatory legislation. For the latter, the authors of this book are largely responsible.

### *Insurance: Honour, Ethics and Big Risks*

I have always found insurance law interesting. From my earliest days as an articulated clerk, later as a solicitor and then as a barrister, a good part of my work involved battles against and for insurance companies. Like many lawyers, I have seen the problem of insurance disputes from both sides. Although, occasionally, a claim is shown to be fraudulent, far more numerous are the disputes about the existence of insurance cover, the extension of a cover which exists to the loss which has occurred, the compliance by the insured with its duties under the policy and the amount that can be recovered having regard to the policy's provisions. When a loss occurs it can be devastating to an individual or a small business enterprise. Like many a lawyer, I have faced across the desk an anxious client who knew that there was a policy but had never troubled, until the loss, to examine the precise terms which the policy contained. Then comes the urgent search through the words of the policy, including its exclusions, to see whether the claim for insurance can be sustained. The battle between the individual citizen or the small corporation and the insurer ensconced in its large city building of marble and steel is inescapably an unequal one. The insurer is well funded, well lawyered and sometimes well able to ruin the insured who, faced with a loss, may not be in a financial condition to add to its burdens the risks and costs of litigation.

2. See W S Holdsworth's *History of English Law* (2nd ed), vol 8, 294ff. Cf Halsbury's *Laws of England* (4th ed), vol 25 (Insurance) 9.

3. See, eg, *Jones v Randall* (1774) 954 Cowp 17, 98 ER 944. See discussion in MacGillivray and Parkington, *Insurance Law* (8th ed), (M Parkington et al, eds) London, Sweet & Maxwell, 1988, 15. Legislation was enacted in England against fraudulent and excessive gambling, betting and sports or games. See 16 Car 2 c 7. But this legislation did not affect the validity of wagering policies of insurance.

4. *Martin v Sitwell* (1691) 1 Show 156, 89 ER 509.

On the other hand, for five years I acted, as a solicitor, for seven large insurers — Australian and English. With very few exceptions, I always regarded their approach to insurance claims to be honourable and ethical. Many were the cases where I advised a legal entitlement to deny indemnity but the claims manager or officers higher up felt that it would not be 'right', in all the circumstances, to do so. Considerations of good will, customer relationships and corporate reputation in an age of investigative journalism and consumer watchdogs imposed checks on the rejection of claims about which the law books were perfectly silent.

### *Insurance Law Reform in Halcyon Days*

In 1976, the Federal Attorney General, Mr R J Ellicott QC, gave the Australian Law Reform Commission a reference requiring it to report on the Australian law of insurance. I was by this time the Chairman of the Commission. I brought to my approach to the task assigned the experience of dealings with insurers and insureds which gave me a perspective of the viewpoint of each. The Commissioner assigned to take charge of the reference was Professor David St L Kelly, a full-time member of the Commission then on leave from the University of Adelaide. The other Commissioners included barristers and academics. We also had the priceless help of Mr John Q Ewens, for a long time First Parliamentary Counsel of the Commonwealth. In charge of research was Mr Michael Ball, a young lawyer-recruited to the Commission from Adelaide who quickly buried himself in the detail of insurance law.

Gathered around the Commissioners and their research team was a most remarkable collection of consultants. There were judges and statutory office-holders, academics and community representatives. But the most numerous were representatives of every branch of the insurance industry. I observe that in the text of this book I am said, in one case, to have offered an opinion less robust than my colleagues.<sup>5</sup> Well, there was no lack of robust comment from the insurance industry as the Law Reform Commission took its proposals for reform through numerous phases and a multitude of meetings with the consultants and the community to the final report.<sup>6</sup>

We have all scattered since those halcyon days. David Kelly, after heading the Law Department of Victoria, is now Chairman of the Victorian Law Reform Commission. The barristers on the Commission have become judges. The academics have become law deans. Michael Ball is now a partner in a leading Sydney firm. The camaraderie and voluble agreement and dissent of the meetings with the consultants fade into ghostly memories that occasionally, unexpectedly, return to visit the mind. But a monument to those endeavours has been left in the form of the new insurance legislation which has profoundly affected the way insurance in Australia is written and disputes about it determined.<sup>7</sup>

5. See, eg, chapter 3, para 130; cf chapter 7, para 59.

6. The Law Reform Commission (Cth) Insurance Contracts (ALRC 20), AGPS, Canberra, 1982.

7. See Insurance (Agents and Brokers) Act 1984 (Cth) and Insurance Contracts Act 1984 (Cth).

*Reforming Legislation on Both Sides of the Tasman*

The Law Reform Commission was fortunate in that its report on insurance contracts was delivered at a propitious political moment. A change of Federal Government in Australia had brought to the office of Attorney General a past Law Commissioner (Senator G J Evans). Within a relatively short space of time, by a mixture of cajoling and decisiveness, the legislation was put into its final form. Substantially, it was as the Law Reform Commission had proposed it. More than 80 years after the establishment of the Commonwealth of Australia, the Federal Parliament proceeded to enact a general law to govern insurance, just as s 51 (xiv) of the Australian Constitution had envisaged when it granted power to the Parliament to make laws with respect to 'insurance other than State insurance; also State insurance extending beyond the limits of the State concerned'.

The Insurance Contracts Act did not abolish the common law of insurance. It remains the great canvas upon which the provisions of the Act have been drawn. But many of the alterations made by the Act are profound. A number of the changes effected were radical: requiring that a century and more of common law thinking should be shaken off. The advantages of this book include the collection and discussion of issues of insurance law in a conceptual way but calling upon the decisions of the courts on common problems which are likely to recur, as much under the new regime as they did before. There is a wealth of English authority. For my own part I believe that lawyers in Australia and New Zealand must begin to throw off the intellectual infatuation with judicial pronouncements from the Strand in London. They should look more energetically to the jurisprudence of Canada and, in a field such as insurance, to the courts of Ireland, Hong Kong, Singapore and India.<sup>8</sup> But London remains one of the world's centres of insurance business. So there is still much to be derived in insurance law from the English case books. The authors have recognised this.

A special value of the book is the useful reference to New Zealand statutory provisions and common law decisions. Important reforms were introduced in New Zealand by the Insurance Law Reform Acts of 1977 and 1985 discussed in this book. The New Zealand Court of Appeal is a most distinguished court, increasingly referred to in Australian decisions. With the advent of the Closer Economic Relations Treaty between Australia and New Zealand, and moves afoot to facilitate commercial transactions between the two countries,<sup>9</sup> I welcome the growing tendency of legal textbooks on commercial subjects to look at issues in an Australasian way. This can only benefit the countries on both sides of the Tasman and foster our own Antipodean community of nations.

Perhaps the greatest use of the book for many readers will be the interplay which the authors provide between their presentation of recent Australian

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8. Cf *Cook v Cook* (1986) 162 CLR 376, 390.

9. See M D Kirby, 'Integration of Judicial Systems' in K M Vautier & Ors, *CER and Business Competition — Australia and New Zealand in a Global Economy*, CCH New Zealand Ltd, Auckland, 1991, 15.

court decisions and the new requirements laid down by the Insurance Contracts Act. There are many distinguished books on the principles of insurance law written in England. For the Australian scene, these works must now be read subject to the Insurance Contracts Act. It is this task which the authors have set for themselves. Their treatment of the common law on the subject is typically followed by a reference to the Act and a commentary upon the way in which the Act may be expected to operate.

### *Judicial Differences About the New Legislation*

The interpretation of the Insurance Contracts Act will present many quandaries for the courts, made up of lawyers brought up in the old ways. Already, we have seen strongly expressed differences of judicial opinion about the meaning of specific provisions of the Act. Thus in *Advance (NSW) Insurance Agencies Pty Ltd & Anor v Matthews & Anor*<sup>10</sup> the New South Wales Court of Appeal (by majority) upheld the construction of the Act favoured at first instance by Young J. The dissent by Samuels JA<sup>11</sup> drew heavily upon the report of the Law Reform Commission to reach its conclusion. The High Court of Australia preferred that view.<sup>12</sup> It reversed the Court of Appeal. I suspect that we will see many more cases of judicial elucidation of the Insurance Contracts Act. I write this Foreword when the ink is scarcely dry upon another majority opinion of the Court of Appeal, this time in relation to the meaning of s 34 of the Act.<sup>13</sup> Inescapably, new legislation with novel provisions is bound to produce differences of judicial interpretation. It will take a time for the new law to become settled. And then, perhaps, it will be time for yet another major task of reform. This is the way of our law: Reflecting changing social and economic attitudes, it is in a state of never-ending adaptation — one hopes generally for the better.

Therefore, it seems likely to me that judges of the future will be taken to the pages of this book for assistance in finding the basic rules of the common law and, where these have been changed by reforming legislation (whether in New Zealand or Australia), to the mischief to which the legislation was addressed and the probable meaning to be ascribed to the new statutory words. There are many practical sections with useful collections of recent Australian and New Zealand authority on words, all too familiar, which continue to present difficulties in insurance-contract claims: phrases such as 'caused by', 'resulting from', 'violent accidental external and visible means' or words such as 'accident', 'flood', 'reckless' and so on. The book will be a helpful companion to other textbooks so that lawyers and those whose decisions are affected, will come to their conclusions with the advantage of the rich treasurehouse of judicial, academic and practical opinion now available to them.

10. (1988) 12 NSWLR 252.

11. *Id.*, 260.

12. *Advance (NSW) Insurance Agencies Pty Ltd & Anor v Matthews & Anor* (1989) 166 CLR 606, 617.

13. *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd*, Court of Appeal (NSW), unreported, March 1990.



*Welcome to a Treasury of Law and Opinion*

There was a time, in the not so distant past, when, by convention, a textbook would not be cited to a court of law unless the authors were dead. The usual explanation given to support this convention was that the authors might in their lifetimes change their opinions. Happily, this convention has now withered away. Led by the High Court, Australian courts are now much more open and vigorous in their use of academic and professional opinion. I believe that they will welcome the opinions expressed in this book — including those which are critical of earlier decisions — out of recognition of the virtually unrivalled position of these authors to express opinions. Not only did they take the leading part in one of the great reforming statutes of recent times in Australia, on the way to the statute they achieved an intensive acquaintance with a great body of law, a deep understanding of the industry which that law serves and an appreciation of the occasional injustices which the earlier law had failed to repair.

So let this book be welcomed and used alongside the *Insurance Contracts* report of the Law Reform Commission. If there is a similarity in the lambent style of each that is, as I have explained, no accident.

*Court of Appeal*  
*Sydney*  
18 March 1991

*Michael Kirby*