Carter Newell
LAWYERS

Professional Liability Guide

Carter Newell LAWYERS

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Professional Liability Guide

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INTRODUCTION

This guide is about two interrelated areas: the scope of the liabilities currently faced by professionals, and the extent to which professional indemnity insurance is available to cover that exposure and the associated costs of defending claims.

In the first part of the guide, we examine the evolving nature of the duties and liability exposure faced by professionals at common law and under statute in Australia. This includes a discussion of contentious and developing areas such as pure economic loss and the apparently diminishing scope of advocate's immunity, and the application by the courts of the proportionate liability legislation. These are areas which I am sure will continue to attract judicial scrutiny and – for at least some of the issues discussed – may be the subject of further legislation.

In the second part of the guide, we turn our attention to the nature of the insurance policies that have evolved to provide indemnity for professional liability. This includes a discussion of the expanding notion of what constitutes a '*professional*', the more contentious and most litigated aspects of the *Insurance Contracts Act 1984* (Cth), and the meaning and judicial interpretation of the most important phrases found in claims made and notified policies (and their exclusions). Once again, due to the complex factual scenarios that arise in practice – which make it difficult to eliminate all ambiguity from policy wordings – these are areas that are likely to experience an ongoing development of the common law and potential further legislation.

One thing is for certain, the importance of professional indemnity insurance cannot be understated in the current litigious environment in which we find ourselves. We therefore hope you will find this guide a useful tool when considering various aspects of the wide variety of claims that can be made against professionals and some of the issues that can arise when considering policy coverage.

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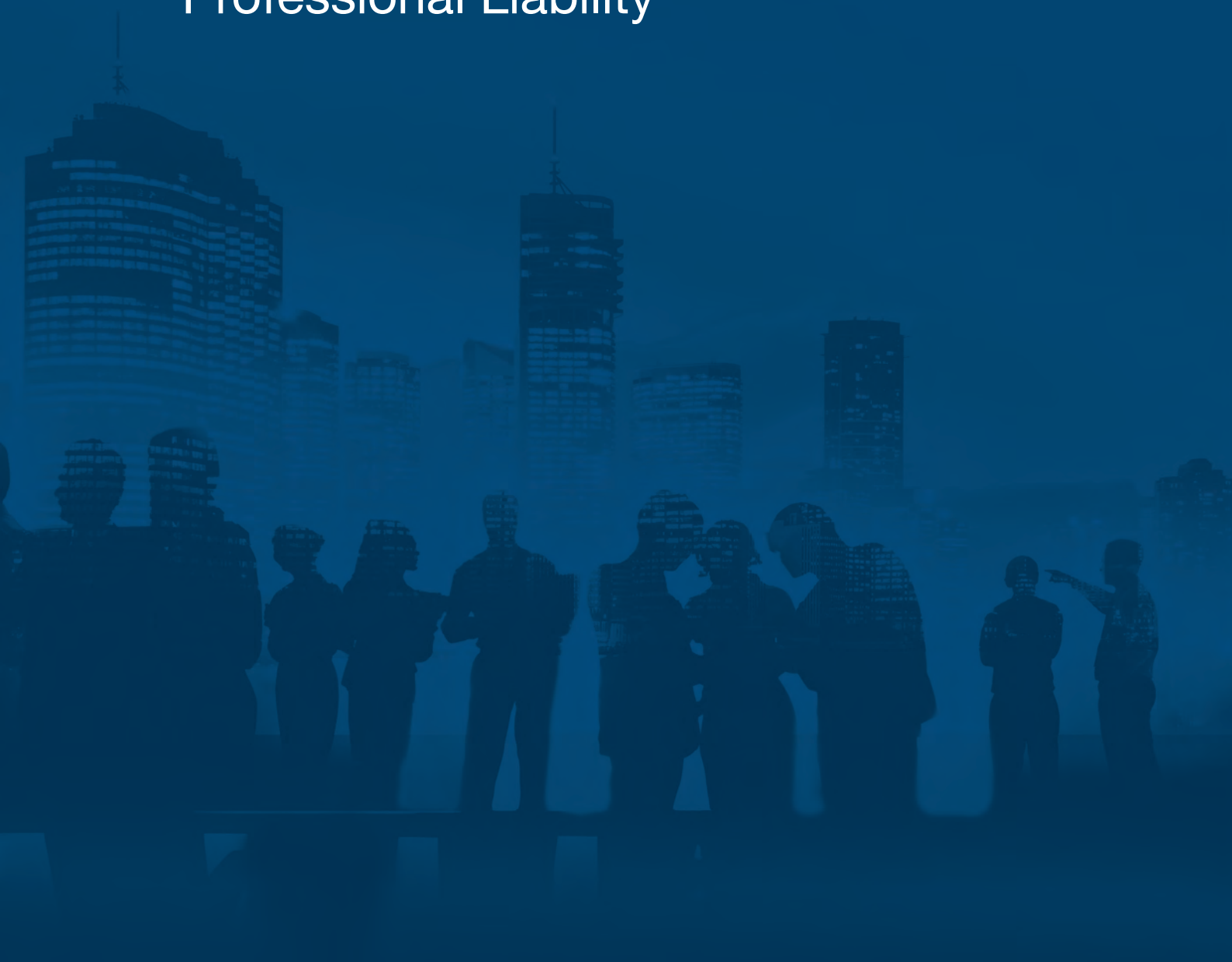
Carter Newell LAWYERS

The Scope of Professional Liability



CHAPTER 1 – DUTIES

Precisely what constitutes a profession, and in turn who constitutes a professional, can be a vexed question.

More than 20 years ago, Queensland Court of Appeal considered the question in *FAI General Insurance Co Ltd v Gold Coast City Council*[1] in (relevantly) the context of a professional indemnity policy issued to a local council, saying that the term *'professional'* connotes *'pertaining or appropriate to a profession'* or *'engaged in one of the learned professions'.*[2]

In modern usage, the term is no longer confined to the traditional professions of medicine or the law. There would be little contention in applying the definition to any number of recognised professions, including solicitors and barristers, doctors and other health care providers, architects, engineers and surveyors, accountants and financial advisors, IT professionals and surveyors.

The duties owed by those professionals in the pursuit of their calling, and to whom they are owed, are becoming increasingly wide and varied. It is now commonplace for professionals to be subject to separate duties under contract, in tort and pursuant to statute, owed not only to clients but non-client parties alike.

Then there is the separate body of fiduciary duties, and professional conduct or ethical rules, which govern the conduct of a number of professions.

Contract

The obvious place to start any consideration of the obligations of a professional is the law of contract, as it is invariably the case that a professional will be retained by a client for a particular purpose, be it the provision of advice or other services.

The retainer could range on the one hand from an informal or oral engagement, all the way to a comprehensively documented and executed agreement. In any case, the scope of the professional's obligations (and liability) will depend in large measure on the terms of the retainer.

Express terms

Where the retainer is written, its express terms will be of primary importance in determining the scope of the professional's obligations. It is axiomatic to observe that the retainer document will set out the nature and the scope of the duties to be discharged by the professional in his or her dealings with the client.

It has long been said that there is no such thing as a general retainer. In *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)*[3] Oliver J said that:

> *'There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of [a solicitor's] duty depends on the terms, and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.'*[4]

[1] [1992] 2 Qd R 341.
[2] Ibid 344.
[3] [1979] Ch 384.
[4] Ibid 402.

Similar sentiments were expressed by the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[5] (in the context of an engineer) that the *'contract defines the task which the builder or engineer took'* and the Supreme Court of Victoria in *Sali & Ors v Metzke & Allen*[6] (in the context of an accountant) that *'the scope and extent of an accountant's liability to the client is largely established by the terms of the accountant's retainer'* and that *'Courts must not impose upon a professional duties beyond the scope of what he or she was retained to do.'*

Careful consideration must therefore be given to the contractual matrix with a view to defining the tasks agreed to be undertaken by the professional on behalf of the client, from which any obligations (and liability) might arise.

So for instance, as was the case in *Midland Bank*, where a solicitor is instructed to advise on the tax implications of exercising an option to purchase land, the duty did not extend to ascertaining whether the option was registered.

There is however a line of authority emerging in Australia as an exception to this rule, particularly in cases involving solicitors.

The issue was given detailed consideration by the Queensland Court of Appeal in *Littler v Price*,[7] which concerned the failure of a solicitor to provide certain advice to the purchasers in an off the plan unit purchase. The unit was subject to a lease agreement, of which the purchaser would have the benefit for 10 years, with an option for a further two 10 year periods. The deal was that the development company would rent the unit, conduct the complex as a resort, and return to the purchaser income from the letting out of the unit. The question was whether it was negligent for the solicitor not to advise the purchaser that the lease agreement upon which the income stream was dependent had not been guaranteed by the directors of the development company.

The solicitor contended that his obligation was limited to advising in respect of the mechanics of the conveyancing documentation, and that no advice was sought by the purchasers concerning the lease, or whether the lease should be supported by a guarantee.

In the leading judgment of the Court of Appeal, Cullinane J endorsed the finding of the trial judge that the solicitor had a duty to advise the purchasers about the lease, and the lack of protection afforded to the purchasers in the absence of guarantees of the lessee company's obligations.[8]

Justice Jerrard was also dismissive of the solicitor's argument that it had assumed that advice in respect of the lease had been provided to the clients by the financial advisor, who had referred the clients to the solicitors for the purpose of the conveyance. In this regard, his Honour observed:[9]

> *'. . . his saying that he assumed the financial advisor had done that (namely, advised concerning the lease) impermissibly delegated the solicitors' obligations to the advisor, and saying that the clients did not contact him to ask for advice failed to put at their disposal the knowledge he had. If his doing that jeopardised his chance of getting his fee agreed upon between himself and the financier and dependent upon the transaction going ahead, then that was a matter he was not entitled to take into account.'*

[5] (2004) 216 CLR 515, 532.
[6] [2009] VSC 48, [12].
[7] [2005] 1 Qd R 275.
[8] Ibid 281.
[9] Ibid 278.

In *Littler v Price* reliance was placed on the decision of the Full Court of the Federal Court in *Fox v Everingham and Howard*,[10] in which it was held that a general retainer assumed by the solicitors to act in the client's interests when entering into a contract to purchase a property required the solicitors to:

> a) *'Go through the contract with the Foxes and explain the salient points to them.*
> b) *Explain to the Foxes provisions of the contract, which were in an unusual form and which might affect their interests as they were known by the respondents to be.*
> c) *Give attention, before the contract was signed by the Foxes, to the question of whether it, from their point of view, contained adequate provisions to protect them against a variety of contingencies which might reasonably have been foreseen as likely to arise if things did not go as expected.'*

The Full Federal Court in *Fox* held that:[11]

> *'In cases such as the present a solicitor is paid not only for what he in fact does, but also for the responsibility he assumes in trying to protect clients from financial loss if things go wrong. It is easy enough to act for people if things go as they are expected to. But it is because the unexpected will sometimes happen that solicitors are rightly paid the fees which they command. The corollary of this proposition is that if they do not measure up to the standard which is required of them, they are liable for breach of the obligation which they owe to clients. The standard required of them is not an absolute one.'*

However, a limited retainer in respect of the purchaser of a business was established in *Tasmanian Sandstone Quarries Pty Ltd v Legalcom Pty Ltd.*[12]

The client complained that the solicitor had failed to advise it to arrange a pre-settlement inspection of the business. Nyland J however concluded the solicitors' retainer was indeed a limited one, observing that on the evidence the acquisition was controlled primarily by the client who often acted directly without the solicitor's involvement or knowledge, and that the solicitor was only instructed on discrete aspects of the acquisition. This evidence could not support the proposition that the solicitor had been instructed to act and advise in regard to all aspects of the transaction.[13]

In *Artistic Builders Pty Ltd v Nash*[14] the New South Wales Supreme Court considered an action in negligence against the partners of a law firm that allegedly failed to provide warnings and advice in respect of the securities proffered to support advances made by the plaintiffs of several million dollars on a staged development, which advances were to be secured by three mortgages. It was claimed that the solicitors had failed to provide adequate advice as to whether the securities proffered were acceptable, as a result of which substantial losses were sustained.

The negligence case against the solicitors failed on a limitation issue. Nevertheless, the case contains useful statements in respect of determining the parameters of a solicitor's retainer. In the lengthy judgment it was observed by Hall J that:[15]

[10] (1983) 50 ALR 337.
[11] Ibid 341
[12] (2010) 270 LSJS 519.
[13] Ibid [36]–[41].
[14] [2010] NSWSC 1442.
[15] Ibid [509]–[510].

> *'The scope of any retainer and the ambit of the implied duty to carry out the retainer with reasonable care depends upon the facts peculiar to the relationship between the solicitor and the client in each case: Larson v Lynch (2006) FCA 385 at 27. Reference was made in that case to the observations of Oliver J in Midland Bank Trust Company Limited v Hett Stubbs & Kemp (a firm) (1979) 1 Ch 384 at 402: "There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained."*
>
> *It is well accepted that the duty of a solicitor arises from the relationship of solicitor/client and from the work undertaken by the solicitor. In Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1 at 188, the Court of Appeal (Spigelman CJ, Sheller, Stein JJA) observed: "Even in the case of a solicitor/client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances. Not every aspect of a solicitor/client relationship is fiduciary. Conduct which may fall within the fiduciary component of the relationship of solicitor and client in one case, may not fall within the fiduciary component in another."'*

A solicitor was similarly unsuccessful in establishing a limited retainer in *Robert Bax & Associates v Cavenham Pty Ltd.*[16] That case involved the plaintiff's extension of loans of approximately $2.2 million, in a series of four transactions, to the proprietors of a Gold Coast night club. The plaintiff had been informed that the borrower would register a first mortgage over its property in order to protect the plaintiff's loans, but that did not occur. The nightclub went into receivership, the money was lost and the plaintiff held its solicitor accountable for the loss of the loans.

The Court of Appeal upheld the following finding of the primary judge that the solicitor's duty extended beyond the express terms of the retainer to provide advice not specifically requested:

> *'The defendant was obliged to act generally in the plaintiff's interests in relation to the proposed transactions. That extended to the defendant's advising the plaintiff about the need for legal protection against contingencies which may arise. It was particularly relevant that the plaintiff was not well-versed in relation to these sorts of transactions, and the defendant should have taken the steps which overall would have led the plaintiff to some adequate understanding. The proper discharge of the defendant's retainer did not depend on the plaintiff's actively seeking advice. The defendant was obliged proactively to give the appropriate advice.'*

While in appropriate circumstances a limited retainer will be established, it may nonetheless be possible for a professional to be subject to a tortious duty of care to a client that extends beyond the strict scope of a retainer. This is explored further below.

Where the retainer is oral (or partly oral and partly written), it may be necessary to examine the pre-contractual representations by both parties in order to ascertain the existence of any express terms.

In *Howarth v Miotti*[17] the Supreme Court of Queensland found that an oral retainer was created with a solicitor in respect of the purchase of an off the plan unit, for which the client purchasers paid a large deposit which was ultimately lost when the developer disappeared. The clients claimed the solicitor had been retained to protect their interests in respect of the purchase, but failed to give appropriate advice in relation to securing the deposit money paid.

[16] [2013] 1 Qd R 476.
[17] [2009] QSC 96.

There was no written retainer. Rather, the clients asserted that the retainer was predicated on the solicitor's nomination as their legal representative in the contract of sale they entered into for the purchase of the unit.

Justice Ann Lyons found that a retainer had been created, although not by reference to nomination of the solicitor in the contract of sale but by reference to a subsequent course of correspondence between the solicitor and the solicitors for the vendor.

As to the nature of the duty owed by the solicitor, her Honour referred to *Littler v Price*[18] in which Justice Jerrard held:[19]

> *'the solicitor's obligations included those of perusing and advising on documents executed before the solicitor was retained, and to advise on any unusual benefits the documents conferred or any unusual burdens or detriments which it imposed. The retainer is also similar in terms to that found in Fox v Everingham and Howard (1993) 50 ALR 337-338, namely to "represent his wife and himself in the purchase of the house". The Full Federal Court held, and again I agree, that the retainer included an obligation to explain the salient points of the contract to the purchasers, any provisions of it which were in an unusual form and which might affect their interests as they were known by the solicitors, and to give attention to the question of whether the contract contained adequate provisions from the point of view of the purchasers to protect them against a variety of contingencies which might have reasonably been foreseen as likely to arise "if things did not go as expected". The Court summarised the solicitor's obligations as being that the purchasers were entitled to rely on the solicitors to see if the contract was adequate to protect their interests.'*

In reality, disputes of this nature will often involve direct contests of oral evidence, making a definitive determination of the scope and extent of a professional's obligations all the more difficult.

Accordingly, best practice dictates that professionals (and clients alike) should always seek to ensure that:

- the retainer is recorded in writing;
- the parties to the retainer, the services that are/are not to be provided, and when and how the retainer is to commence and conclude, are properly identified;
- the retainer is duly executed (or as a fall-back, that it permits acceptance via conduct, such as the provision of instructions by the client to proceed with the services to be performed under the retainer); and
- the retainer is kept current throughout the life of the agreement, with any changes (for instance to the identity of the parties or the scope of the services) being appropriately recorded and either countersigned or confirmed in writing.

Implied terms

The implication of contractual terms into a retainer is equally important. At the least, courts will readily imply into a contract of professional services a term requiring the professional to exercise reasonable care in providing the services.

[18] [2005] 1 Qd R 275.
[19] Ibid 277.

In *Astley v Austrust*,[20] a case involving a professional negligence claim against a solicitor, the majority (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J dissenting) acknowledged the existence of concurrent liabilities of professionals in both contract and tort.[21] They said the implied term of reasonable care in a contract of professional services arises by operation of law. It is one of those terms that the law attaches as an incident of contracts of that class. It is part of the consideration that a professional pays in return for the express or implied agreement of the client to pay for the services provided.

Prima facie therefore, it was held a client may sue a solicitor in either contract or tort, or both, and that where concurrent liability exists the client has the right to assert the cause of action most advantageous in respect of any particular legal consequence.[22] There are subtle, yet important, differences between an action in contract or tort, such as limitation of actions, remoteness of damage and measure of loss, as well as the existence and efficacy of contractual limitations or exclusions of liability, which can become important in determining which cause of action a client may pursue. In this respect the existence of concurrent duties is of undoubted benefit to a client.

Since *Astley*, an implied term to exercise reasonable care has been found to exist in retainers of barristers,[23] accountants,[24] financial advisors,[25] engineers,[26] architects[27] and medical practitioners.[28] The principle is likely to be of further application in other professional retainers.

Given the courts' readiness to imply such a term into a contract for professional services, it is now becoming increasingly common for professionals to proactively include a comparable duty as an express term of the retainer, reflecting the common law position. A preparedness to recognise the existence of the duty could be seen as a matter of client service offering.

It should however be noted that the majority in *Astley* acknowledged the ability of a professional to '*bargain away or limit*' the existence or scope of the contractual duty, if they so choose.[29]

In some cases the dividing line between a contractual promise to do something and a promise to do it with reasonable care will be a fine one. That dividing line was discussed in *Midland Bank Trust* as follows:[30]

> *'The classical formulation of the claim in this sort of case as "damages for negligence and breach of professional duty" tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care is but one.'*

[20] (1999) 197 CLR 1.
[21] Ibid 22.
[22] *Carmody v Priestly & Morris Perth Pty Ltd* (2005) WAR 318, 335.
[23] *Smith & Anor v McCusker QC & Anor* [2000] WASCA 320.
[24] *Carmody and Ors v Priestley and Morris Perth Pty Ltd and Anor* (2005) WAR 318.
[25] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1.
[26] *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners* [2000] 2 Qd R 461.
[27] *Oaktwig Pty Ltd v Glenhaven Property Holdings Pty Ltd* [2007] NSWSC 1533.
[28] *Bergman v Haertsch* [2000] NSWSC 528.
[29] (1999) 197 CLR 1, 22.
[30] [1979] Ch 384, 434.

Oliver J then offered the following practical example:

> *'If I employ a carpenter to supply and put up a good quality oak shelf for me, the acceptance by him of that employment involves the assumption of a number of contractual duties. He must supply wood of an adequate quality and it must be oak. He must fix the shelf. And he must carry out the fashioning and fixing with the reasonable care and skill which I am entitled to expect of a skilled craftsman. If he fixes the brackets but fails to supply the shelf or if he supplies and fixes a shelf of unseasoned pine, my complaint against him is not that he has failed to exercise reasonable care and skill in carrying out the work but that he has failed to supply what was contracted for.'*

Where a professional's retainer contains an express term requiring a particular task be undertaken or outcome achieved, and which the professional fails to do, a breach will ordinarily be established. So a financial advisor whose retainer contains an express obligation to only offer products selected from an approved list of products carefully researched and approved by a team of research experts, will breach that express obligation by recommending an unapproved product.

The same result will likely ensue in respect of an implied duty to exercise reasonable care and skill in providing financial advice, if the discharge of the duty nonetheless required carrying out an appropriate inquiry to ascertain the suitability of the product.[31] Although, in this latter case the focus will be not so much on the express contractual obligations but on the exercise of reasonable care.

The standard of care expected of a professional was set out by Windeyer J in *Voli v Inglewood Shire Council*[32] as requiring due care, skill and diligence, the competence and skill that is usual among professionals practising their profession, and due care. In considering whether a professional has failed to exercise the requisite standard of care and skill, it has consistently been held that courts must guard against hindsight bias – the *'the standard of care to be expected of a professional . . . must be based on events as they occur, in prospect and not in retrospect.'*[33]

In the case of a solicitor or accountant, the standard of care does not extend to ensuring that advice that is given is in all respects correct[34] or in the case of an engineer that a design will be perfect.[35] Rather, it is cast no higher than requiring the requisite degree of professional skill and care to be exercised in the giving of the advice or preparation of the design.

Terms may also be implied into a contract for professional services by statute. Section 74(1) of the *Trade Practices Act 1974* (Cth) (**TPA**) implies into contracts entered into prior to 31 December 2010 for the provision of services by a corporation a warranty that the services will be rendered with due care and skill.

Section 74(2) contains an implied warranty that services provided will be reasonably fit for a purpose that is made known (whether expressly or by implication) to the supplier.

Similar provisions existed in the comparable legislation engaged in most Australian States and Territories, which apply to both corporations and individuals.[36]

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[31] *Selig v Wealthsure Pty Ltd* (2013) 94 ACSR 308, 423.
[32] (1963) 110 CLR 74, 84.
[33] *Duchess of Argyll v Beuselinck* [1972] 2 Lloyds Rep 172, 185; *March v E & MH Stramare* (1991) 171 CLR 506, 515; *Sali & Ors v Metzke & Allen* [2009] VSC 48, [16].
[34] *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, 53; *Carmody v Priestley* (2005) 30 WAR 318, 337.
[35] *Pullen v Gutteridge Haskins and Davey Pty Ltd* [1993] 1 VR 27.
[36] *Fair Trading Act 1987* (NSW) (**FTA (NSW)**) s 40S; *Fair Trading Act 1999* (Vic) s 32J; *Consumer Transactions Act 1972* (SA)) s 7; *Fair Trading Act 1987* (WA) s 40; *Consumer Affairs and Fair Trading Act* (NT) (**FTA (NT)**) s 66. The Queensland, Tasmanian and Australian Capital Territory legislation contain no comparable provisions.

The implied warranties under the TPA (and comparable State and Territory legislation) were replaced with a uniform national regime for the imposition of consumer guarantees, under the *Australian Consumer Law* (**ACL**) which is found in sch 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The ACL applies under s 131 of the CCA as a law of the Commonwealth, which is applicable to the conduct of corporations. The ACL also applies as a law of each State and Territory under their respective legislation,[37] which extends its application to individuals.

The new statutory guarantees under the ACL became effective on 1 January 2011 and so apply to contracts entered into on or after that date.

The guarantees relating to the supply of services are found in ss 60 and 61 of the ACL. Section 60 provides that in a contract for the provision of services to a consumer there is a guarantee that the services will be rendered with due care and skill, while s 61 provides a guarantee that services will be reasonably fit for known purposes. These are largely comparable with their predecessor provisions.

The implied warranties under the TPA (and the statutory guarantees under the ACL) apply to contracts for the supply of services to *'consumers'.* Services are acquired as a consumer if they are acquired at a cost of $40,000 or less, or otherwise for personal, domestic or household use. There is therefore sufficient scope for the application of legislation to professional engagements. Provided the monetary limitation is met, the provisions can apply to consumption by a business.

In considering whether an implied warranty has been breached, in *Reneham v Leeuwin Ocean Adventure Foundation & Anor*[38] the Supreme Court of the Northern Territory held that the implied warranty is no different from the promise implied by the common law and is coextensive in content and concurrent in operation with the duty which arises by the law of tort to take reasonable care.

However, one slight yet potentially important distinction is that a cause of action based on breach of a warranty implied by the old TPA remains a claim under the general law of contract[39] whereas a claim for breach of the consumer guarantees under the ACL gives rise to remedies under the ACL. Like concurrent duties in contract and tort, the two causes of action carry differences in the applicable limitation period and the assessment of loss.

However, an important feature of the legislative regimes (unlike the common law) is the prohibition on contracting out. Section 68 of the TPA (and s 64 of the ACL) provides that any term of a contract that purports to exclude, restrict or modify the operation of the legislation is void. There are however certain exceptions which qualify this general prohibition, the most notable of which is s 68A of the TPA (s 64A of the ACL), which permits a contracting party to limit its liability for breach of a warranty or guarantee to either supplying the services again or payment of the cost of having the services supplied again. The efficacy of contractual limitations as a means of limiting or avoiding liability is considered further below.

The consumer protection provisions of the TPA (and the CCA) do not apply to the provision of financial services, which are separately governed by the *Australian Securities and Investments Commission Act 1989* (Cth) (**ASIC Act**).

[37] *Fair Trading Act 1989* (Qld)) s 16; FTA (NSW) s 28; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8; *Fair Trading Act 1987* (SA) s 7; *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 7; FTA (NT) s 27; *Fair Trading Act 2010* (WA) s 19 and *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 6.

[38] (2006) 17 NTLR 83, [82].

[39] *Arturi v Zupps Motors Pty Ltd* (1980) 33 ALR 243.

Financial service is defined broadly in the ASIC Act (s 12AB) to include providing financial product advice, dealing in a financial product, making a market for a financial product, operating a registered scheme, providing a custodial or depository service, operating a financial market or clearing a settlement facility, or providing a service otherwise supplied in relation to a financial product.

Section 12ED of the ASIC Act is in similar, but not identical terms to s 74 of the TPA, and implies into contracts for the supply by corporations of financial services a warranty that the services be rendered with due care and skill and be reasonably fit for the purposes made known by the consumer. These warranties similarly cannot be excluded or modified (s 12EB).

Implied retainers

A more novel situation arises where a party seeks to imply not only the terms of an express retainer (whether written or oral), but also the very existence of the retainer itself. Proving such a retainer will require an analysis of the conduct of the parties in order to establish the existence of an implied retainer.

Courts have acknowledged that the existence of a contract for the provision of professional services, and the terms of the contract, may be implied or inferred.[40] However, an implied retainer will only arise in circumstances in which, on an objective assessment of all the circumstances, an intention to enter into a contractual relationship may fairly and properly be imputed to the parties.[41]

In *Steele v Marshan*[42] the New South Wales Court of Appeal was obliged to consider the question of the existence of an implied retainer in circumstances in which a solicitor undertook professional work without an express retainer being entered into.

In rejecting the client's appeal, the New South Wales Court of Appeal endorsed the judgment of the Local Court Magistrate who, at first instance, had adjudicated the circumstances in which a retainer would be implied. In this regard, the Magistrate relied upon the decision in *Pegrum v Fatharly,*[43] in which it was held:

> *'A contractual relationship of solicitor and client will therefore be presumed if it is proved that the relationship of solicitor and client existed de facto, between a solicitor and another person. Upon proof of that kind, it would not be necessary to prove when, where, by whom or in what particular words, the agreement of retainer was made. Applying the rule expressed by Thomas J in Australian Energy Limited v Lennard Oil NL, the de facto relationship of solicitor and client has to be a necessary and clear inference from the proved facts before a retainer will be presumed.'*

By way of contrast, in *Meerkin & Apel v Rossett Pty Ltd*[44] the Supreme Court of Victoria declined to find the existence of an implied retainer. In that case, lawyers worked on behalf of developers of an office development and prepared leases for certain units in the development. The developers forwarded the draft leases to the owner of the units who gave comments on the leases to the developer. The owner was subsequently fined when it was determined that certificates of occupancy had not been issued in respect of the units. The owner sued the developer's lawyers, alleging a breach of an implied retainer in failing to advise in respect of the failure to secure the certificates of occupancy.

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[40] *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd* (1988) 5 BPR 97, 326.
[41] See *Burke v LFOT Pty Ltd* (2000) 178 ALR 161.
[42] [2012] NSWCA 141.
[43] (1996) 14 WAR 92.
[44] [1998] 4 VR 54.

The Supreme Court of Victoria found that there was no implied retainer in circumstances in which it was found that the owner had not consulted the developer's lawyer at all but, rather, had consulted its own lawyer in relation to matters involving the sale of the units.

Similarly, in *Townsend and Anor v Roussety and Co (WA) Pty Ltd and Anor*[45] the court refused to find that a client impliedly retained a firm of accountants to act as its accountant and advisor in respect of the acquisition of a business, notwithstanding the accountant had assisted the client to apply for finance to fund the acquisition.

Tort (negligence)

Professionals may come within the scope of a wide range of tortious liability (including trespass, nuisance and deceit), however the tort most commonly coming to bear on professionals, and on which this Guide is focused, is the tort of negligence.

Duty to clients

Where a professional is the subject of a retainer, a tortious duty to exercise reasonable care will readily exist.

The duty owed by a medical professional was described by the High Court in *Rogers v Whittaker*[46] as follows:

> *'The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a "single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment"; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case.'*

In a similar vein, the duty that is owed in the case of an architect was described by Windeyer J in *Voli v Inglewood Shire Council*[47] as:

> *'An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession.'*

In *Heydon v NRMA Ltd & Ors*[48] the duty of solicitors and barristers was described as follows:

> *'In each case the duty is to apply the relevant degree of skill and exercise reasonable care to carrying out the task. There is no implied undertaking that the advice is correct, but only that the requisite degree of professional skill and care has been exercised in the giving of the advice.'*

[45] (2007) 33 WAR 321.
[46] (1992) 175 CLR 479, 483.
[47] (1963) 110 CLR 74, 84.
[48] (2000) 51 NSWLR 1.

Similarly, in *Pullen v Gutteridge Haskins and Davey Pty Ltd*[49] the Victorian Court of Appeal said in the case of an engineer's engagement that the matter of reliance, which will often be important in determining the existence of relevant proximity, need not be pleaded or proved where there is a relationship of a professional man and his client. The court said that a duty of care is implicit in such a relationship, as is reliance (it was manifest beyond argument that a client would rely on a professional).

These are but a few examples of the court's application of the principles of duty of care to professionals. A duty of this nature – that is, to exercise reasonable care and skill – will apply to any professional practising within their profession. The duty is, as noted above, concurrent and coextensive with an implied duty in contract.

That said however, the fact that the causes of action in tort and contract may be concurrent does not mean that their incidents are necessarily the same. Although the contract of retainer will be an important indicator of the nature of the relationship which gives rise to the common law duty of care, it will not chart exclusively the parameters of that duty.[50] In appropriate circumstances, a tortious duty of care may require the taking of positive steps beyond the specifically agreed professional task or function where the steps in question are necessary to avoid a real and foreseeable risk of economic loss being sustained by the client.[51]

Duty to third parties

Perhaps unsurprisingly, while the existence of a tortious duty owed by a professional to a client is not usually contentious, the same cannot be said in relation to duties owed to third parties.

In appropriate circumstances a professional can owe a duty to a non-client, however the law has developed incrementally and cautiously. Despite numerous instances coming before the High Court, the law is by no means settled.

Until the 1960s, the common law precluded recovery in tort for pure economic loss (about which more is below) caused by negligent misstatement; recovery for such losses could only arise in contract. It was not until *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[52] that the common law opened the door to allow a non-client to recover for such loss.

The facts in *Hedley Byrne* are as follows. Hedley Byrne was an advertising agency, which placed advertisements for a client (Easipower) on credit. Hedley Byrne sought to ascertain the Easipower's financial position and creditworthiness, and so asked its bank (National Provisional Bank) to obtain a report from Easipower's bank (Heller & Partners). Heller & Partners gratuitously provided an encouraging response (to the effect that Easipower was considered good for its ordinary business engagements) albeit on a without responsibility basis. Easipower went into liquidation and Hedley Byrne subsequently loss as it was unable to recover its outstanding debts.

[49] [1993] 1 VR 27, 39.
[50] *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, 652.
[51] *Hawkins v Clayton* (1988) 164 CLR 539, 579; *Cavenham Pty Ltd v Robert Bax & Associates* [2011] QSC 348, [28] and on appeal *Robert Bax & Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476, 490.
[52] [1964] 2 All ER 575.

Lord Reid expressed the principle in the following manner:[53]

> *'A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to the give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.'*

Pure economic loss

The term pure economic loss was authoritatively described by the High Court in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*[54] as damage that is distinct from, and not consequent upon, ordinarily physical injury to person or property.

Pure economic loss can take any myriad of forms. As exemplified by a number of High Court decisions, it can encompass:

- diminution in value of a building as a result of defective construction;[55]
- loss of funds invested by a developer in reliance on a plan of development by a State planning authority that was subsequently abandoned;[56]
- financial loss suffered when a residential property fell into disrepair as a result of a solicitor's failure to notify the executor and beneficiary under a will of the death of the testatrix;[57]
- financial loss sustained by a financier in connection with the erroneous auditing of the accounts of a borrower.[58]

A distinction needs to be drawn in respect of some of examples from *Sutherland Shire Council v Heyman* and *Hawkins v Clayton*, which do in a sense involve an element of physical damage to property. Although that might be the case, such loss has nonetheless been held to be pure economic loss. The majority in *Bryan v Maloney*[59] aptly described the distinction in the following terms:

> *'the distinction is between ordinary physical damage to a house by some external cause and mere economic loss in the form of diminution in value of a house when the inadequacy of its footings first becomes manifest by consequent damage to its fabric.'*[60]

The field of liability for pure economic loss is a comparatively new and developing area of the law of negligence. Its key feature is that courts have been reluctant to impose a duty of care to avoid pure economic loss, even if loss is foreseeable. The rationale is that if reasonable foreseeability of a risk of economic harm was sufficient, there would be a real risk in many cases of creating *'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'*

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[53] Ibid [583].
[54] (1976) 136 CLR 529.
[55] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. The same type of pure economic loss subsequent arose in *Bryan v Maloney* (1995) 182 CLR 609 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.
[56] *San Sebastian Pty Ltd & Anor v Minister Administering the Environmental Planning and Assessment Act 1979 & Anor* (1986) 162 CLR 340.
[57] *Hawkins v Clayton* (1988) 164 CLR 539.
[58] *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.
[59] (1995) 182 CLR 609.
[60] Ibid [623].

Circumstances necessary to give rise to the existence of a duty generally involved an element of reliance or dependence by a plaintiff on a defendant, or a vulnerability of a plaintiff to the effects of the defendant's negligence, against which the plaintiff is otherwise unable to protect itself.

Additionally, in earlier Australian authorities, the duty of care to avoid causing another's pure economic loss had required a '*relationship of proximity*' between the parties in addition to the reasonable foreseeability of damages.

In *Hawkins v Clayton*[61] Deane J discussed the principle in the following manner:

> *'In the more settled areas of the law of negligence involving direct physical injury or damage caused by negligent act, the reasonable foreseeability of such injury or damage is, of itself, commonly an adequate indication that the relationship between the parties possesses the requisite element of proximity (see, eg, Wyong Shire Council v Shirt (1980) 146 CLR 40 at 44; Jaensch v Coffey (1984) 155 CLR 549 at 581–2). That cannot, however, be said of cases in the area where the plaintiff's claim is for pure economic loss. In that area, the categories of case in which the requisite relationship of proximity is to be found are properly to be seen as special in that they will be characterised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two (see, generally, Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 443–4).'*[62]

This requirement of proximity – which involved the notion of nearness or closeness (in contemplation, if not in physical proximity) – arose because an otherwise unfettered duty of care based on mere foreseeability that a person might suffer a financial loss would extend liability in negligence too broadly, to any number of defendants and would inevitably hinder normal commercial activities.

A high water mark of the proximity test was *Bryan v Maloney*[63] where the High Court identified that duties to avoid causing pure economic loss would only be found in special cases. In 2014, the '*special cases*' concept discussed in *Bryan v Maloney* evolved to found the vulnerability test which forms the basis of the High Court's decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[64] and now represents the law in Australia.

In *Brookfield*, a developer contracted with a builder (Brookfield) to construct an apartment complex. After construction was complete and the strata plan registered pursuant to statute, the Owners Corporation came into existence and became the owner of all common property in the apartment complex.

Some latent defects arose in the common property and, as the developer was not a financially viable defendant, the Owners Corporation brought a claim against the builder to recover the costs of rectifying the defects. Importantly, there was no contractual relationship between the Owners Corporation and the builder, and indeed the Owners Corporation did not exist at the time the builder conducted the defective works (so there could be no suggestion of reliance).[65]

The issue was whether the builder owed the Owners Corporation a duty to exercise reasonable care in the construction of the building to avoid causing the Owners Corporation to suffer pure economic loss resulting from the latent defects in the common property.

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[61] (1988) 164 CLR 539.
[62] Ibid 95.
[63] (1995) 182 CLR 609.
[64] (2014) 254 CLR 185.
[65] French CJ, 204, and the plurality, 235.

In reaching its decision, the court reviewed the contract between the builder and the developer and the standard purchase contract between the developer and subsequent purchasers and noted that:[66]

- both contracts contained express provision for the quality of work promised and provided mechanisms for achieving that quality if it was not initially provided;
- the design and construct contract contained a number of mechanisms to allocate risk between the parties and specifically created a mechanism through which defects (including latent defects) were to be rectified by the builder;
- the purchase contracts also provided the subsequent purchasers with mechanisms for having works rectified.

In view of these express provisions, the court was not prepared to find that the developer and the purchasers were unable to protect themselves from any lack of care on the part of the builder. Accordingly, they were not vulnerable in the sense required by the test and therefore, the builder did not owe the Owners Corporation a duty of care.[67]

So, in *Brookfield*, the plurality recognised that, subsequent to *Bryan v Maloney*, the plurality of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[68] (where the Court had spoken in terms of known reliance and the assumption of responsibility) had noted that in decisions such as *Perre v Apand Pty Ltd*,[69] *Hill v Van Erp*[70] and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[71] the concept of vulnerability was alluded to as the rationale explaining the exceptions to the general rule that damages are not recoverable for economic loss which is not consequential upon injury to person or property. In *Brookfield*, vulnerability was clarified to involve the plaintiff's inability to take steps to protect itself from pure economic loss arising out of the defendant's want of reasonable care.[72]

Breach

At common law, the test for whether a duty of care has been breached is authoritatively set out by Mason J in *Wyong Shire Council v Shirt*,[73] as follows:

> *'In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.'*
>
> (our emphasis)

[66] Particularly the examination of the contractual terms in the plurality judgment, [215ff].
[67] French CJ, 204–205, Hayne & Keifel JJ, 210–211, the plurality, 214 and Gageler J, 245.
[68] (2004) 216 CLR 515.
[69] (1999) 198 CLR 180.
[70] (1997) 188 CLR 159.
[71] (1997) 188 CLR 241.
[72] *Brookfield* per French CJ, 200, and Hayne and Keifel JJ, 209 and 210.
[73] (1980) 146 CLR 40, 47–48.

Most States and Territories have since enacted legislation which seeks to restate this common law test. While there are some slight differences between the wordings of the respective provisions, it is predominantly the case that a person does not breach a duty to take precautions against a risk unless:[74]

- the risk was foreseeable (being a risk which the person knew or reasonably should have known about);
- the risk was not insignificant; and
- a reasonable person in the position of the person would have taken precautions.

When considering what precautions a reasonable person would take against the risk, a court should take into account factors such as the probability and likely seriousness of harm, the social utility of the activity creating the harm, and the burden precautions would create.

The legislation applies to civil claims for damages for personal injury, damage to property or economic loss, and to a duty of care in tort and any other concurrent and coextensive duty (both under contract and statute). Its application is sufficiently broad as to capture most types of professional negligence claims.

In *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*[75] the High Court unanimously confirmed that the starting point of any consideration of breach of duty must be the civil liability legislation (in that case, the New South Wales Act), because if attention is not directed to the legislation, there is a serious risk that the inquires will miscarry.

This principle was followed in *New South Wales v Mikhael*,[76] in which Beazley JA said:

> *'The Civil Liability Act, s 5B essentially enacts in statutory form the common law test of breach of duty: see Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53 at [28] per Allsop P. However, as Allsop P noted, despite the closeness of the statutory regime to the common law test, it is the statute to which regard must be had. See also Adeels Palace Pty Ltd v Moubarak at [27]. The High Court in Adeels Palace also confirmed that the question whether there had been a breach of duty under the statutory test was to be assessed prospectively: see Vairy v Wyong Shire Council [2005] HCA 62; 223 CLR 422.*
>
> *Section 5B(1)(a) requires a determination as to whether the risk is foreseeable. As the authorities stand at present, the common law test as stated in Wyong Shire Council v Shirt [1980] HCA 12; 146 CLR 40 remains the touchstone for the determination of foreseeability. In regard to foreseeability, Mason J said, at 47:*
>
> > *"A risk of injury which is quite unlikely to occur . . . may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable".'*

[74] *Civil Liability Act 2003* (Qld) (**CLA (Qld)**) s 9; *Civil Liability Act 2002 (NSW)* (**CLA (NSW)**) s 5B; *Wrongs Act 1958* (Vic) (**Wrongs Act (Vic)**) s 48; *Civil Law (Wrongs) Act 2002* (ACT) (**CLA (ACT)**) s 43; *Civil Liability Act 2002* (Tas) (**CLA (Tas)**) s 11; *Civil Liability Act 1936* (SA) (**CLA (SA)**) s 32; *Civil Liability Act 2002* (WA) (**CLA (WA)**) s 5B. The Northern Territory has not enacted comparable civil liability legislation.

[75] (2009) 239 CLR 420, 432.

[76] [2012] NSWCA 338, [75]–[76].

This was also the case in *Mules v Ferguson*[77] (upheld on appeal[78]), where the Supreme Court of Queensland considered a professional negligence claim against a medical practitioner for a failure to diagnose, and had regard to the principles in s 9 of the CLA (Qld). Similarly, in *UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd*[79] the New South Wales Supreme Court applied s 5B of the CLA (NSW) to a professional negligence claim against an engineer.

A key element of the civil liability legislation is the 'not insignificant' test. The purpose of the test is that respondents should only be held liable for failing to take precautions in relation to risks that are 'not insignificant', rather than being required to take precautions in response to an array of risks which are unlikely to materialise. The common law test regarding foreseeability from the decision of *Wyong Shire Council v Shirt* defined a foreseeable risk as one that was 'not far-fetched or fanciful'.

The Queensland Court of Appeal in *Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd*[80] accepted that the test in s 9 was more demanding than the common law test established in *Shirt*. Justice Fraser (with whom White JA and Mullins J agreed) held that, in determining claims to which the Queensland Act applies, the 'not insignificant' test should be applied instead of the common law test of 'not far-fetched or fanciful'.[81]

Causation

For a defendant to be liable in negligence, it needs to be established not only that there is a breach of duty, but also that the breach was *causative* of loss. While such a link is not a stated element of a contractual or statutory cause of action (unlike in tort), a plaintiff likewise needs to establish the alleged wrongful conduct caused actual loss, should it wish to recover more than nominal damages.

Causation at common law ordinarily falls to be decided as a question of fact which must be determined by applying common sense to the facts of the case.[82] The *'but for'* has an important (although not wholly determinative) role to play in the resolution of the question. Applying the *'but for'* test, causation will be established if a plaintiff would not have sustained loss or damage had a defendant not been negligent – that is, *but for* a defendant's negligence, loss would not have occurred.[83]

The principles of causation of loss have also been restated in the State and Territory civil liability legislation, in terms which are broadly reflective of common law principles.[84]

The legislation provides that a determination that a party's negligence (or breach of duty) caused particular harm involves establishing the following elements:

- that the negligence was a necessary condition of the occurrence of the harm (***factual causation***); and
- that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

[77] [2014] QSC 51.
[78] [2015] QCA 5.
[79] [2014] NSWSC 1959.
[80] [2013] 1 Qd R 319, 333.
[81] Ibid [16].
[82] *March v Stramare (E & MH) Pty Ltd* (1991) 99 ALR 423, 429.
[83] Ibid 435.
[84] CLA (Qld) s 11; CLA (NSW) s 5D; Wrongs Act (Vic) s 51; CLA (ACT) s 45; CLA (Tas) s 13; CLA (SA) s 34; CLA (WA) s 5C. The Northern Territory has not enacted comparable civil liability legislation.

A plaintiff's evidence as to what they would have done if no breach of duty had occurred is inadmissible except to the extent of the evidence is contrary to the plaintiff's interests.[85]

Even if the parties fail to analyse causation in accordance with this statutory test at trial, the court is nonetheless obliged to have regard to it.[86]

In *Wallace v Kam*[87] the High Court explained the application of the statutory test, as follows:

> *'A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E. A determination in accordance with s 5D(1)(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (amongst other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.*

Looking at each element in isolation, in relation to the first limb of the test the High Court then said:[88]

> *'The determination of factual causation' . . . 'involves nothing more or less than the application of a "but for" test of causation. That is to say, a determination . . . that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.'*

However, the legislation in each jurisdiction provides that in exceptional cases where the *but for* test cannot be satisfied, the court may still find that factual causation has been established.[89] This may occur where there are multiple causes of harm such that the contribution of each cause does not satisfy the *but for* test individually. Further, it may apply to cases where negligent conduct has materially increased the risk of harm but the current state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff's harm,[90] such as cases requiring an analysis of the causation of mesothelioma.

In such circumstances a defendant's negligence need not be the sole necessary condition of the occurrence of the harm. It is sufficient if a defendant's negligent act contributes, jointly with other acts, to any harm that is suffered.[91]

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[85] CLA (Qld) s 11(3)(b); CLA (NSW) s 5D(3)(b); CLA (Tas) s 13(3)(b); CLA (WA) s 5C(3)(b). Victoria, the Australian Capital Territory and South Australia have not enacted a comparable provision.

[86] *Jamieson v Westpac Banking Corporation* (2014) 283 FLR 286; *Settlement Group Pty Ltd v Purcell Partners (firm)* [2013] VSCA 370, [98].

[87] (2013) 250 CLR 375, 383.

[88] Ibid.

[89] CLA (Qld) s 11(2); CLA (NSW) s 5D(2); Wrongs Act (Vic) s 51(2); CLA (ACT) s 45(2); CLA (Tas) s 13(2); CLA (SA) s 34(2); CLA (WA) s 5C(2).

[90] *Strong v Woolworths Ltd* (2012) 246 CLR 182.

[91] *Strong v Woolworths Ltd* (2012) 246 CLR 182; *Settlement Group Pty Ltd v Purcell Partners (a firm)* [2013] VSCA 370, [99].

In *Strong v Woolworths Ltd*, the plurality of the High Court observed:[92]

> *'Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.'*

As was the case in *Wallace*, where a medical practitioner fails to exercise reasonable care to warn a patient of one or more material risks inherent in a proposed treatment, to establish factual causation a patient would need to prove, on the balance of probabilities, that the patient has sustained, as a consequence of having chosen to undergo the medical treatment, physical injury which the patient would not have sustained if warned of all material risks.[93]

This was also considered by the High Court in *Tabet v Gett*.[94] The plaintiff alleged that a delay by a doctor in diagnosing her brain tumour resulted in her losing the chance of avoiding brain damage. She was successful at first instance,[95] but the decision was reversed on appeal.[96] Her appeal to the High Court was unsuccessful, with the court finding that the chance of a better medical outcome amounted to a mere possibility, as opposed to a probability as required by the legislation.

In *Jameison v Westpac Banking Corporation*[97] the primary judge (upheld on appeal to the Queensland Court of Appeal[98]) said that in a '*no transaction'* case against a financial advisor in respect of a failed investment, the question of factual causation required consideration of whether the plaintiff would not have entered into the subject investment had the found breaches of duty not occurred.[99] More is said about 'no transaction' cases in chapter 4.

The High Court has most recently said, in *Badenach v Calvert*[100] that in a lost opportunity case, the onus of proving causation of loss is not discharged by a finding that there was more than a negligible chance that the outcome would be favourable, or even by a finding that there was a substantial chance of such an outcome. In such a case the onus is only discharged where a plaintiff can prove that it was more probable than not that it would have received a valuable opportunity.

In respect of the second limb of the legislative causation test (legal causation), in *Wallace v Kam* it was said that:[101]

> *'Satisfaction of legal causation [scope of liability] requires an affirmative answer to the further, normative question . . . is it appropriate for the scope of the negligent medical practitioner's liability to extend to the physical injury in fact sustained by the patient?'*

[92] *Strong v Woolworths Limited* (2012) 246 CLR 182, [194].
[93] (2013) 250 CLR 375, 383.
[94] (2010) 240 CLR 537.
[95] *Tabet v Mansour* [2007] NSWSC 36.
[96] *Gett v Tabet* (2009) 254 ALR 504.
[97] [2014] QSC 32.
[98] [2016] 1 Qd R 495.
[99] *Jameison v Westpac Banking Corporation* (2014) 283 FLR 286, [113].
[100] (2016) 331 ALR 48 per French CJ, Kiefel and Keane JJ, 56–57.
[101] *Wallace v Kam* (2013) 250 CLR 375, 385.

The plurality in *Strong* noted that once factual causation is established the scope of liability consideration will ordinarily present little difficulty, as it would not usually be in contention that it is appropriate that the scope of a defendant's liability extend to the harm a plaintiff suffered.[102] It is only where a risk of harm that is beyond the scope of a defendant's duty to warn or advise materialises that the scope of liability limb of the statutory causation test will not be satisfied.

A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche.[103]

In this scenario the factual causation test would be satisfied (but for the negligent advice the mountaineer would not have made the climb) however the scope of liability test would not be (the risk of harm as a result of an avalanche being beyond the scope of a doctor's duty to exercise reasonable care and skill). Scope of duty has been addressed above.

Statute

Professionals are likely to be subject to various statutory obligations in providing advice or services to clients (and third parties). The two most common obligations are those prohibiting firstly misleading or deceptive conduct and secondly false and misleading representations.

These two obligations are by no means mutually exclusive, and will often be advanced as alternative causes of action in respect of the same conduct (and perhaps in addition to claims in contract and tort). In fact, this is probably now a prudent course for any plaintiff in light of the High Court's reasoning in *Selig v Wealthsure*[104] which permits a plaintiff to recover 100% of a loss where both apportionable and non-apportionable claims[105] are established arising in respect of the same loss, notwithstanding it was contributed to by the wrongful conduct of others.

Misleading or deceptive conduct

Section 18 of the ACL[106] prohibits misleading or deceptive conduct. The section takes its format from its predecessor, s 52 of the TPA, and provides that *'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.*

Comparable provisions are found in s 12DA of the ASIC Act (in relation to financial services) and s 1041H of the *Corporations Act 2011* (Cth) (**Corps Act**) (in relation to financial products and services).

There is an intentional overlap in the various provisions, and authorities arising from s 52 of the TPA are still relevant today in the context of the current legislation.

Basic principles

In *ACCC v Dukemaster Pty Ltd*,[107] Gordon J restated the following principles as applicable to a contravention (that is misleading or deceptive conduct in the context of the TPA):

[102] *Strong v Woolworths Limited* (2012) 246 CLR 182, 190.
[103] *Wallace v Kam* (2013) 250 CLR 375, 385.
[104] (2015) 255 CLR 661.
[105] For a full discussion of proportionate liability and apportionable claims, see chapter 3.
[106] For the application of the ACL, ASIC Act and TPA, see under the heading *Implied terms* above.
[107] [2009] FCA 682, [10].

- a contravention is established by '*conduct*' which is misleading or deceptive or likely to mislead or deceive.[108] The '*conduct*', in the circumstances, must lead, or be capable of leading, a person into error[109] and the error or misconception must result from '*conduct*' of the corporation and not from other circumstances for which the corporation is not responsible;[110]
- conduct is likely to mislead or deceive if there is a '*real – not remote chance or possibility regardless of whether it is less or more than fifty per cent*';[111]
- section 52(1) is concerned with the effect or likely effect of conduct upon the minds of that person or those persons in relation to whom the question of whether the conduct is or is likely to be misleading or deceptive falls to be tested. The test is objective and the court must determine the question for itself.[112] Section 52 is not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests.[113] Moreover, it would be wrong to select particular words or acts which although misleading in isolation do not have that character when viewed in context;[114]
- precisely the same principles control the operation of s 52(1) to statements involving the state of mind of the maker when the statement was made (such as promises, predictions and opinions). A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or impliedly) that the maker of the statement had a particular state of mind when the statement was made and, commonly, that there was a basis for that state of mind;[115]
- a statement of opinion will not be misleading or deceptive or likely to mislead or deceive merely because it turns out to be incorrect, misinforms or is likely to do so.[116] An incorrect opinion does not of itself establish that the opinion was not held by the person who expressed it or that it lacked any or any adequate foundation.[117] An expression of an opinion which is identifiable as an expression of opinion conveys no more than that the opinion is held and perhaps that there is a basis for the opinion. If that is so, an expression of opinion however erroneous misrepresents nothing;[118]
- however, an opinion may convey that there is a basis for it, that it is honestly held and when it is expressed as the opinion of an expert, that it is honestly held upon rational grounds involving an application of the relevant expertise. If the evidence shows that the opinion was not held or that it lacked any or any adequate foundation, particularly if the opinion was expressed as an expert, a statement of opinion may contravene s 52 of the TPA.[119]

[108] *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 87.
[109] *Hannaford (t/as Torrens Valley Orchards) v Australian Farmlink Pty Ltd* [2008] FCA 1591, [252], citing *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 200; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198.
[110] *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 91.
[111] Ibid 87.
[112] Ibid 87.
[113] *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, 241.
[114] Ibid 242, citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.
[115] *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88.
[116] *Elders Trustee* and *Bateman v Slatyer* (1987) 71 ALR 553, 559.
[117] *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88.
[118] Ibid 88.
[119] *Elders Trustee* (1987) 78 ALR 193, 242. See also *Hannaford* [2008] FCA 1591, [253] and *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388.

The decision of *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*[120] is illustrative of the difference between the two concepts, in which Lockhart J said:

> *'The two words, "misleading" and "deceptive", are plainly not synonymous. That is not to say that each word may not catch some of the same conduct and that there may not be some degree of overlap. "Mislead" does not necessarily involve an element of intent and it is a word of wider reach than "deceive". However, it is difficult, in my opinion, to read the word "deceive" in s 52 other than as involving some degree of moral turpitude as it does in ordinary English usage. Trickery, craft and guile, though not essential elements of liability, are typically at the heart of this second element of the statutory provision directed to the protection of the public from unfair trading practices.'*

A more simplistic interpretation of '*misleading*' was given in *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*[121] by French CJ and Kiefel J as to lead or likely to lead into error.

In the context of professionals, the application of the prohibition is of broad application. It can apply to any advice, statements of opinion, documents prepared or other representations made in the course of a professional engagement. It can apply to statements of past or present fact, statements of opinion or future matters (subject to reasonableness about which more is said below), as well as potentially also to conduct by silence. Further, it is not necessarily limited to conduct or representations made by a professional to a client, but is of equal application beyond a retainer if other factors exist.

Statements of fact

The most common and straightforward form of misleading or deceptive conduct involves a representation of a past or present fact. If the representation is incorrect, it will invariably be misleading.

This is illustrated by the decision of *Gates v City Mutual Life Assurance Society Ltd*,[122] in which the appellant (Gates) was induced to take out a total disability cover insurance policy with the respondent (City Mutual) based on a representation by its insurance agent that benefits would be paid under the policy if he was unable to carry on his usual occupation as a carpenter, whereas benefits were in fact only payable if he was rendered unable to carry on *any* gainful employment. The conduct of City Mutual (by its agent) was held to be false – and therefore misleading – in contravention of s 52 of the TPA (Gates' appeal ultimately failed as he was unable to prove any losses flowing from the breach).

Statements of opinion

A case often cited in relation to whether a statement of opinion is misleading or deceptive is *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*[123] in which the Full Court unanimously said:

> *'The non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor's intention lacked any, or any adequate, foundation. Similarly, that a prediction proves inaccurate does not of itself establish that the maker of the prediction did not believe that it would eventuate or that the belief lacked any, or any adequate, foundation. Likewise, the incorrectness of an opinion (assuming that can be established) does not of itself establish that the opinion was not held by the person who expressed it or that it lacked any, or any adequate, foundation.*

[120] (1988) 39 FCR 546.
[121] (2010) 241 CLR 357, [368].
[122] (1986) 160 CLR 1.
[123] (1984) 2 FCR 82, [31].

> *The applicants argued that, nevertheless, the statement of an incorrect opinion is misleading or deceptive or likely to mislead or deceive merely because it misinforms or is likely to misinform. An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing.'*

However, as noted above, an expression of opinion may carry with it an implied representation that the opinion expressed is honestly held, and/or that there is a reasonable basis for the opinion.

In such a case, the focus of the inquiry is not on whether the statement ultimately proved to be accurate, but whether there existed reasonable grounds for the representation. Whether reasonable grounds exist is to be determined by the facts and circumstances in existence at the time the statement was made.

Where an opinion either was not held at the time it was expressed, or lacked adequate foundation, it may be considered misleading. For example, in *Bateman v Slatyer*[124] the seller of a business made a representation regarding the profitability of the business, which was held to be misleading because no serious attempt was made to establish a proper basis for the cash flow projection represented, and in light of the information then available the seller could not have believed that the figures were soundly based.

The question whether there are reasonable grounds for making a particular representation is an objective one. A genuine or honest belief on the part of the representor is relevant but not sufficient to show reasonable grounds.[125] For there to be reasonable grounds for a representation there must exist facts which are sufficient to make the representation reasonable.[126]

Representations with respect to future matters

In *Tinge v Blanche*, Hill J said:[127]

> *'It will be readily apparent that a representation as to future conduct or a future event will generally imply (and sometimes explicitly state) that the maker of the representation was of a particular state of mind as to the future conduct or event as at the time the representation was made. A representation that a particular occupancy rate for a hotel might in the future be achieved, or, as alleged here, that a particular rent for nominated premises could be achieved in a future letting, impliedly involves a representation that the maker of the representation believed that the occupancy rate or rental could be achieved. It would be no less a representation as to the future by virtue of this implication. If the actual term of the representation is that the maker of the representation is of the view at the time that the occupancy rate or rental nominated could be achieved in the future, does that express statement turn a representation as to the future into a representation as to existing fact?*
>
> *. . .*
>
> *Whatever may be the case where there is an express representation as to the maker's state of mind concerning a future matter, it is not, in my opinion, correct to treat a representation as to an event or conduct in the future, be that in the form of a prediction or otherwise, as not being a representation with respect to a future matter merely because it implies a representation as to the maker's present state of mind.'*

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[124] (1987) 71 ALR 553.
[125] *Cummings v Rundle* (1993) 41 FCR 559, 565.
[126] *Grande Enterprises Ltd v Pramoko* [2014] WASC 294, [63].
[127] (1993) 118 ALR 543, 552–553.

In relation to representations with respect to future matters, the prohibition in s 18 of the ACL of misleading or deceptive conduct must be read in the context of s 4(1).

Section 4(1) of the ACL provides that where a person makes a representation with respect to a future matter and does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

Section 4(2) of the ACL then creates a presumption of a lack of such reasonable grounds that is rebuttable by the person making the representation. That is, the person making the representation bears the onus of establishing that he or she had reasonable grounds for making the representation.

In order to rebut the presumption in s 4(2) a representor needs to demonstrate:[128]

1. *Some facts or circumstances;*
2. *Existing at the time of the representation;*
3. *On which the representor in fact relied;*
4. *Which are objectively reasonable; and*
5. *Which support the representations made.*

Ultimately, the existence of reasonable grounds for the making of a representation as to future matters is something to be determined by the court. In *McGrath v Australian Natural Care Products Pty Ltd*,[129] Emmett J of the Federal Court said:

> *'However, if evidence is adduced by the representor to the effect that the representor had reasonable grounds for making the representation, the deeming provisions will not operate. Where the representor adduces such evidence, it is then a matter for the court to determine, on the balance of probabilities in the ordinary way, whether or not the representor had reasonable grounds for making the representation.'*

Silence

Section 2 of the ACL defines the phrase '*engaging in conduct*' in sufficiently wide terms to include, relevantly, *refusing to do any act.* In some circumstances, this can be constituted by silence.

An important limitation however is that inadvertently refraining from doing an act is insufficient. Section 2 of the ACL requires actual knowledge for a failure to disclose to be actionable.[130]

That is not to say the ACL imposes on a party any particular duty of disclosure. Rather, the whole of the circumstances need to be examined in order to determine whether silence is of itself misleading or deceptive.

In *Demagogue Pty Ltd v Ramensky & Anor*[131] Black CJ observed that:

[128] *Sykes v Reserve Bank of Australia* (1998) 158 ALR 710, 712.
[129] (2008) 165 FCR 230, 242.
[130] *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592, 622 (in respect of the predecessor provision in s 4(2) of the TPA).
[131] (1992) 39 FCR 31.

> *'Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.'*

The relevant circumstances of the Henjo Investments case involved the seller of a business who knew that it was subject to serious limitations upon its lawful seating capacity, which affected the goodwill, takings and profitability of the business, but which was being conducted contrary to law with a substantial element of overseating. These circumstances were found to be sufficient to give rise to a duty on the part of Henjo as vendor to reveal the true position to Collins Marrickville, the potential purchaser, before any contract was signed.

The Full Court of the Federal Court upheld the primary judge's findings that Henjo had engaged in misleading or deceptive conduct by silence, in breach of s 52 TPA.

Lockhart J (with whom Burchett J and (on this point) Foster J agreed) said that *'misleading or deceptive conduct generally consists of representations, whether express or by silence; but it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation.'*[132]

His Honour went on to say:[133]

> *'The circumstances in which silence may constitute misleading conduct under the Act were referred to in Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 68 ALR 77; 12 FCR 477. That case established that silence may be relied on in order to show a breach of s 52 when the circumstances give rise to an obligation to disclose relevant facts: see Bowen CJ (ALR) at 84; (FCR) at 490; Lockhart J (ALR) at 98–9; (FCR) at 504; and Jackson J (ALR) at 102–3; (FCR) at 508. The duty to disclose is not confined to cases where there are particular relationships, such as trustee and beneficiary or solicitor and client, principal and agent and guardian and ward. There is no useful purpose in seeking to analyse the circumstances in which the duty to disclose will arise as this must depend on the facts of each case.'*

A different result ensued in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.[134] Consolidated Timber Holdings engaged Miller as its insurance broker to assist in an application for an insurance premium funding loan with the financier, BMW. Miller supplied BMW with various documents including a memorandum and certificates of insurance in relation to the underlying policy.

[132] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, [94].
[133] Ibid [96].
[134] (2010) 241 CLR 357.

BMW thought the insurance policy was cancellable (cancellable policies constituted a form of security for financiers as they allow the financier to cancel the policy and recover the unused premium in the event of a default by the borrower). In fact, the policy was neither assignable nor cancellable. BMW lent Consolidated almost $4 million, only $1 million of which was repaid before Consolidated defaulted on its obligations. BMW claimed that Miller had engaged in misleading and deceptive conduct and sued Miller alleging a representation that led BMW to believe that the policy was assignable and cancellable. Alternatively BMW argued that Miller's failure to disclose that the policy was neither assignable nor cancellable constituted misleading and deceptive conduct.

The High Court found that Miller had not breached s 52 of the TPA. Miller's silence on this issue was put under scrutiny, however the court considered that as the parties to the transaction were all commercially sophisticated and that BMW was an experienced premium lender, there was no duty on Miller to volunteer any additional information. BMW, as an experienced industry participant, could have made reasonable inquiries about the policy and, in particular, examined the policy for a cancellation clause. It had failed to do so, and Miller was not in breach.

False or misleading representations

Section 29 of the ACL contains a comprehensive suite of prohibitions against the making of false or misleading representations about goods or services. They replace and largely mirror the prohibitions formerly in s 53 of the TPA.

A number of the prohibitions are of potential application to professionals, including most relevantly the prohibitions against making false or misleading representations:

- that services are of a particular standard, quality, value or grade (s 29(1)(b) of the ACL; s 53(aa) of the TPA);
- with respect to the price of services (s 29(1)(i) of the ACL; s 53(e) of the TPA).

Comparable provisions are found in s 12DB of the ASIC Act (in relation to financial services) and s 1041E of the Corps Act (in relation to financial products and services), and these naturally impact the position of professionals such as financial planners and finance brokers.

In *ACCC v Gary Peer and Associates Pty Ltd*[135] Sundberg J described the two elements in s 53(e) of the TPA (the equivalent of s 29(1)(i) of the ACL, concerning the price of goods or services) as follows:

> *'A representation may be false within the meaning of s 53(e) if it is contrary to fact, irrespective of the knowledge of the representor: Given v C V Holland (Holdings) Pty Ltd (1977) 29 FLR 212 at 217.*
>
> *A "price" of goods or services in s 53(e) does not have to be a precise figure. There can be a "price" even though it is stated to be within a range of a particular figure or that otherwise an element of approximation is involved: Trade Practices Commission v Penfolds Wines Pty Ltd (1992) ATPR 41-163 at 40,222. It was submitted that the relevant issue is whether the advertisements falsely or misleadingly represented the price, namely the monetary consideration for the sale of the Property: Australian Competition and Consumer Commission v Nationwide News Pty Ltd (1996) ATPR 41-519 at 42,493–4.'*

[135] (2005) 142 FCR 506, [57]–[58].

ACCC v Dukemaster Pty Ltd (decided in the context of the TPA) highlighted the absence of authority suggesting any material difference between the phrases *'false or misleading'* and *'misleading or deceptive'*.[136] The prohibition under s 29 is however of more limited scope to that under s 18, as the former applies only to *representations* while the latter applies more broadly to *conduct* (which, as noted in the preceding section, extends beyond representations).

However, in representation cases where both provisions are relied on there is therefore no reason why the application of one provision should not fall to be determined upon the conclusions reached in relation to the other provision. Courts have often dealt with the '*false and misleading*' and '*misleading or deceptive*' aspects of the conduct together, with the application of s 29 falling to be determined upon the same conclusions reached in respect of whether conduct is misleading or deceptive for the purpose of s 18.[137]

[136] [2009] FCA 682, [14].
[137] *ACCC v Dukemaster Pty Ltd* [2009] FCA 682, [15]; *Foxtel Management Pty Ltd v Australian Video Retailers Association Ltd* (2004) 214 ALR 554.

CHAPTER 2 – CONTRACTUAL INDEMNITIES AND LIMITATIONS

Contractual indemnities

What is a contractual indemnity

In *Andar Transport Pty Ltd v Brambles Ltd*,[138] Justice Kirby described indemnity clauses as *'provisions that purport to exempt one party from civil liability which the law would otherwise impose upon it. They are provisions that shift to another party the civil liability otherwise attached by law to the first party.'*[139]

Indemnities therefore alter, by way of contract, the parties' common law or statutory liability.

An indemnity is enforceable only according to its terms and therefore recovery under an indemnity involves an examination of what loss has been sustained by the party seeking to enforce the indemnity, and whether that loss arises out of an indemnified event.

Types of indemnities

The three most common types of indemnities are:

- bare indemnity. A bare indemnity exists where party A agrees to indemnify party B from all liability incurred in connection with a specified event or circumstances, without any limitation. Such a clause can often be silent as to whether it indemnifies party B from loss arising from its own act or omissions. Given its breadth, it is possible that a bare indemnity may have the effect of a reflexive/reverse indemnity (see next point);
- reverse or reflexive indemnity. A reflexive or reverse indemnity requires one contracting party, B, who has successfully sued another (but defaulting) contracting party, A, to indemnify A. A reflexive indemnity is distinguishable from a bare indemnity in that a reflexive indemnity is intended by the parties to apply to a liability which arises, as between them, from the indemnified party's own default (for example, a breach of duty or breach of contract).[140] Put simply, a reflexive or reverse indemnity involves party A indemnifying party B against loss incurred as a result of party B's own acts or omissions;
- proportionate or limited indemnity. This is the opposite of a reverse indemnity. Party A indemnifies party B against losses except those incurred as a result of party B's own acts or omissions. Proportionate indemnities are common in contracts yet they do no more than state (or enshrine a reversion to) the common law position and do not assist a party in respect of liability flowing from that party's own acts or omissions.

Less common types of indemnities include:

- third party indemnity, where party A indemnifies party B against liability to or claims by party C;
- financing indemnity, where party A indemnifies party B against loss incurred if party C fails to honour the financial obligation (i.e. the primary obligation) to party B (most often these are coupled with a guarantee); and
- party/Party indemnities, where each party to a contract indemnifies the other for losses occasioned by the indemnifier's breach of the contract.

[138] (2004) 217 CLR 424.
[139] Ibid 452.
[140] *Westina Corporation Pty Ltd v BGC Contracting Pty Ltd* (2009) 41 WAR 263, 277.

Interpreting indemnity clauses

When construing a contractual indemnity, it is useful to keep in mind that:

> *'It is . . . a fundamental consideration in the construction of contracts of this kind that it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence.'*[141]

Given that indemnities can have a significant financial benefit to the indemnified party, their inclusion in a relevant contract will likely be the result of specific negotiations and may even be the result of valuable consideration passing from the indemnified to the indemnifier.

It is also important to be mindful of the fact that each case will turn on its own facts and on the specific wording of the clause being considered in the context of the commercial relationship between the parties. For that reason, having recourse to previous decisions interpreting indemnities may provide some assistance when interpreting the clause at hand, but those decisions may ultimately not be indicative of how a court will construe the indemnity due to the nuances of either the wording or the relationship between the parties.

Also relevant is that a contractual indemnity will be construed by the court *contra proferentum* in the event of ambiguity. That is, where an indemnity clause is ambiguous (as to which, see Applegarth J's remarks in *Ellington* below) in its effect, it will be construed against the party whose interest the clause favours.[142]

The case of *Samways v WorkCover Queensland & Ors*[143] not only provides guidance on the interpretation of indemnity clauses, it also provides a good example of the benefit they can convey.

The plaintiff, a concretor, was dispatched by his employer to work at a site under the control of the defendant building contractor. The building contractor entered into a 'wet hire' agreement with the defendant hire agency for the hire of a bobcat and operator. One afternoon, after some mechanical trouble, the bobcat was left on the site in its usual parking space but with the bucket in an elevated position. The following morning, the plaintiff walked into the raised bucket and injured his shoulder.

The plaintiff sued his employer, the building contractor and the hire agency. At trial, all three defendants were liable for the plaintiff's injuries insofar as:

- the hire agency was liable for the negligence of the operator in failing to move the bobcat or lower its bucket;
- the site supervisor, employed by the building contractor, was negligent for failing to move the bobcat, or make arrangements to have it moved; and
- the employer was liable for failing to direct its employees not to carry out tasks in the area of the bobcat or to erect a barricade around it.

Liability was apportioned 60% to the hiring agency, 30% to the building contractor and 10% to the employer.

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[141] *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, 419 cited in *Ellington v Heinrich Constructions Pty Ltd* (2005) 13 ANZ Ins Cas 61-646.
[142] *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549.
[143] [2010] QSC 127.

The hire agency sought a full indemnity in respect of its exposure from the building contractor, pursuant to the terms of the '*wet hire*' agreement which provided, insofar as material:

> *'The [building contractor] shall fully and completely indemnify the [hire agency] in respect of all claims by any person or party whatsoever for injury to any person or persons and/or property caused by or in connection with or arising out of the use of the plant and in respect of all costs and charges in connection therewith whether arising under statute or common law.'*

The hire agency argued the indemnity operated in its favour and encompassed all claims for negligence, including its own negligence.

The building contractor relied on *Ellington v Heinrich Constructions Pty Ltd*[144] to argue that the clause should not be construed so as to oblige it to indemnify the hire agency against the consequences of the agency's own negligence.

In construing the indemnity clause, Applegarth J observed[145] that:

- an indemnity clause must be construed strictly, and any doubt as to the construction should be resolved in favour of the indemnifier. Doubt may arise not only from the uncertain meaning of a particular expression but from its apparent width of possible application;
- the authorities that require ambiguity to be resolved in favour of the indemnifier do not require that ambiguity be detected where the natural and ordinary meaning of the language, taken in its contractual context, requires no such conclusion. Absent statutory authority, a court has no mandate to rewrite a provision to avoid what it retrospectively perceives as commercial unfairness or lack of balance;
- effect should be given to the ordinary meaning of the language used (absent use of technical expressions or terms of art) so as to provide certainty as to where responsibility may lie, against which insurance may be obtained. The fact that the contract requires a party to take out insurance against the indemnified liability may be taken into account in concluding that the indemnity applies to that liability, whether or not insurance is in fact taken out. The absence of a provision for insurance against the liability may also be taken into account. However, the fact that the indemnifier is not required by the contract to take out insurance, and chooses not to take out insurance should not affect the construction of an indemnity that unambiguously allocates responsibility for the liability against the indemnifier;
- the outcomes of other cases involving different contractual arrangements and different clauses do not dictate the outcome of this case. However, the principles of construction established in those cases should be followed;
- one line of authority construes indemnities on the assumption that it is inherently improbable that a party would contract to absolve the other party against claims based on the other party's own negligence. The competing view is that at least a principal purpose for obtaining such an indemnity is to protect a party against liability for its own fault.

Ultimately, Applegarth J held that the apparent breadth of the indemnity, in extending the indemnity to claims for personal injuries '*caused by or in connection with or arising out of the use of the plant*', including claims in respect of the hire agency's own negligence, arose from the ordinary language of the clause. In circumstances in which the hire agency gave control over the operator and the building contractor assumed that control, the clause was to be construed according to its ordinary meaning to extend the claims for liability for personal injury in circumstances in which the hire agency was vicariously liable for the negligence of its employee. The hire agency was thereby entitled to an indemnity against the plaintiff's claim and in respect of costs.[146]

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[144] (2005) 13 ANZ Ins Cas 61-646.
[145] *Samways v WorkCover Queensland & Ors* [2010] QSC 127, [66]–[70].
[146] Ibid [74].

In short, the indemnity was found to be sufficient to reduce the hire agency's liability to 0% even in circumstances where its operator had been the primary tortfeasor.

Contractual limitations

Another common method to limit exposure to liability is by the use of temporal or monetary limitation clauses to limit either the time in which a claim can be made or to cap exposure to that claim.

In construing such clauses, a court will apply the test from *Darlington Futures Limited v Delco Australia Pty Ltd*,[147] which requires a limitation clause to be determined by giving the words their:

> *'. . . natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract and, where appropriate, construing the clause contra proferentum in the case of ambiguity.'*[148]

Temporal limitations are a common and often effective way for contracting parties to place limits upon the time in which a claim may be brought, altering the ordinary six year statutory limitation applicable to claims in contract and tort.

In *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*,[149] Barwick CJ said that:

> *'The relevant law as to the enforceability of a time limitation clause, in my opinion, is not in doubt and needs no detailed exploration. The decision in Suisse Atlantique Société d'Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale indicates, in my opinion, that whilst exemption clauses which, for present purposes, can be assumed to include a time limitation such as cl 17, should be construed strictly, they are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract or, for some other reason, justify the cutting down of their scope.'*[150]

In *Owners SP 62930 v Kell and Rigby Pty Ltd*[151] the New South Wales Supreme Court considered the terms of a retainer between a building owner and an engineering firm, which contained the following temporal limitation:

> *'The Consulting Engineer shall be deemed to have been discharged from all liability in respect of the Services, whether under the law of contract, tort or otherwise, at the expiration of the period specified in Item 10 of the Schedule or if no date is specified on the expiration of one year from the completion of the Services, and the Client shall not be entitled to commence any action or claim whatsoever against the Consulting Engineer in respect of the Services after that date.'*

The period specified in Item 10 of the Schedule in that instance was two years. The retainer in that case also included a monetary limitation of $5 million, but which was not the focus of the case.

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[147] (1986) 161 CLR 500.
[148] Ibid 510.
[149] (1978) 139 CLR 231.
[150] Ibid 238.
[151] [2009] NSWSC 1342.

The court (having determined that the claim against the engineers was one which triggered the indemnity) observed – in the course of upholding the indemnity as a bar to the claim against the engineers – that:

> *'One of the purposes of clauses that exclude or limit liability is to enable that party relying upon them to be able, as it were, to rule off its books once the monetary amount of the temporal limitation has been reached. There are clear commercial advantages inherent in this: including, of course, in relation to the cost of insurance.*
>
> *Looking at the matter objectively, what the parties sought to achieve was to specify precisely and exclusively, so far as the law allows, the monetary and temporal limits of any liability that [the engineer] might have with the developers under the contract between them.*
>
> *The words "or otherwise" are wide enough in their ordinary meaning to pick up liability under statute.'*[152]

Similarly, in *Lane Cove Council v Michael Davies & Associates*,[153] the New South Wales Supreme Court was called on to consider the terms of a retainer between an architect and a local council which contained a temporal limitation in the following terms:

> *'MDA's liability in respect of the services whether under the law of contract, in tort or otherwise shall cease after the expiration of one year from the date of the invoice of the final amount claimed pursuant to clause 1, 2 and 3, the date of Practical Completion or the date of termination of the architectural services whichever is the earlier.'*

The court held, following a similar finding in *Kell and Rigby*,[154] that the ordinary meaning of the words 'under the law of contract, in tort or otherwise' includes liability under a statute.[155]

The court in both instances found no reason to consider the temporal limits (two years and one year, respectively) were other than reasonable. Although the periods were substantially shorter than the ordinary six year limitation that would have applied, they were nonetheless seen as the objective intention of two contracting parties.

Some uncertainty however surrounds whether monetary and contractual limitation clauses can be used to limit liability for misleading and deceptive conduct, something often alleged against professionals.

It is well accepted that a party cannot contract out of liability for misleading and deceptive conduct. However, in *Lane Cove Council* the court formed the view that a contractual limitation (as opposed to an exclusion) did not amount to contracting out of liability but rather such clauses simply reflect the parties' intentions to impose temporal and monetary limits on the damages that may be awarded under competition and consumer legislation.[156] His Honour in *Kell and Rigby* also noted that no party had made a submission to the effect that the temporal limitation conflicted with or should be read down by reference to the six year limitation period in the TPA.[157]

[152] Ibid [20].
[153] [2012] NSWSC 727.
[154] [2009] NSWSC 1342, [28].
[155] [2012] NSWSC [727].
[156] Ibid [73].
[157] [2009] NSWSC 1342, [30].

CHAPTER 3 – DEFENCES

Contributory negligence

Contributory negligence can be raised as a defence to any number of actions for damages in circumstances where the actions of a claimant have in some way caused or contributed to the loss the result of the defendant's alleged negligence. The defence has its grounding both in common law and under various statutes.

The principles applied in determining whether a plaintiff has been contributorily negligent are the same as in deciding whether the defendant breached a duty of care.[158] The standard of care is that of a reasonable person on the basis of what they knew, or ought reasonably to have known, at the time the harm was suffered.[159]

Contributory negligence does not of itself defeat the claim, but legislation gives the court the power to apportion liability and reduce damages.[160] Damages can be reduced by an amount it considers just and equitable, which may be up to 100% depending on the circumstances.[161]

In determining the amount of the reduction of damages for contributory negligence, the court undertakes a comparison both of culpability, that is, of the degree of departure from the standard of care of the reasonable man and of the relative importance of the acts of the parties in causing the damage. It is the whole of the conduct of each negligent party in relation to the circumstances of the incident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case.[162]

In *Swanson v Harrison & Ors*[163] the defendant insurance broker raised a defence of contributory negligence on the part of his plaintiff client in defence of a claim following a series of events resulting in the plaintiff being disentitled to indemnity under a life insurance policy.

The broker alleged the plaintiff was contributorily negligent for failing to inform the broker that, at the time of providing instructions to cancel one life insurance policy and enter into another, the plaintiff was undergoing medical investigations for symptoms that (after the new policy's inception) turned out to be pancreatic cancer.

The court reduced the plaintiff's damages by 50% because it was of the view that the plaintiff failed to exercise the care of a reasonable person in his situation by not telling the broker his ongoing symptoms and that the results of the further investigations were pending.

Proportionate liability

Proportionate liability operates to limit a defendant's liability to an amount reflecting what the court considers fair, having regard to the extent of that party's responsibility for the loss and damage.

[158] CLA (Qld) s 23 (1); CLA (NSW) s 5R(1); CLA (SA) s 44(1); CLA (Tas) s 23(1); Wrongs Act (Vic) s 62(1); CLA (WA) s 5K(1).
[159] CLA (Qld) s 23 (2); CLA (NSW) s 5R(2); CLA (SA) s 44(1); CLA (Tas) s 23(2); Wrongs Act (Vic) s 62(2); CLA (WA) s 5K(2).
[160] *Law Reform Act 1995* (Qld) (**LRA (Qld)**) s 10(1); *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (**LRA (NSW)**) s 9(2); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**LRA (SA)**) s 7(3)(a); *Wrongs Act 1954* (Tas) (**Wrongs Act (Tas)**) s 4(1); Wrongs Act (Vic) s 26(1)(A); *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) (**LRA (WA)**) s 4(1)(a); CLA (ACT) s 102; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) (**LRA (NT)**) s 16(2).
[161] CLA (Qld) s 24; CLA (ACT) s 47; CLA (NSW) s 5S; Wrongs Act (Vic) s 63.
[162] *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529, 532–533.
[163] [2014] VSC 118.

Proportionate liability schemes are contained in State and Territory legislation[164] in addition to the ASIC Act, the Corps Act, and the CCA (collectively, **the Commonwealth Acts**).

Where liability is joint and several (opposed to proportionate), the usual practical outcome is that a deep pocketed defendant may be exposed to the entirety of any award of damages even if that defendant's conduct is a minor cause of the plaintiff's loss. Conversely, under proportionate liability schemes, when there are impecunious, uninsured, insolvent or unidentifiable defendants satisfying certain criteria set up within the scheme the plaintiff must bear the share of the loss attributable to those defendants.

The schemes can therefore be to the advantage of defendants who may otherwise have been exposed to a disproportionate share of an award of damages having regard to their involvement in the conduct giving rise to the claim.

Some statutes allow the parties to contract out of the proportionate liability schemes,[165] where as other jurisdictions are either silent (Victoria, Australian Capital Territory, Northern Territory, South Australia and the Commonwealth Acts) or in the case of Queensland expressly prohibit this practice.[166]

While the schemes differ in various respects, proportionate liability will generally arise where:

- the claim made against the defendant is an '*apportionable claim*';
- the defendant is a '*concurrent wrongdoer*'; and
- the relevant Act does not expressly exclude the defendant's liability from being apportioned.

Apportionable claims

All State and Territory based schemes apart from South Australia define '*apportionable claim*' as a claim for damages for economic loss or property damage arising from a breach or a failure to take reasonable care (or in Queensland, a breach of a duty of care) in tort or contract, or for damages under the misleading or deceptive conduct provisions of each State and Territory's consumer laws.[167]

In South Australia, '*apportionable liability*' is defined as property and economic loss, not including economic loss consequent on personal injury, where two or more wrongdoers, who are not joint tortfeasors, commit a negligent and innocent wrongdoing.[168]

In the Commonwealth Acts, apportionable claims are limited to claims for economic loss or damage to property caused by misleading or deceptive conduct.[169]

[164] CLA (ACT); CLA (NSW); *Proportionate Liability Act 2005* (NT) (**PLA (NT)**); CLA (Qld); CLA (Tas); Wrongs Act (Vic); CLA (WA); LRA (SA).
[165] CLA (NSW) s 3A; CLA (WA) s 4A; CLA (TAS) s 3A.
[166] CLA (Qld) s 7(3).
[167] CLA (ACT) s 107B(2); CLA (NSW) s 34(1); PLA (NT) ss 3, 4(2); CLA (Qld) s 28(1)(a); CLA (Tas) s 43A(1); Wrongs Act (Vic) s 24AF(1); CLA (WA) s 5AI(1).
[168] LRA (SA) s 3(2)(a).
[169] CCA s 87CB(1); Corps Act s 1041L(1); ASIC Act s 12GP(1).

In Selig v Wealthsure[170] the High Court considered a situation where a claim was made under a number of provisions of the Corps Act, including a claim involving s 1041H (misleading or deceptive conduct). The question for determination was whether claims for damages pursuant to s 1041H as well as other sections are to be treated as apportionable claims. The High Court concluded that the '*apportionable*' nature of a claim based upon a contravention of s 1041H does not extend to claims based upon conduct of a different kind even if a claim includes a breach of s 1041H and another section. The result was that the claim was not apportionable and the plaintiffs were able to recover the entirety of their loss from the defendants.

That interpretation can be applied to the CCA and the ASIC Act which contain almost identical definitions of '*apportionable claims*', including most notably the requirement that the claims be based on misleading or deceptive conduct.

Concurrent wrongdoer

The Commonwealth Acts all define concurrent wrongdoer as a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.[171]

Similarly, under the State schemes, a concurrent wrongdoer is generally defined as a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim. It does not matter if that concurrent wrongdoer is insolvent, being wound up or has ceased to exist.[172]

While this definition is largely consistent between the State based schemes, Queensland and South Australia omit the term '*jointly*' in their definition of concurrent wrongdoers.[173] The effect of the omission of this word is that in Queensland and South Australia a wrongdoer and the party vicariously liable for the actions of that wrongdoer are not concurrent wrongdoers.

An illustration is found in the Queensland case of *GEJ & MA Geldard Pty Ltd v Mobbs & Ors (No 2)*,[174] where Ann Lyons J emphasised the importance of the words '*independently of each other'* in determining whether a party is a concurrent wrongdoer, and how that phrase, properly construed, meant if parties had jointly caused a loss, then they were not concurrent wrongdoers. For example, the liability of a negligent employee and a vicariously liable employer is '*joint*' and not '*independent*'.

This was reinforced in another Queensland decision, *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd & Anor*,[175] where a defendant engaged a subcontractor to perform modifications to a truck and alleged that it and that subcontractor were concurrent wrongdoers in response to allegations that the modifications were defective.

The court ordered the defence of proportionate liability to be struck out on the basis that the subcontractor was not independently responsible for the plaintiff's damage so the same acts or omissions by the defendant and the subcontractor caused the plaintiff's loss. As the conduct was the same, the parties could not be concurrent wrongdoers.

Whether a concurrent wrongdoer '*caused*' the plaintiff's loss or damage is a question of fact.[176]

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[170] (2015) 255 CLR 661.
[171] ASIC Act s 12GP(3); CCA s 87CB(3); Corps Act (Cth) s 1041L(3).
[172] See CLA (NSW) s 34(2); CLA (ACT) s 107D(1); PLA (NT) s 6(1)); CLA (Tas) s 43A(2); Wrongs Act (Vic) s 24AH(1); CLA (WA) s 5AI.
[173] CLA (Qld) s 30(1); LRA (SA) s 3(2)(b).
[174] [2012] 1 Qd R 120.
[175] [2013] QSC 319.
[176] *Hunt & Hunt v Mitchell Morgan Pty Ltd* (2013) 247 CLR 613, 635.

Exclusions

All proportionate liability schemes exclude claims arising out of personal injury.

Claims against wrongdoers who fraudulently or intentionally cause the plaintiff's loss are excluded either expressly,[177] or by virtue of the relevant definitions of '*apportionable claim*'.[178]

In Queensland an apportionable claim cannot be one which has been made by a '*consumer*'[179] and in New South Wales claims for breach of statutory warranty are excluded.[180]

Where a claim is apportionable in part only, the part which is not apportionable will not attract the operation of the proportionate liability provisions and will, instead, be determined in accordance with the relevant principles at common law and under statute.

*Consequences of being a '*concurrent wrongdoer*'*

Most jurisdictions require the defendant to assist the plaintiff to identify all other concurrent wrongdoers and the circumstances giving rise to their involvement in the loss.[181] A failure by a concurrent wrongdoer to comply may have cost consequences and make it severally liable for any award of damages made.[182]

In Queensland a failure by a plaintiff to join other concurrent wrongdoers as identified by a defendant may also have costs consequences.[183] The Queensland scheme also allows the court to make adverse cost orders against any concurrent wrongdoer where it alerts the plaintiff to the existence of another concurrent wrongdoer, the plaintiff joins that party, and the court finds that party not to be liable to the claim.[184]

While the schemes are silent on who bears the onus of proof in establishing the concurrent wrongdoers, Ann Lyons J in *Geldard v Mobbs* found that the Queensland scheme did not change the general rule that a defendant bears the onus of pleading and proving a defence. Therefore, once the plaintiff has met its burden and established that a defendant has caused it to suffer a loss, then it is a matter for the defendant to prove that the damages should be reduced because there are concurrent wrongdoers who are liable to the plaintiff because their independent acts or omissions have caused the loss or damage.

Discharging such an onus of proof can potentially be difficult for a defendant, as a defendant may be obliged to lead evidence at trial regarding the liability of other defendants who may no longer be directly involved in the hearing, due to a prior settlement having been brokered with the plaintiff.[185]

Contrary to the common law position, concurrent wrongdoers against whom judgment has been given cannot seek contribution or indemnity from each other.[186] It is therefore vital that in a matter involving an apportionable claim, defendants plead proportionate liability during the proceeding.

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[177] CLA (Qld) s 32D and 32E; Wrongs Act (Vic) s 24AM.
[178] CLA (Tas) s 43A(6); CLA (WA) s 5AJA(2); LRA (SA) s 3; CLA (NSW) s 34A(2); PLA (NT) s 7(1); CLA (ACT) s 107E(2).
[179] CLA (Qld) s 28(3)(b).
[180] CLA (NSW) s 34(3A).
[181] CLA (Tas) s 43D(1)(a) and (b); CLA (WA) s 5AKA(1)(a) and (b); LRA (SA) s 10(1); CLA (NSW) s 35A(1)(a) and (b); PLA (NT) s 12(1)(a) and (b); CLA (ACT) s 107G(1)(a) and (b); CLA (Qld) s 32(2) and (3).
[182] CLA (Tas) s 43D(1) and 43D(2); CLA (WA) s 5AKA(1) and (2); LRA (SA) s 10(2) and (3); CLA (NSW) s 35A(1) and 35A(2); PLA (NT) s 12; CLA (ACT) s 107G(1),(2) and (3); CLA (Qld) s 32(5).
[183] CLA (Qld) s 32(1).
[184] CLA (Qld) s 32(6).
[185] As was the case in *GEJ & MA v Geldard v Mobbs (No 2)* [2012] 1 Qd R 120.
[186] CLA (Qld) s 32A.

Determining liability

The wording of each scheme's provision concerning the assessment of a concurrent wrongdoer's proportional share of the loss is similar, with the wording varying between '*just and equitable*',[187] '*just*',[188] and '*fair and equitable*'.[189]

Courts take a holistic approach in considering the comparative wrongdoing of all concurrent wrongdoers, including those who haven't been joined to the proceedings by the plaintiff.

Podrebersek v Australian Iron & Steel Pty Ltd[190] provides a useful starting point for considering how Courts approach the issue of determining apportionment between concurrent wrongdoers. The decision concerns the principles to be applied in the context of contributory negligence (apportioning responsibility between a plaintiff and defendant) although have been held to apply whenever the issue of apportionment between parties arises, including under the Queensland,[191] New South Wales[192] and Victorian[193] proportionate liability schemes, and under the TPA.[194]

The High Court in *Podrebersek* said that a finding on a question of apportionment is a finding upon *'a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds.'*[195]

The High Court went on to say that:

> *'[t]he making of an apportionment . . . involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man . . . and of the relative importance of the acts of the parties in causing the damage: Stapley v Gypsum Mines Ltd [1953] AC 663 at 682; Smith v McIntyre [1958] Tas SR 36 at 42–49 and Broadhurst v Millman [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.'*[196]

More recently, Chernov JA in *Alcoa Portland Aluminium Pty Ltd v Husson*[197] stated that:

> *'The approach to be adopted . . . requires a comparison both of culpability and the relative importance of the acts of the parties in causing the injury, requiring the whole of the relevant conduct of each of the negligent parties to be subject to comparative examination. The tasks involve matters of proportion, balance and relative emphasis and are, in this regard, similar to the exercise of a broad discretion.'*

[187] CLA (Qld) s 31(1)(a).
[188] CLA (Tas) s 43B(1)(a); CLA (WA) s 5AK(1)(a);); CLA (NSW) s 35(1)(a); PLA (NT) s 13(1)(a); CLA (ACT) s 107F(1)(a); ASIC Act s 12GR(1)(a); Corps Act s 1041N(1)(a); CCA s 87CD(1)(a).
[189] LRA (SA) s 8(2).
[190] (1985) 59 ALR 529.
[191] *Geju Pty Ltd v Central Highlands Regional Council* [2016] QSC 279, [164].
[192] *Av8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd* [2014] NSWCA 46, [125].
[193] *Iannello v BAE Automation and Electrical Services Pty Ltd* [2008] VSC 544, [71].
[194] *Orchard Holdings Pty Ltd v Paxhill Pty Ltd* [2012] WASC 271, [342]–[343].
[195] (1985) 59 ALR 529, 532.
[196] Ibid 532–533.
[197] (2007) 18 VR 112, 136.

The Victorian Supreme Court applied these principles in *Sali & Ors v Metzke & Allen*,[198] a professional negligence claim against an accountant following a business failure. The court compared the respective culpabilities of what it described as the '*active wrongdoer*' who was primarily responsible for the failure (to which it apportioned 70% of the liability), with that of the defendant accountants who were not the active cause of the failure but were in a position to take steps which could have prevented it from occurring (to which it apportioned the 30% balance).

It is therefore generally the case that a party who is actively responsible for causing a loss will be apportioned a greater share of responsibility than a party who simply failed to stop it from occurring or continuing.

This was also the case in *Reinhold v New South Wales Lotteries Corporation* and *Reinhold v New South Wales Lotteries Corporation (No 2),*[199] which further illustrates how a court will approach apportionment of liability between concurrent wrongdoers.

In this case Mr Reinhold went to his local newsagency to buy a ticket in the Oz Lotto. The prizes for that week totalled $2 million. The first ticket that he was given, printed out from the newsagency's ticket machine, was incomplete (ticket A). This was not an uncommon occurrence. Therefore, the newsagency staff generated another ticket for Mr Reinhold (ticket B). This ticket was complete and, therefore, constituted a valid ticket issued by the New South Wales Lotteries Corporation which ran the Oz Lotto. Mr Reinhold left the newsagency with ticket B, which was fully printed, and for which he had paid. The newsagency staff were left holding the incomplete ticket A and sought advice from the helpline of the New South Wales Lottery office as to what they should do with it. The advice was that the ticket had to be properly cancelled pursuant to the rules of Oz Lotto.

Through error, ticket B was cancelled instead of ticket A. Ticket B was the winning ticket in the New South Wales State Lottery for that week and Mr Reinhold attempted to claim his $2 million cash prize. He was informed that his winning ticket had been cancelled and subsequently brought a claim against the New South Wales State Lottery and his local newsagent alleging breach of contract and negligence.

The court was asked to determine (amongst other things) how the liability should be divided between the local newsagency and the New South Wales State Lottery.

The court found that financial strength and profitability of a defendant is not relevant to assessing contribution or apportionment.[200]

A relevant issue is, however, which of the wrongdoers were *'more actively engaged'* in the activity causing loss, and which was more able to effectively prevent the loss happening.[201]

Justice Barrett considered it to be significant that, for the newsagents, the printing of a partially completed lottery ticket was an unusual occurrence but, for the New South Wales State Lottery this was something which was not unusual. In fact, the New South Wales State Lottery had anticipated this occurrence by promulgating a policy as to how to deal with this problem and had published that policy to all the newsagents which sold its tickets.

Accordingly, once the newsagency employees contacted the New South Wales State Lottery help line to ask them what to do, the helpline, supposedly more experienced in dealing with these matters than the newsagency, assumed a greater degree of responsibility for the loss.

[198] [2009] VSC 48.
[199] [2008] NSWSC 5 and [2008] NSWSC 187 respectively.
[200] [2008] NSWSC 187, [57].
[201] Ibid [58].

Justice Barrett concluded there was a *'very significantly greater degree of culpability on the part of Lotteries and a very significantly stronger causative force in Lotteries' conduct'*.[202]

Accordingly, Justice Barrett held that the New South Wales State Lottery was responsible for 90% of the loss, and the newsagency 10%.

Application to contractual breaches

In *Yates v Mobile Marine Repairs Pty Ltd*,[203] a case referred to in both *Reinhold* decisions, it was determined that the proportionate liability regime may be applicable in respect of the breach of a contractual obligation, but only if the contractual obligation involves a duty to ensure that work is undertaken with due care, skill and diligence.

The case involved faulty repair work undertaken on a luxury game fishing vessel called *The Eagle*. The owner of *The Eagle* sued Mobile Marine Repairs, the repairer, and MAN Automotive Imports Pty Ltd, the authorised agent for the German company which had manufactured the faulty engine installed by the repairer in *The Eagle*. The problems with the engine in *The Eagle* were so bad that the engine had to be removed and replaced. It was determined that the claim was an '*apportionable claim*', pursuant to the New South Wales regime.

However, the agent for the negligent German manufacturer, which had been sued in contract and tort, argued that the claim against it in tort could not be maintained because the duty of care imposed upon it arose solely as a result of the contract and, as its liability arose out of the contract, the claim was not an '*apportionable claim*' because it did not arise from a breach of duty of care.

Justice Palmer of the New South Wales Supreme Court disagreed. He held:

> *'The contract imposed an obligation on MAN Australia (the agent for the German manufacturer) to ensure that the work was done properly. It "omitted" to perform a contractual duty which, if performed, would have prevented the loss. I**n my opinion, a breach of contractual duty to ensure that work is done properly by others, whether employees, agents or independent contractors, is an "omission" within section 34(2) CLA such as may make a contract breaker a concurrent wrongdoer within the operation of Pt IV CLA.**'*[204]
>
> (our emphasis)

How, then, was the loss to be divided between the negligent repairer and the agent for the negligent manufacturer? Justice Palmer observed:

> *'The court must exercise a large discretionary judgment founded upon the facts proved in each particular case. The principles upon which the court will exercise this discretionary judgment will come to be developed on a case by case basis. However, it seems clear enough that the policy of part 4 is that a wrongdoer who is, in a real and pragmatic sense, more to blame for the loss than another wrongdoer should bear more of the liability. This calls for the exercise of the same kind of judgment as the Court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury.'*[205]

[202] Ibid [74].
[203] [2007] NSWSC 1463.
[204] Ibid [98].
[205] Ibid [94].

Justice Palmer concluded that the repairer was *'more actively engaged, if not solely engaged, in the physical activity which caused Mr Yates' (the plaintiff's) loss',* **but** that the agent was not in a position where it was unable to effectively prevent the loss occurring (that is, to turn the double negative around, it was in a position to prevent the loss occurring), and therefore the agent *'could not disregard its responsibility under the contract to ensure that Mobile Marine had carried out the work properly'.* Accordingly, each was found equally liable for the loss.

Effect of settlement by one concurrent wrongdoer

The authorities which emphasise the importance of the court reaching a determination as to whether one is a concurrent wrongdoer or not, and, thereafter, the extent of each concurrent wrongdoer's liability for loss, determined by the yardstick of what is '*just and equitable*', have concluded it is not possible for the proportionate liability regime to be invoked by a party who settles a claim with a plaintiff, therefore avoiding a determination being made by a court as to the key issues concerning the applicability of the proportionate liability regime. In this regard, judgment of the Victorian Court of Appeal in *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd*[206] is instructive.

In that case, a party which otherwise might have been a *'concurrent wrongdoer'* settled the apportionable claim before judgment, then sought contribution from another concurrent wrongdoer in respect of the settlement sum. The issue for determination was whether the concurrent wrongdoer who settled the claim before judgment was prevented, by the operation of the Victorian scheme, from seeking contribution from the other concurrent wrongdoer toward the settlement sum that it had paid. The court held it could **not** be so prevented because there was no judgment given against the party that had settled.

It was central to the *Godfrey Spowers* decision that a key element of the provision is a prohibition upon contribution being sought by concurrent wrongdoers *'against whom judgment is given'*. As a party who has settled has generally not had judgment entered against it, there was accordingly no prohibition upon contribution being sought. The court observed:

> *'The determination that a defendant is a concurrent wrongdoer in an apportionable claim triggers the limitation upon the amount of the judgment which can be entered against that defendant, and in turn protects the defendant against claims for contribution or indemnity by other concurrent wrongdoers.'*[207]

The ability of a defendant to invoke the proportionate liability regime in defence of a claim is wholly dependent upon a judgment being entered against that defendant. There was no such judgment in the *Godfrey Spowers* case, and so contribution could be sought by the party who had settled.

Similarly, in considering the Queensland scheme relating to *'subsequent actions'*[208] Justice Ann Lyons dispensed with the issue in three brief paragraphs in *Geldard v Mobbs.*[209] Her Honour found that the provision:

> *'only relates to a situation where a plaintiff has previously recovered judgment against a concurrent wrongdoer . . . [that is not the present case] . . . as the proceedings against the other defendants were settled prior to trial . . . Section 32B does not therefore apply.'*

[206] (2008) 21 VR 84.
[207] Ibid 102.
[208] CLA (Qld) s 32B.
[209] [2011] QSC 33, [25]–[28].

In this way, her Honour answered in the negative her own question of whether *'the settlement figure [reached pre-trial with some of the defendants] should be taken into account in the calculation of damages which the sixth and eighth defendants should be ordered to pay'*.[210]

Extension beyond the courts

The extent to which a proportionate liability regime may extend beyond determinations in court was considered in *Aquagenic Pty Ltd v Break O'Day Council (No 2)*[211] where it was held that commercial arbitrations are subject to the proportionate liability regime if the terms of the arbitration agreement contain an implied term granting the arbitrator authority to give the parties the same relief which they could have obtained in court.

However, by way of contrast, decisions of the Financial Industry Complaints Service are not subject to the proportionate liability regime, as was held in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Limited*[212] because the manner in which panel members reach their decisions is on the basis of what is fair in all the circumstances, having regard to the legal authority. A consideration of what is *'fair'* is a different test from a consideration of what is *'just and equitable',* as is enshrined in the various State and Federal proportionate liability schemes.

Peer professional opinion

As discussed in chapter 1, civil liability legislation in most States and Territories governs the standard of care owed by professionals, providing (with some variation in the wording) that a professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that, at the time the service is provided, was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.[213]

The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of the opinions being relied on for the purposes of the defence. Also, the respective provisions expressly state that peer professional opinion does not have to be universally accepted to be considered widely accepted.

However, the provisions also provide that peer professional opinion cannot be relied on if the court considers that the opinion is irrational or contrary to a written law. Also, it does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.

In *Grinham v Tabro Meats Pty Ltd*, Forrest J described the requirements of the defence under the Victorian legislation, as follows:[214]

[210] Ibid [24].
[211] [2009] TASSC 89.
[212] (2009) 69 ASCR 418.
[213] CLA (Qld) s 22; CLA (NSW) s 5O(1); Wrongs Act (Vic) ss 57– 60; CLA (Tas) ss 21–22; CLA (SA) ss 40–41; CLA (WA) ss 5PA–5PB.
[214] [2012] VSC 491, [181].

> *'Peer professional opinion is directed to acceptance or otherwise of the manner in which the professional acted in the circumstances confronting the defendant. It is to this issue that the opinions of the other professionals in the field are directed. It may be that in some cases an opinion is based upon hypothetical analysis rather than one actually encountered in practice. Whilst this factor may go to the quality of the opinion expressed, what matters is the opinion of the other professionals as to the way in which the defendant carried out or failed to carry out the professional tasks impugned in the proceeding.'*

This focus on the circumstances confronting the professional was also adopted by the Queensland Court of Appeal in *Mules v Ferguson*.[215] The matter involved a claim against a doctor arising from the failure to diagnose cryptococcal meningitis, a disease which left the plaintiff blind, deaf and with other grievous disabilities. The plaintiff brought an action in negligence against Dr Ferguson claiming that she did not undertake a proper examination or make proper enquiries as to the plaintiff's reported symptoms so as to exclude cryptococcal meningitis. The plaintiff contended that had the defendant acted competently, the plaintiff would have been referred for tests and treatment so that the disease was diagnosed and treated before she suffered her grievous injuries.

At first instance Justice Henry assessed the plaintiff's damages at $6.7 million but dismissed her claim because, although his Honour found that the defendant failed to act with reasonable care and skill in not adequately physically examining the plaintiff and enquiring about the progress of her previously recorded symptoms, he concluded that that breach did not cause the plaintiff's injuries. An adequate examination and further enquiries would not have detected anything to prompt the defendant, exercising reasonable care, to respond differently. The court concluded the defendant provided competent and comprehensive care of a standard expected of a general practitioner, and that (with reference to s 22 of the CLA (Qld)) the defendant acted in a way that was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.[216]

The plaintiff appealed the findings with respect to the application of s 22.

In considering the application of s 22, the Court of Appeal said the defence requires an identification of the particular conduct (that is, how the professional in fact acted), and the group of peer opinion supporting that conduct as being widely accepted practice.[217] The onus rests on the professional to satisfy that defence.[218]

The Court of Appeal concluded that the evidence established that the defendant, in failing to undertake a physical examination of the plaintiff when presented a patient with the plaintiff's symptoms,[219] did not act in a way that was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.[220] The court said the trial judge was in error in relying on expert opinion that was not based (as the trial judge had found) on the plaintiff's symptoms and therefore, there was no evidence upon which the trial judge could be satisfied the defendant had discharged her evidential onus.[221] The plaintiff was awarded damages of $6.7 million.

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[215] [2015] QCA 5.
[216] *Mules v Ferguson* [2014] QSC 51, [273]–[276].
[217] *Mules v Ferguson* [2015] QCA 5, [191].
[218] Ibid.
[219] It was concluded that a general practitioner, when presented with a patient complaining of headaches and neck pain, should have undertaken a physical examination and attempted to determine the source of the pain and nature, location and severity of the headaches. The court was of the view that those steps would have resulted in the plaintiff being referred for specialist assessment or to her local hospital for further specialist assessment.
[220] *Mules v Ferguson* [2015] QCA 5, [76]–[89].
[221] Ibid [191]–[201].

Section 22 was also considered by the Supreme Court of Queensland in *Mazza v Webb*.[222] The plaintiff (who was suffering from abdominal symptoms) underwent an endoscopy conducted by the defendant. During the procedure, the endoscope was passed only part way into the plaintiff's duodenum. The defendant determined that the plaintiff's symptoms were the result of uncontrolled Coeliac Disease, and wrote a report to the treating general practitioner to that effect. The plaintiff's condition continued to deteriorate for some further 15 months, when a subsequent endoscopy (performed by a different specialist) revealed advanced bowel cancer.

McMurdo J found that, in light of the symptoms presented to the defendant doctor, the defendant had acted in accordance with peer professional opinion when performing the original endoscopy.[223] The defendant however was ultimately found to be liable because the report he provided to the treating doctor was deficient as it represented that the endoscopy had confirmed that the plaintiff's symptoms were caused by untreated Coeliac Disease and made no mention of the partial nature of the investigation.[224] It was determined that the report was a causative factor in the plaintiff's cancer remaining undiagnosed because it created the impression that no further investigation was needed.[225]

In *Hope v Hunter and New England Area Health Service*[226] the New South Wales District Court said, that the term '*irrational*' did not mean '*without reason*', but instead it to refers to '*reasons that are illogical, unreasonable or based on irrelevant considerations*'.[227]

Also in *Dobler v Kenneth Halverson; Dobler v Kurt Halverson (by his tutor)*[228] the court confirmed that the New South Wales provision does not define the content of the duty of care owed by the professional. Rather, it is intended to operate as a defence where the professional, if found to have failed to exercise reasonable care and skill, could avoid liability if he or she established that he or she acted according to widely accepted peer professional opinion.

Conduit defence

In circumstances where an allegation of misleading or deceptive conduct is made against a person who has unknowingly passed on misleading or false information given to it by another, the '*conduit*' defence may be raised. The defence is so called because the person making the representation is said to be the mere conduit of the source of the information.

In *Yorke v Lucas*[229] the High Court said:

> *'If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.'*[230]

When, however, a representation is conveyed in circumstances in which the person making the representation does not disclaim the information as being sourced from another, then that person will be considered to have made the representation. It will be a question of fact in each case.[231]

[222] [2011] QSC 163.
[223] Ibid [29].
[224] Ibid [42]–[44].
[225] Ibid [47]–[48].
[226] (2009) 10 DCLR (NSW) 63.
[227] Ibid 80.
[228] (2007) 70 NSWLR 151, [167].
[229] (1985) 158 CLR 661.
[230] Ibid 666.
[231] *Gardam v George Wills & Co Ltd* [No 1] (1988) 82 ALR 415, 427.

In *Butcher v Lachlan Elder Realty Pty Ltd*[232] it was alleged a real estate agent misrepresented the location of the high water mark when marketing a waterfront property, by having included in the marketing brochure an inaccurate survey diagram provided by the seller. The marketing material said to be misleading or deceptive contained a disclaimer that:

> *'All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries.'*[233]

Finding in favour of the real estate agent, the High Court said that whatever representation the seller made to the buyers by authorising the agent to issue the marketing material, it was not made by the real estate agent, who did no more than communicate what the seller was representing, without adopting it or endorsing it.[234]

By contrast, in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*[235] a real estate agent, who in the course of marketing a commercial property, misrepresented the lettable area, was unable to rely on the conduit defence. Despite the marketing material containing a disclaimer that the agent does not guarantee the information, it also represented that the agent was a consultant to institutional investors and to developers of major properties. In the court's opinion, an agent who so held itself out would not be regarded as merely passing on information without any belief in its truth or falsity.[236]

The conduit defence was recently reaffirmed by the High Court in *Google Inc v Australian Competition and Consumer Commission*.[237] The ACCC commenced proceedings against Google seeking injunctive relief in relation to allegations that '*sponsored links*' belonging to certain advertisers conveyed misleading and deceptive representations, concerning the relationship between those advertisers and their competitors. It was alleged that the sponsored links falsely represented that there was a commercial association between the advertiser and the competitor, and that information regarding the competitor could be found by clicking what was in fact a link to the advertiser's website.

The High Court unanimously held that by merely publishing or displaying the representation, without adopting or endorsing its content, Google's conduct fell short of being misleading or deceptive.[238] In reaching that conclusion, the majority was of the view that the advertiser was the ultimate author of the sponsored link and that all Google's software did was produce an automated response to a user's search term in light of the advertisement's requirements.[239] The court also expressed the view that ordinary and reasonable users would have understood that the sponsored links were created by the advertisers (because they were clearly described as *'sponsored links*'), and that the representations made by those links were the representations of the advertisers and were not adopted or endorsed by Google.[240]

[232] (2004) 218 CLR 592.
[233] Ibid 596–597.
[234] Ibid 605.
[235] [1994] ANZ ConvR 294.
[236] Ibid 41–359.
[237] (2013) 249 CLR 435.
[238] Ibid 442.
[239] Ibid 459.
[240] Ibid 463.

Advocate's immunity

At common law, barristers and solicitors are immune from liability for negligence in relation to the conduct of a case in court and for work undertaken out of court.[241] The immunity commonly applies in circumstances where the client asserts that, if the case had been prepared and presented properly, a different result would have been reached.[242]

According to the High Court, the advocate's immunity is necessary because, without it:

- there would be a real risk of adverse consequences for the efficient administration of justice because of the exposure of counsel to liability in negligence for breach of a common law duty of care;[243] and
- the administration of justice would be adversely impacted if court decisions were thought not to be final but rather subject to collateral attack by means of actions against counsel for in-court negligence.[244]

In the 2015 decision of *Attwells v Jackson Lalic Lawyers Pty Limited*,[245] the High Court was asked to reconsider the advocate's immunity and overrule its earlier decisions on the point.[246] The High Court upheld the immunity, saying no new issue of principle or policy had been raised that had not been previously considered by the court such as to warrant its abolition.[247] It also said that to abolish the advocate's immunity would generate a legitimate sense of injustice in those who have not pursued claims or have compromised or lost cases due to the advocate's immunity being a part of the common law. It was the High Court's view that an alteration of the law of that kind is best left to the legislature.[248]

For the immunity to apply to work undertaken or advice provided out of court, the work or advice in question must be '*intimately connected*' with the conduct of a case in court, that is:

> *'where the particular work is so intimately connected with the conduct of the case in Court that it can fairly be said to be a preliminary decision affecting the way that case is to be conducted when it comes to a hearing.'*[249]

In *Attwells,* the High Court clarified that the '*intimate connection*' required to attract the immunity is a functional connection between the advocate's work and the judge's decision.[250] It must affect the conduct of the case in court and (in a new emphasis crucial to the outcome in *Attwells*) the resolution of that case by that court.[251]

Work that courts have held to be intimately connected with the conduct of a case (some of which may now be in doubt following the *Attwells* decision) includes:

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[241] *Giannarelli v Wraith* (1988) 165 CLR 543, 559.
[242] *Symonds v Vass* (2009) 257 ALR 689, 710. In that decision, the plaintiffs alleged their solicitor negligently failed to plead additional causes of action and failed to properly particularise the claim, which resulted in a settlement on terms less favourable than could have been achieved absent the negligence.
[243] *Giannarelli v Wraith* (1988) 165 CLR 543, 557.
[244] Ibid 558.
[245] (2016) 331 ALR 1.
[246] Namely, *Giannarelli v Wraith* (1988) 165 CLR 543; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.
[247] *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 331 ALR 1, 8.
[248] Ibid [28].
[249] *Giannarelli v Wraith* (1988) 165 CLR 543, 560, 571, 579, 596; citing *Rees v Sinclair* [1974] 1 NZLR 180 at 187.
[250] *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 331 ALR 1, 4.
[251] Ibid.

- failing to raise a matter pertinent to the opposition of a maintenance application;[252]
- failing to plead or claim interest in an action for damages;[253]
- issuing a notice to admit and making admissions;[254]
- failing to plead a statutory prohibition on the admissibility of crucial evidence;[255]
- interviewing the plaintiff and other potential witnesses;[256]
- giving advice and making decisions about what witnesses to call and not call;[257]
- working up necessary legal arguments;[258] and
- considering the adequacy of the pleadings and, if appropriate, taking necessary steps to have the pleadings amended.[259]

Work that has been found to not fall within the immunity includes:

- failure to advise the availability of possible actions against third parties;[260]
- failure to advise commencing proceedings in a particular jurisdiction;[261]
- the negligent compromise of appeal proceedings leading to the loss of benefits gained at first instance;[262] and
- negligent advice that leads to the settlement of a claim in civil proceedings.[263]

[252] *Rees v Sinclair* [1974] 1 NZLR 180, 187.
[253] *Keefe v Marks* (1989) 16 NSWLR 713, 718.
[254] *Munnings v Australian Government Solicitor* (1994) 118 ALR 385, 388.
[255] *Giannarelli v Wraith* (1988) 165 CLR 543.
[256] *Keefe v Marks* (1989) 16 NSWLR 713, 718.
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 216, 224, 232.
[261] *Macrae v Stevens* [1996] Aust Tort Reports 81-405.
[262] *Donellan v Watson* (1990) 21 NSWLR 335.
[263] *Attwells v Jackson Lalic Lawyers Pty Limited* (2016) 331 ALR 1.

CHAPTER 4 – QUANTUM

The purpose of an award of damages, whether for breach of contract, tort or statute, is to put the plaintiff into the position they would have been in if not for the impugned conduct.

The measure of damages in contract is the amount necessary to put the plaintiff in the position that it would have occupied if the defendant had discharged the contract.[264]

The principle was stated *in Robinson v Harman*[265] in these terms:

> *'The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'*

In negligence, damages are awarded with the objective of restoring the plaintiff to the position in which it would have been had the tort not been committed.[266]

The High Court in *Gates v City Mutual Life Association Society Ltd*[267] explained the difference between the two measures of damage as follows:

> *'In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss).'*

The court then went on to provide guidance as to how damages in tort may be measured, depending on the nature of the plaintiff's claim:

> *'Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation. This may well be so if the plaintiff can establish that he could and would have entered into the different contract and that it would have yielded the benefit claimed: cf. Esso Petroleum Co Ltd v Mardon (1976) QB 801, at pp 820–821, 828–829; Doyle v Olby (Ironmongers) Ltd p 167. The lost benefit is referable to opportunities foregone by reason of reliance on the misrepresentation. In this respect the measure of damages in tort begins to resemble the expectation element in the measure of damages in contract save that it is for the plaintiff to establish that he could and would have entered into the different contract.'*[268]

[264] *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, 39; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Gates v City Mutual Life Association Society Ltd* (1986) 160 CLR 1, 11.
[265] (1848) 1 Exch 850, 855; (1848) 154 ER 363, 365.
[266] *South Australia v Johnson* (1982) 42 ALR 161, 169.
[267] (1986) 160 CLR 1, 11.
[268] Ibid 13.

In *Commonwealth v Amann Aviation Pty Ltd*,[269] Deane J described how the general principle may be worked out in practice, in the following terms:

> *'The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: what relevantly represents the position in which the plaintiff would have been if the wrongful act (i.e. the repudiation or breach of contract or the tort) had not occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act.'*

In the context of claims against professionals, the method for the assessment of quantum likewise varies depending on the nature of the claim. Two methods common in claims against professionals are on a '*no transaction*' or '*alternative transaction*' basis. Each is examined below.

Damages on a '*no transaction*' basis

A '*no transaction*' case arises when a plaintiff asserts they would not have entered into a transaction (such as an investing in a managed fund or purchasing a property) but for the acts or omission of the defendant. No transaction damages seek to put the plaintiff in the position they would have been had they not engaged in the loss-making transaction. Assessing damages on a no transaction basis involves a subjective assessment of what would have happened had the plaintiff not entered into the impugned transaction.

Selig v Wealthsure Pty Ltd[270] provides a good illustration of the assessment of damages on a no transaction basis. The plaintiffs, investors of modest means, acted upon the advice of a financial advisor and invested in a company. That company failed and the plaintiffs lost the whole of the sum invested. They claimed damages against the financial advisor and others. The plaintiffs were awarded damages for the loss of the principle investment and consequential loss on the basis that, had it not been for the defendants' breaches, they would not have made any investment at all (that is, on a no transaction basis). At first instance Lander J was of the view:

> *'If the plaintiffs had been properly advised, they would not have engaged in negative gearing. They could only negatively gear if they had an income of such sufficiency that negative gearing would have been appropriate. When both of them had little or no working capacity, they could not achieve an income of that kind. In reality, and if they had been properly advised, they would not have entered into any speculative investments. If properly advised, they would not have wasted their assets, which was the consequence of [the financial advisor's] advice. They would have consolidated those assets into the one property as the principal place of residence and sought whatever income was available to people who have no capacity to earn income.'*[271]

On appeal to the Full Court[272] the defendants argued that the plaintiffs were not entitled to damages on the no transaction basis because of evidence they would have engaged in an alternative high-risk investment to generate income to meet mortgage repayments on properties they purchased on the advice that the company they had invested in would generate sufficient income to service the mortgage repayments. It was argued that, as the plaintiffs had not proved there was an alternative investment available producing returns similar to those anticipated from the company, they had not proven a loss.[273]

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[269] (1991) 174 CLR 64, 116.
[270] [2013] FCA 348.
[271] Ibid [1186].
[272] *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1 (the assessment of damages was not the subject of the subsequent High Court appeal).
[273] Ibid [222].

In finding for the plaintiffs, the court noted the difficulty faced by the defendants in light of the trial judge's finding (noted above) as to what would have happened had the plaintiffs not entered into the impugned transactions. It was also noted that the plaintiffs had not sought the advice of financial advisors other then the defendants and, if the defendants had given appropriate advice to the plaintiffs, it would not have involved a high risk investment. The court concluded there was no basis to contend that the plaintiffs would have embarked on some other high risk and inappropriate investment.[274] Further, it was thought that the plaintiffs' need for income to satisfy the mortgage repayments was interdependent with the investment in the company (as neither would have proceeded without the other) and was therefore causally related. The plaintiffs were awarded damages for both the loss of their initial investment as well as consequential loss.

Damages on an '*alternative transaction*' basis

'*Alternative transaction*' damages arise where a plaintiff alleges that, had it known of the defendant's acts or omission, it would have either entered into an alternative transaction, being either the same transaction on different terms or alternatively a wholly separate transaction. Assessing damages on the alternative transaction basis involves drawing a comparison between the set of circumstances a plaintiff is actually in and the alternative set of circumstances that the plaintiff would have been in had the contravening conduct not occurred and the plaintiff engaged instead in the alternative transaction.[275]

As with other types of damages, alternative transaction damages aim to put the plaintiff back in the position it would have been in had the relevant acts or omission not occurred. The marked difference is that alternative transaction damages may result in the plaintiff being awarded more than the amount of its initial investment if it can prove that the alternative transaction would have yielded a profit.

Equally however, it may be open for a defendant to plead and prove that the plaintiff would have entered into an alternative, but also loss making, transaction in order to reduce any damages award.

In *Westpac Banking Corporation v Jamieson*[276] the plaintiff sought damages against the defendant bank following the provision of deficient advice, alleging a no transaction case. The plaintiff further alleged that, if the court accepted his evidence that he would not have entered into the relevant transactions, it became irrelevant to have regard to what he might have done instead (such matters being '*irrelevant speculations*').

Despite finding that the plaintiff would not have entered into the loss making transactions but for the deficient advice,[277] the court was of the view it could not disregard what might otherwise have happened. It said:

> *'A claimant is not necessarily required to plead and prove an alternative transaction in order to establish loss. A defendant may seek to demonstrate that a different, loss-making transaction probably would have been undertaken. In a particular case a court may determine that an award of compensation should take into account a hypothetical, alternative transaction which probably would have resulted in a loss. In doing so the court is not engaging in impermissible speculation.'*[278]

[274] Ibid [230].
[275] *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338, [731].
[276] [2016] 1 Qd R 495.
[277] Ibid 542.
[278] Ibid 543.

The court also suggested that approach is equally applicable to an alternative transaction that made a profit, describing the approach of including the gains or losses which occur after the transaction as the *'net gains or losses approach'.* In *Jamieson*, the court was satisfied that the bank '*demonstrated with a reasonable degree of persuasion*' that the plaintiff would have sought an alternative investment of a similar character to past investments he had made and that alternative investment would have made a loss.[279] That loss was factored into the assessment of damages.

Protec v Steuler; BHP v Steuler [280] provides another example of the perils of asserting alternative transaction damages. The plaintiff, BHP, commenced an action to recover damages as a result of having been induced by misrepresentation to install a defective liner in concrete storage tanks at one of its mines. At trial[281] the plaintiff was unsuccessful because, despite the trial judge finding that the defendants had engaged in misleading and deceptive conduct, it was in no worse position had that conduct not occurred because a supervening event (a fire) resulted in the plaintiff having to replace the liner in any event.[282] As regards damages, the trial judge observed that the plaintiff had not proved it had suffered any loss because it could not prove what possible alternative transaction it would have entered into had it not been misled.[283]

The plaintiff was unsuccessful on appeal, not because it could not prove precisely what it would have done but for the defendant's misleading and deceptive conduct, but because it could not prove that it would have been worse off from having relied on the representation.[284] In reaching that conclusion, the court was of the view that past authorities required it to enquire as to whether the alternative option open to the plaintiff would have been of greater benefit or less detriment.[285]

While the Victorian Court of Appeal agreed with the trial judge that the plaintiff failed to prove its loss, it disagreed with his Honour's reasoning. In the view of the appellate judges, when presented with a number of alternative transactions, it was for the trial judge to estimate the likelihood that each hypothetical past situation would have occurred so as to exclude any alternatives that were unlikely. If the trial judge had done so, the Court of Appeal considered that he would have been in a position to consider what loss the plaintiff would have suffered had it engaged in the only alternative transaction reasonably open to it as compared with the actual transaction.[286]

In circumstances where the plaintiff was unable to prove that it was worse off having relied on the misrepresentation, the court was not willing to infer that it had suffered prejudice or disadvantage despite being misled.[287]

Which assessment is appropriate

When determining which method of assessment is appropriate, it is necessary to consider what the plaintiff alleges would have happened absent the relevant act or omission. If the plaintiff alleges it would not have either altered its position at all but for the impugned conduct, or, at the very least, not have entered in the subject transaction, a no transaction assessment is appropriate. If however the plaintiff alleges some other transaction would have been entered into (whether the same transaction but on different terms or a wholly separate transaction), an alternative transaction assessment is required.[288]

[279] Ibid 548.
[280] [2014] VSCA 338.
[281] *BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH (No 2)* [2011] VSC 659.
[282] Ibid [49]–[50].
[283] Ibid [37].
[284] *Protec v Steuler; BHP v Steuler* [2014] VSCA 338, [611].
[285] Ibid [606].
[286] Ibid [603].
[287] Ibid [611].
[288] See *Westpac Banking Corporation v Jamieson & Ors* [2016] 1 Qd R 495; *BHP v Steuler; Protec v Steuler* [2014] VSCA 338 at [731].

Although it is somewhat incongruous for a plaintiff to say they would not have entered into a transaction and, in the alternative, entered into a different transaction had they known of the impugned conduct, no transactions and alternative transaction damages are sometimes pleaded as alternatives.

In practice, determining loss suffered in a no transaction case, if made out, is often easier than in an alternative transaction. In *BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH (No 2)*,[289] Habersberger J noted:

> *'In a no transaction case, the comparison is rather easier for the plaintiff to establish because the alternative course of action is simply that the plaintiff would not have entered into the transaction at all, but for the representation. However, in the alternative transaction case, the plaintiff will need to have evidence of what it could and would have done had the contravention not occurred, in order to prove that it has suffered loss in consequence of the contravention.'*[290]

Alternative transaction cases offer the plaintiff the chance to seek damages for the alternative, and possibly more profitable, transaction. However, the chance of higher damages is not without risk to a plaintiff because the evidence may reveal the plaintiff's position under the alternative transaction to be the same as (or possibly even worse off than) their actual position (as was the case in *BHP*).

In *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd*,[291] the plaintiff alleged it was induced by a misrepresentation to purchase a machine for more than its market value. It claimed damages for the difference between the purchase price and the actual value of the machine (which would have been available on both the no transaction and alternative transaction basis) and for the loss of profit it would have earned had it purchased an alternative machine (only available on the alternative transaction basis).

Despite the misrepresentation, the plaintiff failed to establish there was a difference between the purchase price and the value. It was however successful in establishing that, had it purchased the other machine (that is, had it entered the alternative transaction), it would have made a greater profit. Damages were therefore only awarded for the loss of profit.[292]

Impact of the effect of a decline in the market on quantum

In *Westpac Banking Corporation v Jamieson* the defendant bank argued that, not withstanding its negligent advice, it should not be liable because that loss (a decline in value of an investment it recommended) was at least partly the result of the GFC.[293] The court however, was of the view that the bank should be held to account for that loss because its breaches caused the plaintiff to enter into the loss-making transaction in circumstances where he would not have done so but for the negligent advice and the risk of capital loss was the very thing the plaintiff had sought the bank's advice to avoid.[294]

[289] [2011] VSC 659.
[290] Ibid [34].
[291] [2014] NSWCA 158.
[292] *Lovick and Son Developments Pty Ltd and Anor v Doppstadt Australia Pty Ltd and Anor (No 2)* [2012] NSWSC 1579, [44]. The amount of damages was reduced slightly on appeal. See: *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd* [2014] NSWCA 158.
[293] [2016] 1 Qd R 495, 539.
[294] Ibid 537 and 540.

Damages for misleading or deceptive conduct

As discussed in chapter 1, claims for misleading and deceptive conduct are often made against professionals and arise from myriad circumstances, including claims relating to misrepresentations regarding:

- the performance or characteristics of an investment;
- the characteristics of a property; and
- the nature and extent of cover provided by an insurance policy.

The Victorian Court of Appeal in *BHP v Steuler; Protec v Steuler*[295] recently set out the principles relevant to assessing damages for misleading and deceptive conduct. The following observations emerge.

A plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage it has suffered in consequence of altering its position under the inducement of the misrepresentations made by the defendant. Although, under s 82(1) of the TPA (and s 236 of the ACL) as under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage.

In determining whether a plaintiff has suffered loss or damage, it is usually necessary to compare the position that the plaintiff is in having been misled, with the position it would have been in but for the misrepresentation, by undertaking this comparison a court can determine whether the plaintiff is worse off as a result of relying upon the misrepresentation made by a defendant.

The legislation requires identification of a causal link between loss or damage and conduct done in contravention of the Act. The question of causation is relative to the purpose of s 82, applied to the circumstances of a particular case. Determining the question of causation will often involve considering how much worse off the plaintiff is as a result of entering into the transaction which the representation induced it to enter than it would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from its reliance on the representation, at least if the loss is foreseeable.

Analysing the question of causation only by reference to what is, in essence, a '*but for*' test has been found wanting in other contexts and it should not be treated as an exclusive test of causation, especially where there is more than one cause of the loss.

A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted. It is accordingly necessary to ask what the plaintiff would have done had it not relied on the representation. A court should not however engage in speculation about multiple possibilities of past hypotheticals to which no specific evidence was directed;

Once the causal connection is established, there is nothing in the legislation which suggests that the amount that may be recovered under that section should be limited by drawing some analogy with the law of contract, tort or equitable remedies. Rather, provided the defendant's breach has '*materially contributed*' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.

[295] [2014] VSCA 338, [540], endorsed in *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430, [193].

In exceptional cases however, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional.

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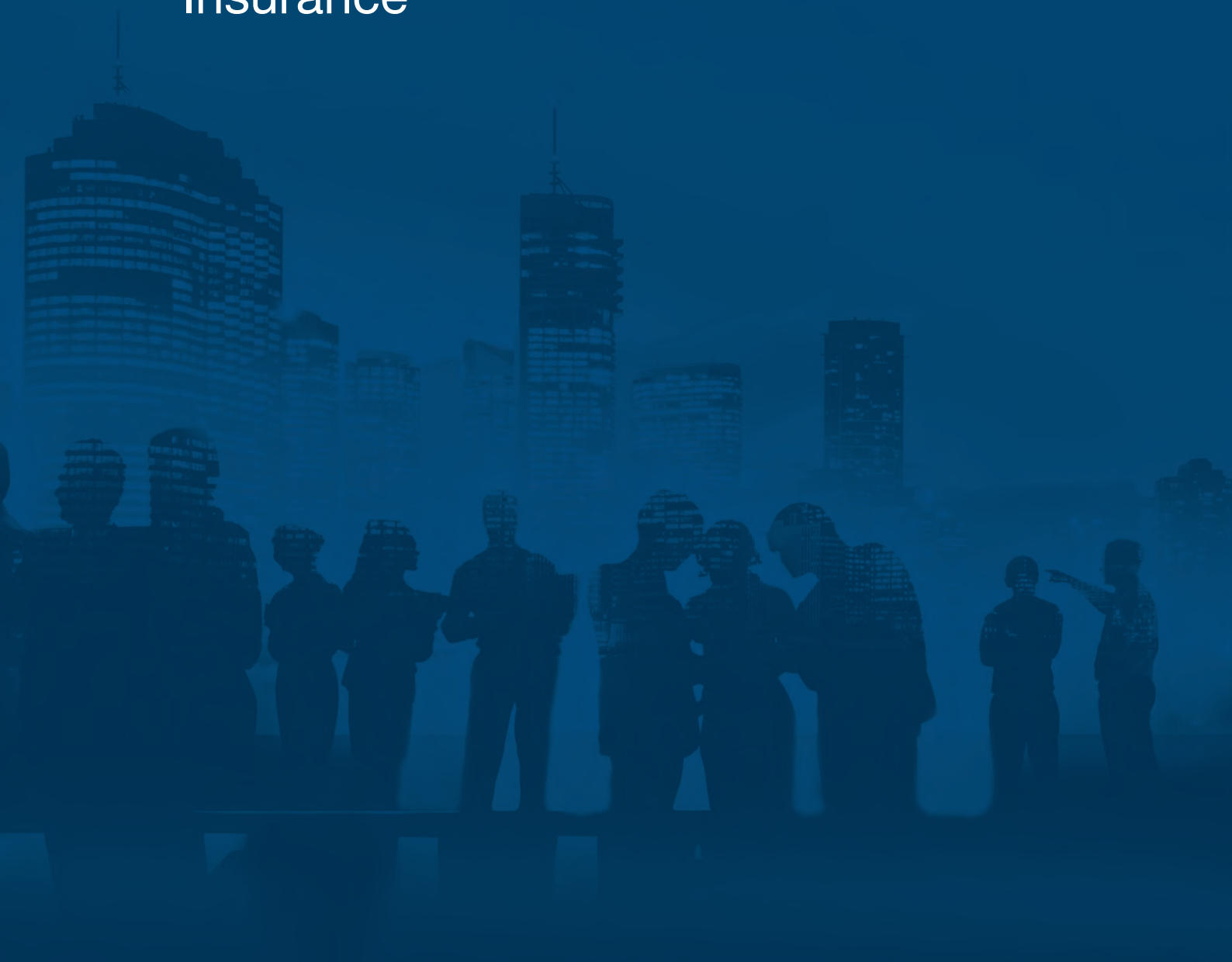
Professional Indemnity Insurance



CHAPTER 5 – WHAT IS A PROFESSIONAL/PROFESSIONAL DUTY

It is perhaps most fitting in the context of this Guide to give foremost consideration to the concept of a professional or professional duty.

Professional indemnity policies provide cover in respect of conduct that is connected with a professional duty (or the breach of a professional duty), or the provision of professional services or advice.

Today, professional indemnity insurance is accessible by a broad range of industries, and is not limited to those who fit within traditional notions of a '*profession*' such as doctors, lawyers, accountants and engineers.

As a result, over the years it has fallen to the courts to consider what the terms '*professional*' and '*professional duty*' mean in an insurance context, and how narrowly or broadly those concepts should be construed.

Development of the meaning of '*professional*'

FAI v Gold Coast City Council

The Queensland Court of Appeal in *FAI General Insurance Co Ltd v Gold Coast City Council*[296] was asked to determine whether a negligent misstatement by an officer of the Gold Coast City Council was a breach of the Council's '*professional*' duty, in the context of its professional indemnity policy with FAI.

The officer had made incorrect statements to a third party about the location and depth of a water main, in a trench, near a boundary of land on which the third party intended to build a warehouse. The officer said the water main would not affect the proposed building. As a result, the design of the warehouse foundation did not account for the risks posed by the true position of the trench. Once the warehouse was erected, part of the foundation subsided, and the third party brought proceedings against the Council.

The Council's policy indemnified it against a claim for breach of professional duty in the conduct of its practice as a '*Municipal Authority*'. The court observed:[297]

- not every breach of duty in the course of the conduct of the Municipal Authority's practice or business is a breach of a '*professional*' duty; and
- '*professional*' connotes *'pertaining or appropriate to a profession'*, *'engaged in one of the learned professions'*.

The court was guided by a Canadian decision, *Chemetics International*,[298] in which a failure to give proper operating instructions in a manual (albeit prepared by a qualified engineer) was held not to be a breach in the provision of '*professional* services', and instead was simply characterised as part of a service provided by a vendor to a purchaser. [299]

[296] [1992] 2 Qd R 341.
[297] Ibid 344.
[298] *Chemetics International Ltd v Commercial Union Assurance Co of Canada* (1984) 11 DLR (4th) 754.
[299] It is important to note that *Chemetics International* concerned a professional services exclusion rather than an insuring clause.

On the facts before it the court placed importance on the Council's officer having done no more than convey incorrect factual information. Although the third party had relied on the information and arguably exercised professional judgment in respect of the information, this of itself *'did not impart any "*professional*" component to the [Council's] duty to provide correct information in the circumstances'*.

The Council's breach of duty was held *not* to be of a '*professional*' nature and therefore outside the terms of its professional indemnity policy.

A broader approach: *GIO v Newcastle City Council*

The New South Wales Court of Appeal signalled the development of a broader interpretation of '*professional*' in an insurance context in *GIO General Ltd t/as GIO Australia v Newcastle City Council*.[300]

That decision concerned an earthquake in Newcastle which had badly damaged a building that was owned and operated by the Newcastle Workers Cooperative Club Ltd, killing and injuring people who were in the premises at the time.

Prior to the earthquake, the building had been inspected and certified as structurally sound by the Newcastle City Council. An engineer who later produced a report on the collapsed building, however, gave evidence there was a serious defect in the construction of the building. It was alleged this defect had caused structural instability and the collapse of the building during the earthquake.

There were numerous actions arising out of the building's collapse, including a claim by the Club against the Council for failing to identify the defect in the course of the inspection and approvals process. The Council sought to be indemnified in respect of the claim by GIO.

One of the questions on appeal was whether the activities of the Council which had given rise to the claim against it concerned the *'rendering or failure to render professional advice or service'*, pursuant to the policy.

Kirby P (with whom Sheller and Powell JJA agreed) observed:

> *'The relevant activities conducted by the [Council] must be examined to see whether, in their nature, they are properly characterised as "professional". The source of the [Council's] duties to perform the activities, although a relevant circumstance, is not definitive. For the same reason, it does not necessarily matter whether the officers of the [Council] who were alleged to have given faulty advice and service were professionally qualified engineers . . . The question is: is the type of service which was provided properly characterised as "professional service"?*
>
> *The term "professional" in the context of professional indemnity insurance today is very broad. This is evidenced by the very large range of policies which are written for such insurance . . . The term involves, in the context of a policy written for a local government authority, no more than advice and services of a skilful character according to an established discipline . . .'*[301]

[300] (1996) 38 NSWLR 558.
[301] Ibid 568.

The court held the Council's activities consisted of the provision of *'professional advice or service'*, because:

- examining and analysing building proposals with a view to granting consent was '*properly characterised as the provision of a service of a skilful character according to a discipline*'; and
- although not determinative, there was evidence that some or all of the activities had been performed by professionally qualified persons.

A focus on the *nature* of the advice or service provided rather than the qualifications of the person providing the advice or service was emphasised in *Government Insurance Office of New South Wales v Council of the City of Penrith.*[302] The court held that a letter sent by a town clerk conveying information on behalf of the Council was not sent in a professional capacity.

Powell JA (Mason P agreeing) observed:

> *'The provision of information as to what may, or may not, be ascertained from Council's records is not, without more, the provision of a professional service; nor is it made so by reason of the fact that the person providing the information may have some form of professional qualification.'*[303]

There was no evidence that the advice in question was given by officers of the Council who were acting in a professional capacity. It was possible the advice had merely followed a miscommunication between non-professional officers.

This was consistent with the arguments made by QBE and accepted by the Supreme Court of New South Wales in *Pioneer Road Services v QBE Insurance Ltd*,[304] that the breach of a road work contract was not a breach of a *'contract for the provision of professional services'* pursuant to Pioneer's policy with QBE.

The contract concerned the provision of a traffic control plan by Pioneer to a third party, including the supply and laying of road surfacing in accordance with the design and specifications already determined by the then Road Traffic Authority. There was no element of design in the contract, nor did it call for the provision of advice. As a result, Wood CJ accepted QBE's submission that the breach in question '*did not involve services of a skilful character according to an established discipline*'.[305]

Suncorp Metway v Landridge

The Victorian Court of Appeal considered whether a real estate agent had breached a professional duty so as to be entitled to indemnity in respect of a personal injuries claim in *Suncorp Metway Insurance Limited v Landridge Pty Ltd*.[306] The claim against the agent was brought by the tenant of a residential property it managed, who suffered injuries when she tripped in a shallow hole in the floor of the property's garage.

[302] (1999) 102 LGERA 102.
[303] Ibid 105.
[304] (2002) 12 ANZ Ins Cas 61-520.
[305] Ibid 76,093–76,094.
[306] (2005) 12 VR 290.

Prior to the incident the tenant had complained about the hole to the agent's receptionist, who had failed to pass on or record the complaints. The agent's property manager responsible for inspecting the property had failed to notice the hole or recognise the injury risk it posed. The question for the Court of Appeal was whether those failures constituted breaches of a *'professional duty'* within the meaning of the agent's insurance policy. In its submissions, the insurer emphasised the low level of expertise possessed by the receptionist and the property manager, and the simplicity of the tasks they had failed to carry out.

Buchanan JA acknowledged that if:

> *'the word "professional" in the insuring clause is limited to the conduct of a learned profession [referring to the reasoning in FAI v Gold Coast City Council], the cover afforded by the policy will be restricted to probably no more than some incidental aspects of the business of an estate agent. Put another way, unless the agent was to be regarded as under a professional duty to monitor the condition of leased premises and ensure they were kept in good repair, it is difficult to see that any professional duties were owed by the agent in respect of property management, a major component of the agent's business.'*[307]

His Honour also distinguished the case before him from the facts in *GIO General Ltd v Newcastle City Council* which had led Kirby P to define professional services as the provision of *'advice and services of a skilful character according to an established discipline'*. While that definition was appropriate in the context of a local government authority, a broader approach was necessary for a real estate agent who performed very few functions in the context of property management that would fall within that definition.

Buchanan JA concluded the agent was entitled to policy cover in respect of its breach of a professional duty (Nettle JA and Hollingworth AJA agreeing), saying:

> *'The question whether a breach of duty answers the description of a breach of a professional duty depends upon characterisation of the overall activity in the context of which the breach occurs, and is not answered by concentrating on the specific task which has not been performed or badly performed so as to give rise to liability. The relatively simple tasks of the council clerks the subject matter of the cases relied upon by the insurer were not part of the councils' professional activities. The breaches by the agent's employees in the present case, on the other hand, occurred in the course of carrying out the activity of property management, which in my opinion is to be regarded as a professional activity for the purposes of the policy of insurance.'*[308]

Nettle JA agreed that the breach of professional duty covered by the policy was intended to include tasks performed by the insured in the course of its business as a real estate agent and the provision of its usual services to its clients. In his view it was irrelevant that some of the property management services *'may have demanded little in the way of intellectual activity or skill in performance.'*[309]

His Honour emphasised that the policy must be read as a whole:

> *'Given that the general principles of contractual construction apply as much to policies of insurance as to any other contract, the conception of "professionalism" within a given policy of insurance must always depend upon the business to which the policy relates and thus upon the "profession" which is in view.'*[310]

[307] Ibid 293.
[308] Ibid 294.
[309] Ibid 296.
[310] Ibid 297.

The Victorian Court of Appeal was guided by that decision in *Kyriackou v ACE Insurance Limited.*[311] Mr Kyriackou was the director of a group of companies which provided a range of financial services and were the subject of Federal Court proceedings brought by ASIC for operating unregistered managed investment schemes. Mr Kyriackou sought to be personally indemnified by ACE for the legal costs he incurred defending the claim, pursuant to the companies' professional indemnity policy.

While it was ultimately determined that Mr Kyriackou was not entitled to cover under the professional indemnity policy in respect of ASIC's claim, it was for reasons separate to the question of whether he was acting in a *'professional capacity'* within the meaning of the policy. In that regard, it was ACE's position that Mr Kyriackou's conduct was entrepreneurial, not professional, because he had solicited money from the public to invest in the relevant schemes rather than provide professional advice or services.

Harper JA (Tate JA and Kyrou AJA agreeing) referred to the reasoning of Buchanan JA in *Suncorp v Landridge* noting that the question of whether there has been a breach of a professional duty:

> *'depends upon characterisation of the overall activity in the context of which the breach occurs, and is not answered by concentrating on the specific task which has not been performed or badly performed so as to give rise to liability.'*[312]

The description of the insureds' business in the policy schedule included *'Finance Originators, Finance Intermediaries, Finance Brokers, Finance Consultants, Mortgage Aggregators.'* Harper JA accepted that Mr Kyriackou was acting in a professional capacity, not because his activities were characterised as "*professional*" but because, in the context of the policy, *'the activities of a finance originator, finance intermediary or finance consultant fell within the phrase "professional capacity" in the insuring clause.'*[313]

The additional comments of Kyrou AJA demonstrate the courts' increasing attention on giving commercial purpose to the policy as opposed to adhering strictly to traditional notions of a '*professional*' which might render a policy largely ineffective:

> *'In modern times, professional indemnity policies are sold to all types of business, including fencing contractors. Yet, many policies continue to retain the Professional Capacity Wording in the insuring clause. If such a policy is sold to a person who is not in a traditional profession, a narrow reading of the Professional Capacity Wording would deprive the insured of any meaningful cover. Recent authorities have recognised this problem and have sought to overcome it.*
>
> *In my opinion, where:*
>
> *a) the insuring clause of a professional indemnity policy contains the Professional Capacity Wording;*
> *b) the policy is sold to a person who is not in a traditional profession; and*
> *c) the policy defines the business that the person conducts,*
>
> *the effect of the Professional Capacity Wording is simply to require that the liability for which cover is sought under the policy arises from a breach of duty owed in connection with that business.'*[314]

[311] [2013] VSCA 150.
[312] Ibid [85].
[313] Ibid.
[314] Ibid [141]–[142].

It is clear that the courts are, rightly, conscious of the commercial purpose of the policy when asked to interpret the scope of the terms '*profession*' or '*professional duty*'. However, despite the trend towards a broader interpretation of '*professional*' duties and services in professional indemnity policies generally, the courts have adopted a more cautious approach when those concepts arise in exclusion clauses.

'*Breach of professional duty*' vs '*Liability in connection with professional business*'

An insuring clause that affords cover for *'breach of a professional duty in the conduct of the insured's Professional Business'* will be construed narrower than a clause affording cover for *'any civil liability incurred in connection with the insured's Professional Business.'*

In the latter case, as a matter of interpretation, the term Professional Business will ordinarily be construed broadly, as defining the ambit of an insured's business rather than limiting cover to a breach of a professional duty. It will not therefore restrict cover to professional liability arising from a breach of professional duty.[315]

As its widest therefore, a policy on this basis could be construed as providing cover to an insured for any claim or liability so long as the underlying conduct was '*in connection with*' the conduct of its business, regardless of whether it involves a breach of professional duty by the insured. The casual requirement '*in connection with*' is itself of wide import, requiring only a casual or consequential relationship between the claim and the insured's business, not necessarily limited to a breach of professional duty.

Whether a liability is incurred in connection with an insured's professional business will usually be unproblematic, where it arises in the ordinary pursuit of the insured's profession. Uncertainties can arise however where an insured also conducts separate business of an entrepreneurial nature, or steps beyond the roles and responsibilities ordinarily associated with its professional business.

In *Solicitors' Liability Fund v Gray & Winter*,[316] a firm of solicitors (Gray & Winter) were involved in a scheme in which they purchased properties and then promoted and sold those properties to clients, with the aim of providing those clients with investment and tax advantages. The transaction the subject of the proceeding involved the purchase and then sale of a kiwifruit orchard to a syndicate of clients. The syndicate sued the respondents for false representations, negligence and breach of fiduciary duty. The action was settled commercially, and the solicitors then sought indemnity under their professional indemnity policy for the settlement sum, which provided indemnity *'against any civil liability in connection with their practice'.* The insurer resisted the claim on the basis that the work being performed by the solicitors was not in connection with their practice as solicitors.

The solicitors were successful at first instance, however the insurer's appeal was allowed.

Lockhart J, while acknowledging the broad scope of a solicitors' practice, commented[317] that *'there must, however, be some point reached where the solicitor ceases to engage in his practice as a solicitor and enter other areas of activity, particularly business activity. This case is an excellent example of the grey dividing line between the two.'*

[315] This was the approach adopted in *Pioneer Road Services Pty Ltd v QBE Insurance Ltd* (2002) 12 ANZ Ins Cas 61-520.
[316] (1997) 147 ALR 154.
[317] Ibid 165.

His Honour went on to determine that the activities under consideration were not part of a practice of a solicitor, saying:[318]

> *'The "practice" as defined in the policy means the private practice of a solicitor carried on by the firm of Gray & Winter. I do not think the activities with which they were concerned that led to the claim against them by [the client] and then the ultimate settlement answer this description. They were engaged in the business of syndicating property transactions. Any work which they did in relation to that as solicitors was peripheral to the claims made against them. The centre of activity was property syndication.*
>
> *In my opinion the proper conclusion to be drawn from the evidence on which the case turns, in order to characterise the true nature of the relevant activities of Messrs Gray and Winter with which this case is concerned, is that the liability incurred by Messrs Gray and Winter in settling the claim for damages brought against them by [the client] was not incurred in connection with their practice as solicitors.'*

Beaumont and Burchett JJ, agreeing with Justice Lockhart, similarly held that the provisions in the contract of professional indemnity insurance should be construed so as to cover liability having some nexus with the professional functions of a solicitor. The cover does not extend to liability for an entrepreneurial activity which has no real nexus with the solicitor's practice. When the conduct of the solicitors in relation to the property syndication scheme was considered as a whole, the inference was drawn that the things they did were done as the actions of a businessman, rather than as solicitors. They acted as entrepreneurs rather than as legal professionals. It followed that the claims made by the client were outside the scope of the insurance policy.

Similarly, *Malcolm Douglas Carr Trading As Forshaws Neill v Swart and Ors; Lawcover Pty Limited v Swart and Anor*[319] concerned whether a claim against a solicitor fell within the scope of his professional indemnity policy, which provided cover for *'civil liability incurred in connection with the Practice'* of a solicitor. The solicitor entered into a Joint Venture Funds Management Agreement with an investor under which the solicitor would manage funds provided by the investor for investment purposes. The solicitor transferred the funds to a third party for use in a purported investment scheme, which was ultimately lost. The insurer refused to indemnify the solicitors in respect of the investor's professional negligence claim.

The New South Wales Court of Appeal in referring to *Solicitors' Liability Fund v Gray & Winter* said[320] *'that case does support an approach whereby all circumstances are considered and a judgment made as to whether what is done by a solicitor is done as a solicitor or in some other capacity.'*

In applying that rationale to the circumstances under consideration, the court then said *'the [joint venture agreement] was entered into by Mr Carr, not as part of or in the course of his practice as a solicitor, but as a distinct commercial venture in which he was playing an entrepreneurial and/or managerial role, and in which the exercise of his legal expertise was at most incidental and peripheral.'* The solicitors' liability under the joint venture agreement was therefore held not be have been incurred in connection with the practice of a solicitor.

These decisions are to be contrast with that in *Drayton v Martin.*[321] Mr Martin conducted business as both an accountant and investment adviser, and in doing so gave investment advice to a client. The client later made a claim against the accountant, alleging breach of duty. The accountant settled the claim and the question arose whether it fell within the scope of the accountant's professional indemnity policy, and in particular, whether the liability incurred by the accountant was incurred *'in connection with'* his practice as an accountant.

[318] Ibid 168.
[319] [2007] NSWCA 337.
[320] Ibid [53].
[321] (1996) 67 FCR 1.

Sackville J said:[322]

> *'The simple fact of the matter is that, so far as the Draytons were concerned, Mr Martin's advice to them to invest in the cash flow plan was, to use his words "inextricably interwoven" with his role as their accountant and his business or profession as an accountant. In practice, the stringent demarcation identified by Mr Williams was blurred, at least in Mr Martin's dealings with the Draytons. His work as the accountant for the tractor business provided the impetus for his recommendation that the Draytons participate in the tax-driven cash flow plan. His role as an accountant was undertaken at the same time as his role as an investment adviser. His function as an adviser, however imperfectly performed, depended on information obtained as the accountant for the Draytons. In these circumstances, it seems to me inevitable that the liability Mr Martin incurred to the Draytons was incurred "in connection with" his practice as an accountant.'*

That decision was upheld on appeal (*HIH Casualty & General Insurance Ltd v FAI General Insurance Co Ltd*[323]) where Wilcox J said:[324]

> *'As his Honour said, it was Mr Martin's work as accountant for the Draytons in connection with the tractor business that provided the impetus for his recommendation that they participate in what his Honour called the "tax driven cash flow plan" . . . Mr Martin says he told Mr Drayton that the plan "might help to reduce your tax liability. You still have a large amount of money on deposit and you could have tax problems this year and in the future". He then enlarged on the virtues of the plan.*
>
> *I think a simple way of testing whether the liability arose out of Mr Martin's practice as an accountant would be to ask what would have been his position if, after referring the Draytons in general terms to the plan, and recommending it as something for their consideration, he had sent them off to an entirely independent investment adviser who completed the negotiations and signed them up on the plan. Would Mr Martin have been liable? In my view he undoubtedly would have been. I say this because it is quite plain that the plan was only a useful acquisition for the Draytons if the otherwise assessable income of the tractor business was sufficient to support the interest payments that would be required, and indeed to make the incurring of those payments worthwhile. It is clear it was not. At the relevant time the tractor business was operating at a loss and there was nothing to indicate that, in future, it would receive profits of the dimensions necessary to require consideration of a plan such as this.*
>
> *In other words, the scheme was fundamentally flawed from the outset. Mr Martin, as the Draytons' accountant, should have known this.'*

In *Drayton v Martin* (and the decision on appeal) it was therefore determined that the investment advice provided was in connection with the business of an accountant, either because it was advice given by an accountant performing an accountant's role, or if it was advice not given strictly speaking as an accountant it was nonetheless inextricably intertwined with the business of an accountant. This reasoning was distinguished in *Solicitors' Liability Fund v Gray & Winter* on the basis the solicitors there did not undertake any legal work in connection with the property investment scheme.

[322] Ibid 34.
[323] (1997) 9 ANZ Ins Cas 61-376.
[324] Ibid 76, 961.

Exclusion clauses

Professional services exclusions will often be found in public or products liability or Directors' & Officers' insurance policies. Those policies are designed to insure different risks than those arising from professional negligence or related breaches, and it is therefore appropriate that claims connected with the provision of professional services are carved out (for example, in circumstances where separate professional indemnity insurance should be obtained), without circumscribing the cover entirely.

In *Toomey v Scolaro's Concrete Constructions Pty Ltd & Ors (No 5)*[325] it was submitted that '*professional*' must carry the same meaning in an exclusion clause of a public liability policy as that in the indemnity clause of a professional indemnity policy. In response, Eames J observed:

> *'we must not lose sight of the fact that the context in which the word "professional" appears in the two policies is likely to be different. Furthermore, when the term appears in an exclusion clause, the overlaying principle of contra proferentem applies – with particular force . . . [T]he considerations relevant to the application of the word "professional" in one policy are not necessarily the same as those for another.'*

The term '*professional*' will not necessarily bear an identical meaning in an indemnity clause of a professional indemnity policy on the one hand and an exclusion clause of a different policy on the other. In *Fitzpatrick v Job t/as Jobs Engineering*[326] the Western Australian Court of Appeal confirmed that the context in which the term is used in a policy can be significant in determining its meaning.

In that case the court had to consider the operation of an exclusion clause in a public liability policy for claims *'arising out of a breach of duty owed in a professional capacity'*.

The claim in question was brought by Fitzpatrick, the purchaser of a wood processing machine. Jobs Engineering had originally designed and manufactured the machine, and supplied it to another party, Ridolfo, without a cabin. Ridolfo arranged for a cabin to be made before it was sold to Fizpatrick. Fitzpatrick suffered injuries while operating the machine, and brought a claim against Jobs Engineering for failing to properly advise or inform Ridolfo of the need for a barrier or safety switch in the cabin.

The court held that the exclusion did not apply. Buss JA relevantly observed that:

> *'By the indemnity clause in the products liability cover, GIO agreed to indemnify Jobs Engineering, relevantly, in respect of sums which Jobs Engineering "shall become legally liable to pay for compensation in respect of bodily injury or damage to property as a result of an occurrence" and caused by "the nature, condition or quality" of any goods or products sold or supplied by it. If the nature, condition or quality of any machinery or equipment designed, manufactured and supplied by Jobs Engineering were to cause personal injury or property damage to any person, and the relevant nature, condition or quality was attributable to the negligent act or omission of Jobs Engineering, there is a significant likelihood that the person suffering the injury or damage would have a cause of action against Jobs Engineering. If any and all negligent acts and omissions of Jobs Engineering, of the kind I have just mentioned, were to be characterised as breaches of duty owed by it in a professional capacity, within [the exclusion clause], the cover under the indemnity clause of the products liability insurance would be severely circumscribed. The indemnity clause would not respond unless Jobs Engineering's legal*

[325] (2002) 12 ANZ Ins Cas 61-519, 76,075.
[326] (2007) 14 ANZ Ins Cas 61-731.

> *liability to pay was not attributable to its negligence or other breach of duty owed by it in a professional capacity, but arose on some other legal basis. The parties cannot have intended such an uncommercial and unreasonable result, and it is not a construction which the language of the policy unequivocally requires.'*[327]

In *470 St Kilda Road Pty Ltd (ACN 006 075 341) v Robinson*[328] in issue was whether the making of a statutory declaration was an actual or alleged act or omission *'in the rendering of, or actual or alleged failure to render any professional services to a third party'.*

Mr Robinson was employed as the chief operating officer of Reed Constructions, a company retained to perform work for a third party pursuant to a design and construct contract. From time to time, Mr Robinson made statutory declarations to support progress claims under the contract. The third party brought proceedings against Mr Robinson in relation to one of the statutory declarations, which it alleged he had made without reasonable basis, was misleading and deceptive, and was in breach of Mr Robinson's duty of care.

Mr Robinson sought to be indemnified in respect of the proceeding under his employer's directors' and officers' liability insurance policy with Chubb. Chubb denied it was liable to indemnify Mr Robinson, because the D&O policy excluded cover for loss in respect of any claim *'for an actual or alleged act or omission . . . in the rendering of, or actual or alleged failure to render any professional services to a third party'*, which Chubb argued applied to Mr Robinson's conduct. '*Professional services*' was not defined in the D&O policy.

Kenny J was asked to determine whether project management, and in particular the provision of the statutory declaration in question was an act in the rendering of professional services such as to trigger the exclusion. Her Honour indicated that project management might be seen as a profession in some circumstances, but that the commercial context of the policy and its terms and objects would determine whether the terms '*profession*' or '*professional*' applied.[329]

Her Honour viewed Mr Robinson's conduct in providing the statutory declaration as an act of providing information and therefore an administrative activity rather than a professional one, consistent with the authorities in *FAI General v Gold Coast City Council*[330] and *GIO v Council of the City of Penrith.*[331] Her Honour added:

> *'Naturally, as Chubb submitted, in construing an exclusion clause, it must also be borne in mind that such a clause will, of its nature, circumscribe the cover to some extent. Whether or not a particular construction can be said to circumscribe the cover under an insurance policy unduly or inappropriately will depend on the ordinary meaning of the exclusion clause, read in the light of the whole policy, including its nature and purpose. The construction that Chubb would place upon "professional services" in the exclusion clause in this case would have the practical effect of making the exclusion apply whenever officers or employees undertake a great many acts in aid or support of Reed's business activities, including services in connection with the routine administration of a building contract such as the D&C contract. As a result, on Chubb's construction, a great many activities undertaken by employees, officers and directors would necessarily be excluded from cover. Given the nature and purpose of the D&O policy, such an interpretation would have the effect of circumscribing inappropriately the cover*

[327] Ibid 76, 076–077.
[328] (2013) 308 ALR 411.
[329] Ibid 428, 430.
[330] [1992] 2 Qd R 341.
[331] (1999) 102 LGERA 102.

> *provided by the policy. The obvious purpose of the professional services exclusion . . . is to exclude activities that are truly professional in nature, such as architectural design, engineering, surveying and quantity surveying. The clause was not intended to apply to the routine activities of Reed or its officers or employees, including in the provision of information in support of its payment claims under the D&C contract.'*[332]

Her Honour held the exclusion did *not* apply, and confirmed that the terms '*profession*' or '*professional*' will be construed narrowly in exclusion clauses.

Chubb appealed[333] asking the Full Court to revisit the question of whether the professional services exclusion applied to Mr Robinson's claim for indemnity under the D&O policy. Chubb argued Kenny J had erred in:

- focusing on the specific conduct of Mr Robinson (i.e., the provision of information) rather than the overall activity of Reed in the context of which Mr Robinson's conduct occurred; and
- failing to conclude that Reed's provision of project management services pursuant to the D&C contract was the provision of *'professional services'* for the purposes of the exclusion.

The Full Court dismissed Chubb's appeal, rejecting the submission that the professional services exclusion clause should be construed by reference to the scope of cover usually provided by professional indemnity policies, and that Kenny J had therefore construed the exclusion too narrowly.[334] In the Full Court's view this ignored the importance of the principles explained by the High Court for the construction of exclusion clauses, such as in *Selected Seeds*[335] where it was stated:

> *'According to the general rules of construction, whilst regard must be had to the language used in an exclusion clause, such a clause must be read in light of the contract of insurance as a whole, "thereby giving due weight to the context in which the clause appears".'*[336]

The Full Court therefore held:

- the professional services exclusion must relate to a narrower band of activity than the general work or activities of Reed, as this would otherwise inappropriately circumscribe the cover provided by the D&O policy;
- the expression *'professional services'* in the exclusion clause meant services of a professional nature involving the *'application of skill and judgment by the person or persons who carried out the relevant activities on behalf of [Reed] . . . being services which fall within the scope of a vocational discipline which is generally regarded as a profession.'* The exclusion was therefore designed to exclude activities that were truly professional in nature, consistent with Kenny J's decision;
- Mr Robinson's conduct involved the routine provision of factual information and therefore did not involve the rendering of project management services. Even if project management were a profession, Mr Robinson's conduct did not constitute the rendering of *'professional services'*.

[332] (2013) 308 ALR 411, 436 .
[333] *Chubb Insurance Company of Australia Limited v Robinson* (2016) 239 FCR 300.
[334] Ibid [121]–[124].
[335] *Selected Seeds Pty Ltd v QBEMM Pty Ltd* (2010) 242 CLR 336.
[336] Ibid 344.

CHAPTER 6 – CLAIM, CIRCUMSTANCE AND NOTIFICATION

Professional indemnity insurance is commonly written on either a '*claims made*' or '*claims made and notified*' basis.

In essence, a '*claims made*' trigger means the policy which responds is the one in force at the time the claim is made against the insured. Typically it does not matter when the relevant breach occurred, subject to the operation of any retroactive date (which may be a specific date or unlimited).

A '*claims made and notified*' policy, as the name suggests, requires both that a claim is first made against an insured *and* notified to an insurer during the period of insurance. Accordingly, an insuring clause will not *prima facie* respond to a claim if it is not also notified within the policy period.

What is a claim

In *CE Heath Casualty and General Insurance v Pyramid Building Society*[337] Ormiston J said of the word '*claim*' that '*possibly no word in insurance law has given rise to more difficulties'*. In an attempt to deal with those difficulties and to provide clarity for themselves and for insureds, liability insurers will often define (sometimes exclusively) the term '*claim*' within the policy wording. Notwithstanding those attempts at clarity, difficulties and uncertainties still arise.

In the context of a claims made and notified policy, the focus is on the claim by a third party on an insured, not the insured's claim on an insurer.

'*Claim*' is now typically defined in most policies to encompass the receipt by the insured of a written demand for compensation or a writ, statement of claim or other originating process.

A statement of claim or writ will be non-contentious. Although it is the receipt by the insured of the demand or process that is the relevant consideration as to when a claim is '*made*' against it. A statement of claim which is filed but not served will not be a claim[338] (nor without more would it be sufficient to trigger a prior claims exclusion).

What amounts to a demand for compensation can be more difficult. A person saying that they are investigating a loss and requesting information may not be sufficient, although it need not necessarily claim a sum of money either. Ultimately it will be a question of fact.

Courts can be reluctant to give significant weight to judicial authority on the interpretation of the word '*claim*', even where prior decisions are relevant from a legal or factual perspective. The preferred approach appears to be for courts to determine each case on its own facts having foremost regard to the particular clauses within the policy in question.

Nonetheless, there are numerous precedents as to what constitutes a '*claim*', which are of some practical assistance.

In *Walton v National Employers' Mutual General Insurance Association Ltd* Bowen JA referred to the primary sense of the '*claim*' in a liability policy as *'a demand for something as due, an assertion of a right to something. It imports the assertion, demand or challenge of something as a right.'* [339]

[337] [1997] 2 VR 256.
[338] *King v McKean & Park (A Firm)* (2002) 12 ANZ Ins Cas 61-534.
[339] [1973] 2 NSWLR 73, 82.

A leading case on the issue in Australia is *Junemill v FAI Insurance Co*[340] where the Queensland Court of Appeal determined the word *demand* (in a definition of '*claim*' encompassing *'a demand for compensation made by a third party against the insured'*) referred to the subject matter of the claim rather than the act of demanding in respect of it. In so finding, the court considered the determining factor was not that a specific '*demand*' be made (in the ordinary sense of demanding something) but that it involve only an '*assertion of liability*'.

'*Claim*' has also variously been held to be something akin to a demand for compensation against an insured, or the intimation of being held liable or responsible in some part or in whole for some measure of loss,[341] or something that brings home to an insured the substance of the claim that the claimant might bring,[342] or an assertion of a possible future claim or right.[343]

In *Cassidy v Leslie,*[344] the New South Wales Supreme Court considered the contents of an email to a valuer asserting the possibility of a substantial shortfall in the value of a property upon future sale constituted *'a written assertion of a right to compensation.'* The court was not persuaded by an argument the right had to be existing, saying it could be conditional and still arise even though its existence was contingent on something else happening (in that case the sale of the property at a loss).

Some instances that have however been held to fall short of a '*claim*' (in the context of particular definitions in those cases) include:

- a proceeding by ASIC for various breaches of the Corps Act did not satisfy the policy requirement of a claim for *'civil compensation or civil damages'* or alternatively a '*written intimation of an intention to seek*' such damages. The court cited with approval an earlier decision of the Victorian Supreme Court which found that each of the two expressions '*civil compensation*' and '*civil damages*' requires 'a claim for pecuniary redress for some actionable wrong';[345]
- in *Amlin Corporate Member Ltd v Austcorp Project No 20 Pty Ltd*[346] the Federal Court considered whether a defence filed in litigated proceedings, which raised certain allegations against the plaintiff in order to resist the claim (and which prompted subsequent litigation) was a *'claim for civil liability'* which could include a counterclaim. It was argued the defence was a counterclaim because it *'was designed to counter the demands'* of the insured. The court considered that the reference to counter-claim *'was directed to the possibility that the insured may suffer a liability to a third party by reason of the counter-claim'* and that as the defence only raised certain defences to the insured's action and did not claim any relief against, or damages from, the insured, it fell short of a '*claim*' for policy purposes.

So, within the context of '*claims made and notified*' cover, an insured must receive something akin to '*assertion of liability*' within the policy period, and notify it to the insurer.

[340] [1999] 2 Qd R 136.
[341] *Dwyer v Long* (1992) 58 SASR 102, which held that a letter threatening legal proceedings for alleged professional negligence to be a notifiable *'claim'*.
[342] *Drayton v Martin* (1996) 67 FCR 1.
[343] *Junemill Ltd (in liq) v FAI General Insurance Co Ltd* [1991] 2 Qd R 136.
[344] [2010] NSWSC 742.
[345] *Kantfield Pty Ltd v Lockwood* [2003] VSC 420.
[346] (2014) 311 ALR 222.

What is a circumstance

If events fall short of a policy '*claim*' (whether defined or not) the question becomes whether they will be construed as a '*circumstance that may give rise to a claim*' of which notification should nonetheless be provided. The distinction carries potentially significant consequences for insureds, particularly in the event of late notification.

In practice, a number of complications can arise in relation to the question, what constitutes a '*circumstance*'?

In *FAI General Insurance Co Limited v McSweeney*[347] the court said the test was objective, requiring notice when a reasonable person in the insured's position would consider there was a reasonable possibility of a claim. Notice is not required if the possibility of a claim is remote or unlikely. However, providing there is a real or definite risk of a claim, notice is required even if the claim is not probable.

CGU Insurance Limited v Porthouse[348] concerned a barrister's failure to notify his insurer of circumstances that may give rise to a claim against him and the insurers' consequent declinature of coverage under a professional liability policy. The court applied an objective test to the question whether the insured was aware of circumstances that may lead to a claim, being whether a reasonable person in the insured's professional position and ignoring his personal idiosyncrasies would have thought a claim may arise.

Generically, the objective limb of the '*known circumstances test*' provides an important practical protection for insurers. It is intended to protect insurers from genuine, but unreasonable beliefs held by insureds.

The first stage is to create a '*reasonable person*' who is then infused with the insured's professional experience and the insured's knowledge of the facts and circumstances. Next, the '*reasonable person*' is then asked about real (as opposed to remote or fanciful) possibilities, but not about certainties.

Notification of a claim or circumstance

Notification of a claim is an explicit requirement of the trigger for cover under a '*claims made and notified*' policy.

It is not uncommon for policies to provide that an insured is required to (or alternatively *may*) notify an insurer of '*circumstances that might give rise to a claim*'. An obligation of this nature will not, without more, operate to tie any future claim to the policy under which notification is provided.

Cover can however be extended by a contractual *deeming* provision, to a claim made after expiry of the policy if during the period of insurance the insured became aware of facts or circumstances giving rise to the claim and notified the insurer of those facts and circumstances before the policy expired.

Alternatively, s 40 of the ICA is directed to a situation in which an insurer might otherwise be entitled to decline or limit indemnity, if the insured should fail during the currency of the policy to give notice of a claim.

[347] (1999) 10 ANZ Ins Cas 61-443, 75,033.
[348] (2008) 235 CLR 103.

The contractual right of an insurer to decline indemnity in such circumstances is ameliorated by s 40(3), which provides that if the insured gives notice to the insurer of '*circumstances that might give rise to a claim*' as soon as reasonably practicable after he or she became aware of them during the currency of the policy, the insurer is not relieved of liability to indemnify the insured *only* by reason of the fact that any subsequent '*claim*' arising from those circumstances is made after the expiry of the policy.

The section has the effect of a statutory '*deeming*' provision, deeming the claim to have been made and notified during the policy period, provided notification of the claim (after the policy expires) is given as soon as reasonably practicable after the insured learns of the claim.

However, the distinction between the effect of a contractual deeming provision and s 40(3) of the ICA carries important consequences for an insured in the case of a failure to notify a circumstance, as will be explored further below.

Obligation to notify

As a threshold level, for there to be a valid notification of circumstances, an insured must be aware of relevant circumstances during the policy period or extended notification period. A distinction needs to be drawn between circumstances which merely describe a state of affairs and those which indicate the potential for a claim to be made arising out of them.

Facts and circumstances can be notified when an insured is apprehensive that the circumstances may lead to a claim or where they are merely conscious of some error, loss or disgruntlement on the part of a potential claimant and feel there is a risk that something may come of it.

Whilst the test for the interpretation of the expression '*might give rise to a claim*' is an objective one (of whether a reasonable person in an insured's position would have considered there to be a reasonable possibility of the facts leading to a claim), some practical guidance is offered by the following case examples.

In *HIH Casualty & General Insurance v Dellavedova*[349] the court considered that the expression *'. . . loss arising out of any circumstance or occurrence . . . of which [the insureds] were aware'* must relate to an awareness of the prospect of the claim made and notified, rather than to the events themselves giving rise to the claim. If it were otherwise, the insureds would be ineligible for insurance merely by being aware of a circumstance or occurrence which ultimately resulted in a claim without any reason to anticipate that claim. The court considered that in '*the absence of some awareness of the prospect of a claim, there could be nothing about which to give notice*'.

'Circumstance' in that case was considered to be *'. . . a causally relevant fact or circumstance which will, or has the potential to, generate a claim for civil liability. It is some mishap or default which exposes or has the capacity to expose the [insured] to civil liability to a third party . . .'*

In *FAI General Insurance Co v Australian Hospital Care Pty Ltd*[350] Derrington J held that *'. . . it is not necessary to an awareness of an occurrence, that a person also knows its mechanics; it is enough to know that an event has occurred . . .'* In order to come within the terms of the contractual deeming clause, Derrington J held that *'. . . [t]he Insured had to be aware of more than a mere circumstance forming the occurrence; it had to be aware of the possibility of a claim against itself for malpractice associated with those circumstances. However, again it did not have to be aware of how or why this might be so, and whether the possible claim was justified or might be expected to be successful . . .'*

[349] [1999] 10 ANZ Ins Cas 61-431.
[350] [1999] 153 FLR 448.

While the necessary awareness must be more than an awareness of the mere facts upon which the claim is later made, the knowledge that those facts may possibly give rise to a claim (although it is expected that they will not do so) may be enough to justify the giving of notice. That is so even if an insured does not know all the details or the details of the possible alleged culpability.

In *FAI Insurance v McSweeney*,[351] Lindgren J observed that at one end of the spectrum *'Every time an accountant prepares accounts or an auditor performs an audit, there is a possibility of a claim'*, but such a notification would likely be inadequate. Rather, his Honour cited with approval an earlier decision of the Full Court of the Western Australian Supreme Court that a more appropriate test involves *'a known deficiency likely to result in a casualty'*, with one example being *'if it had become known to [an insured] that he had made a serious mistake in writing a report such as using a wrong valuation, this would be [such a circumstance].'*[352]

Lindgren J went on to observe that *'it is not desirable to attempt to define precisely the shade of meaning signified by the expression 'may give rise to a claim"*, and formulated the following range of indicators:

> *'The appropriate connection between the known circumstances and the claim . . . is, perhaps best described by saying that circumstances "may give rise to a claim" if they would . . . immediately suggest to a reasonable pe rson in the proponent insured's position who reflected upon those known circumstances, that the bringing of a claim against the insured in respect of them was a "definite risk" or a "real possibility" of "on the cards". Perhaps the notion of the "springing to mind" of the making of a claim also appropriately expresses the shade of meaning intended.'*[353]

The New Zealand High Court has applied Lindgren J's formulation in two cases, with two different outcomes.

In the case of *Aon New Zealand,*[354] which involved a complex set of circumstances of an initial apprehension of the possibility of an application being made for judicial review of the insured's (a Government Minister's) decision, and the subsequent filing and service of such an application challenging the decision which was known to have impacted on one potential claimant, it was held that at the earlier stage there was '*nothing else to indicate that [the insured] considered a claim . . . to be a reasonable, real or definite risk as opposed to a remote possibility*'[355] (and so no basis for notification to the insurer), but at the later stage when the actual terms of the application for review were known, notification of the circumstances was required.

In the later case of *Barnes,*[356] it was held that merely notifying that *'publicity had surrounded widespread . . . building problems appearing in buildings of similar construction to those in respect of which [the insured property inspector] had completed reports'*, was insufficient to comprise facts *'which may give rise to a claim'*, because there was *'simply no notified circumstances by reference to which [a reasonable property inspection consultant could form the opinion] that a claim may arise'.*[357]

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[351] (1999) 10 ANZ Ins Cas 61-443.
[352] Pidgeon J in *FAI General Insurance Co Ltd v Hendry Rae & Court* (1993) 10 WAR 322, cited by Lindgren J in *McSweeney*, 75,032-3.
[353] *McSweeney*, 75,033-4.
[354] *Attorney General v Aon New Zealand* (unreported High Court of New Zealand, Motions, 10 April 2005).
[355] Ibid [74].
[356] *Barnes v QBE Insurance (International) Limited* [2011] NZHC 285 (4 April 1 2011).
[357] Ibid [54]–[57].

The English Court of Appeal found for an insured in the matter of *Kidsons*[358] on the basis that even where the insured's (a firm of accountants) notification *'did not say that any claim had been made, indeed it said that no claim had been made'*, but raised the insured's view that *'the Inland Revenue, if minded, could be critical of some procedures [by which certain tax products had been implemented] followed in certain cases'*, this was sufficient to constitute a notification of '*facts which may give rise to a loss or claim'*.[359.]

Rix LJ was of the view that he *'would be happy to accept any suggestion that a purported notification of circumstances to an insurer becomes ineffective whenever there might be a real point of argument as to its property width."*[360]

The notification in *Kidsons* was held to be valid in relation to a later claim even though the notification had not referred to the transaction from which the later claim arose, let alone identified a defect in relation to the handling of a particular client as likely to give rise to a claim by that client. This position was subsequently summarised by the English High Court in *McManus & Ors v European Risk Insurance Company*[361] as follows:

> *'. . . provided circumstances exist which may give rise to a claim, and provided those circumstances are notified, then any future claim arising out of those circumstances must be paid out by the insurer at risk at the time of notification whether or not the particular transaction or possible claimant has been identified at the time of notification . . .'*

While the more recent UK legal authorities have taken a broad approach to notifications it appears to be common ground between the UK and Australian courts that for the notification to be valid the insured must be aware of the circumstances during the policy period. It is ultimately a question of fact and impression as to whether a subsequent claim/investigation arises out of any notified circumstance.[362]

The New South Wales Court of Appeal in *American Home Insurance Company v Kirby*[363] considered that a court should have regard to the surrounding facts and circumstances when considering whether the later claim was relevantly the result of the earlier notified matters. It will depend on whether the ultimate claim *'. . . travel[s] well beyond . . .'* or could *'. . . never even be remotely suggested . . .'* or is *'. . . wholly different from the . . .'* matters notified.

Adequacy of the notification

The adequacy of the means by which notification of facts or circumstances was made to an insurer was considered in *Antico v CE Heath Casualty and General Insurance Ltd & Anor.*[364]

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[358] *HLB Kidsons v Lloyds Underwriters* [2009] All ER 80, per Rix and Toulson LJJ.

[359] Ibid [84]–[86].

[360] Ibid [87], rejecting an earlier test posed in a UK matter of *Delta Vale*, which had required a notification of facts *'sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to who and when they are intended to operate.'*

[361] [2013] EWHC 18.

[362] *Thorman v New Hampshire Insurance Co (UK) Ltd & Anor* [1988] 1 Lloyds Rep 7, 11-12; *John Connell Holdings Pty Ltd v Mercantile Mutual Holdings Limited* (1988) 10 ANZ Ins Cas 61-407, 74,472-3; *Kajima UK Engineering Limited v The Underwriter Insurance Co Ltd* [2008] 1 All ER 55; *American Home Assurance Company v Kirby* (2004) 13 ANZ Ins Cas 61-600.

[363] [2003] NSWCA 395.

[364] (1995) 8 ANZ Ins Cas 61-268.

The insured (Antico) held a D&O legal expenses policy of insurance with CE Heath. During the period of cover, but in a request for a slightly different D&O policy for the following year (providing coverage for liability and legal expenses), and which was submitted to a different office of CE Heath to that which arranged the initial policy, Antico disclosed facts or circumstances it believed may give rise to a claim. Subsequently, it sought coverage under the earlier policy in respect of a claim, on the basis that the underlying circumstances had already been notified to the insurer in the renewal request.

Giles CJ (at first instance) considered previous decisions of courts in both Australia and the United States, from which he said two matters generally prevailed. First was that *'it must be asked whether the insured has objectively complied with the notification requirements in the Policy [or under the ICA], and it is not sufficient that the insurer has subjectively inferred from the information provided to it that a claim might be made against the insured.'*

Second, was that *'a provision in a claims made policy for notification of facts out of which a claim might arise benefits both the insured by providing additional protection, and the insurer, by permitting it to close its books and thus more accurately fix its reserves for future liabilities and to compute future premiums.'*

His Honour, with whom the Court of Appeal agreed,[365] ultimately concluded that notification of the facts or circumstances that might give rise to a claim, in an application for a policy of insurance of a slightly different nature, submitted to a different office of the same insurer, did not constitute adequate notification of circumstances for the purpose of s 40(3) of the ICA. It was said that *'notification is a significant contractual step not lightly to be imputed to or imposed on the parties to the contract of insurance . . .'* and that accordingly *'more was required than the incidental conveying of information . . . in the documents provided to [CE Heath] in connection with proposals for other insurance.'*

However, in subsequent decisions (such as *HIH Casualty & General Insurance Australia Ltd v DellaVedova*[366] and *CGU Insurance Limited v Corrections Corporation of Australia Staff Superannuation Pty Ltd*[367]) Australian courts have, in passing, said that it would be plainly arguable that notification of circumstances to an insurer in a policy renewal request may amount to sufficient notification (however, in neither decision was the court required to make a determination on that issue).

Best practice suggests that any notification, in terms of both timing and manner of conveyance, should be made strictly in accordance with any requirements in the policy (or else in accordance with s 40(3) of the ICA), to avoid any later dispute. An insured that purports to notify in some other manner does so at its own peril.

Failure to notify a claim or circumstance

The question of whether something constitutes a *'claim'* under an insurance policy or a *'circumstance likely to give rise to a claim'* can have important consequences in the case of a failure to notify. They require consideration in the context of the relationship between ss 40 and 54 of the ICA.

Section 54 is one of the most far-reaching sections of the ICA, and one of its most contentious applications is in relation to late notification.

[365] [1996] 38 NSWLR 681.
[366] (1999) 10 ANZ Ins Cas 61-431.
[367] (2008) ANZ Ins Cas 61-785.

The section essentially precludes an insurer from refusing to pay a claim in circumstances which have resulted through an insured's act or omission, provided the insured's act or omission is not a material cause of the loss.

The section can be directed to the position where the insured knows about circumstances which might give rise to a claim, or a claim, and fails to comply with its contractual obligations under the policy by failing to provide timely notification of the claim or circumstances to the insurer.

When considering the potential application of s 54(1), it is first necessary to consider whether the claim made by the insured is covered by the insuring clause (that is, it is within any inherent restrictions or limitations). Only when that question is answered in the affirmative is it necessary to determine whether an insurer's ability to deny indemnity was the result of an act or omission of the insured or someone else triggering an exclusion or condition.

Whilst the history and development of the law in relation to s 54 is an interesting topic, the current position now seems well settled under Australian law and can be briefly stated as follows.

Section 54 operates to '*forgive*' a failure by an insured to notify a *claim* within the policy period (if cover would otherwise have been available had it done so), provided there is no prejudice to the insurer.[368] The effect is that the insurer who is on risk at the time the claim is made against the insured (and at the time the claim ought to have been notified) remains obliged to respond to the claim, subject to the absence of any discernible prejudice and the policy's other terms and conditions.

What then is the position if an insured's failure to notify within the policy period is in relation to a *circumstance* that may give rise to a claim, rather than an actual claim?

In the well known but sometimes misunderstood decision of *FAI General Insurance Limited v Australian Hospital Care Pty Ltd*,[369] it was held that s 54 also excuses an insured's failure to provide notification to an insurer of a circumstance if (but only if) there is a deeming provision in the policy, and provided there is no prejudice to the insurer. Prior to *Australian Hospital Care*, s 54 of the ICA was argued by insurers to be more limited in its application (in the context of the notification requirement) to an omission to notify *claims*.

Pausing there, the effect of the decision in *Australian Hospital Care* is not to enable s 54 to forgive an insured for failing to notify a *circumstance* until after the policy has lapsed where the policy does not contain a deeming provision. Such deeming provisions have now often been removed by insurers as a result of the *Australian Hospital Care* decision, to ameliorate its effect.

In the Supreme Court of Queensland, Chesterman J considered the interrelationship between ss 40 and 54 in *CA and McInally Nominees Pty Ltd & Ors v HTW Valuers (Brisbane) Pty Ltd*[370] with regard to whether, in the absence of a deeming provision in the policy, the statutory deeming provision in s 40(3) could be used together with s 54 to forgive a failure to notify circumstances.

That case concerned the failure of the insured to give notice of a claim under a professional indemnity insurance policy held by a firm of valuers during the currency of the policy period. The valuers held a professional indemnity insurance policy with CUA for the period 15 September 1998 to 15 September 1999. However, proceedings by the disappointed borrowers against the valuers were not issued until December 1999 (after the termination of the policy) and indemnity was not sought by the valuers from the insurer until March 2000.

[368] *East End Real Estate v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400.
[369] (2001) 204 CLR 641.
[370] [2009] 2 Qd R 1.

The insurer argued that it was not liable to indemnify the valuers as no notification had been given to it whilst the policy was in force.

Encouraged by *Australian Hospital Care*, the valuer submitted an entitlement to indemnity on the basis ss 40 and 54 operated in combination. That is, the valuer's failure to notify a circumstance that may give rise to a claim within the policy period under s 40(3) (there was no deeming provision in the policy), was an '*omission*' for the purpose of s 54, and having regard to the application of s 54 as applied by *Australian Hospital Care*, the insurer could not therefore rely on that omission to justify its declining indemnity.

Chesterman J rejected that argument. His Honour quoted a passage from the joint judgment of McHugh, Gummow and Hayne JJ in *Australian Hospital Care* to the effect that:

> *'The claim which the insured made on FAI was for indemnity against liability for an occurrence of which the insured first became aware during the period of cover. The effect of the contract of insurance is that FAI could refuse to pay that claim by reason only of the fact that the insured did not give notice of the occurrence to it. Section 54, therefore, requires the conclusion that FAI may not refuse to pay the insured's claim. The effect of the contract of insurance, but for section 54, would be that the insurer may refuse to pay the insured's claim by reason only of the omission of the insured to notify the occurrence.'*

His Honour concluded that s 40(3) could not be relied upon in combination with s 54 to cure the failure of the insured to provide notification of the claim to the insured during the currency of the policy period because:

> *'Section 40(3) would have obliged CUA (the valuer's insurer) to grant indemnity, but that indemnity* ***would have flowed from the intervention of the statute, not the effect of the policy****. In this regard, the phrase, "but for this section", which appears in section 54(1) cannot be overlooked. The effect of CUA's policy, if one ignores HTW's omission to give notice of its negligent valuation, would not have been that HTW was entitled to indemnity. An insurer may not refuse to pay a claim by reason only of the fact that an insured omitted to give notice of an occurrence, but, had HTW given notice, the insurer would still not have been obliged to indemnity. To get to that result, s 40(3) must also operate. But s 54 is concerned with the situation where, if an omission is disregarded, a policy of insurance would provide cover. To assist HTW here, s 54 has to be understood as though it read:*
>
> *Where the effect of a contract of insurance would, but for this s and s 40(3).'*[371]
>
> (our emphasis)

Chesterman J held that s 40(3) does **not** imply a term into policies of insurance to the effect of the subsection. Rather, it confers a statutory right on an insured, and obligations on an insurer, but only in circumstances in which the insured has complied with its contractual terms by giving notice. Chesterman J concluded:

> *'HTW's submissions would require a modification to the subsection and provide relief in circumstances other than those specified by the legislation. If it were Parliament's intention that s 54 should modify the operation of s 40(3), one would expect to find some indication of the intention in the provision. There is nothing in s 40(3) which makes the requirement that notice be given during the currency of the policy "subject to s 54."'*[372]

[371] Ibid 43.
[372] Ibid 45.

His Honour also referred to the observations made by McHugh, Gummow and Hayne JJ in *Australian Hospital Care,* in which they held:

> *'Sections 40 and 54 deal with different problems. Section 40 is concerned with certain contracts of liability insurance and, among other things, with the insured giving notice of a potential claim during the period of insurance cover, when the claim is not made until after the expiration of that period. Section 54, by contrast, deals with a much more general subject of an insurer refusing to pay claims.'*[373]

The issue of the relationship between s 40 and s 54 was again considered by Bergin J in *Gosford City Council v GIO General Ltd*.[374]

Gosford City Council sought indemnity from GIO under a policy of insurance which expired on 31 December 1991 and which was not renewed. On 30 May 1991, during the period of the policy, an officer of the Council telephoned the Council's insurance broker advising of circumstances which might give rise to a potential claim. The broker did not notify those circumstances to GIO. GIO subsequently declined to indemnify the Council with respect to the claim on the basis that the wording in the policy required that a claim be made against it during the period of insurance and that no such claim was made.

The Council submitted that there was a failure (through the broker) to notify facts during the currency of the policy. It was also submitted that by a combination of s 40(3) and s 54, the failure to notify those facts did not entitle GIO to refuse to indemnify it.

GIO submitted that the failure to notify those facts did entitle it to refuse to indemnify the Council. It submitted that s 40(3) and s 54 did not operate so as to bring the claim within the policy. In particular it was submitted that, absent special conditions in the policy, s 54 did not apply to instances of a '*claims made policy*' where no claim had been made upon the insured within the policy period. It was submitted that the notification to the broker did not advance matters because there was no clause in the policy that deemed a later claim to have been made at an earlier time in which circumstances were notified.

Her Honour noted that the facts in the cases relied upon by the Council were each distinguishable from the facts in the case before her. In *Antico*, a claim was made during the period of insurance and there was a failure to notify the insurer during that period. Similarly, in *East End Real Estate* a claim was made during the period of insurance and there was a failure to also give notification.

In *Newcastle City Council v GIO General Ltd*[375] there was a notification during the period but the claim was made outside the period. In both *Australian Hospital Care* and *Einfeld v HIH Casualty and General Insurance Ltd*[376] there were deeming provisions. In the case before Bergin J there was no deeming provision, there was no claim made during the period, and there was no notification during the period.

Her Honour went on to consider the decision of Chesterman J in *McInally Nominees* and noted that the opinion in that case was contrary to that expressed by Rolfe J in *Einfeld*, which her Honour noted was obiter dicta. Bergin J respectively disagreed with *Einfeld*, being of the view that the decision appeared to overlook the limitation found in s 54 itself. It operates only where, but for the section, an insurer could refuse indemnity by reason of an omission to give notice.

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[373] Ibid 46.
[374] (2002) 12 ANZ Ins Cas 61-527.
[375] (1997) 191 CLR 85.
[376] (1999) 166 ALR 714.

Bergin J also noted the emphasis in the joint judgment of McHugh, Gummow and Hayne JJ in *Australian Hospital Care* on the point that s 40 and s 54 deal with different problems. Section 40 is concerned with certain contracts of liability insurance and, among other things, with the insured giving notice of a potential claim during the period of insurance cover when the claim is not made until after the expiration of the period. By contrast, s 54 is concerned with the much more general subject of an insurer refusing to pay claims.

In concluding that, as a matter of law, the insurer was not obliged to indemnify the Council under the policy, her Honour observed that what the Council was seeking to do was to utilise the combination of s 40 and s 54 to imply a deemed claims clause and then, utilise the legislation again to claim that, notwithstanding the implication, the Council omitted to comply with the requirement of the implied term. It would follow that but for that omission, the later claim would have been deemed to have been made within the policy period. Her Honour noted that the Council's submissions would require modifications to the subsection and provide relief other than that specified in the legislation. There was nothing within the legislation that would justify the statutory implication of a contractual term or a statutory extension of the policy.

The decision of Bergin J went on appeal to the New South Wales Court of Appeal.[377] Sheller JA delivered the court's judgment, dismissing the appeal.

The Court of Appeal observed that Bergin J had found that the insured did not give written notice of a potential claim before the period of insurance expired and that the claim that was made upon the insured was made after the expiration of the policy.

The Court of Appeal, whose reasons accorded with those of the trial Judge said:[378]

> *'. . . the contract of insurance was a claims made policy. No claim was made against the insured within the temporal limits of the period of insurance. The insured's right to indemnity depended upon the third party's demand on it being made within the period of cover. The claim that was made on the insured was made outside that period. That fact was decisive unless s 40(3) applied. If the subsection operates it denies the insurer escape from liability because the claim against the insured was not made within the temporal limits. To invoke s 40(3) the insured must have given notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired. This was not done. In my opinion, that is the end of the matter. The occasion for s 40(3) to operate did not happen. Accordingly, the subsection does not apply to prevent the insurer contending that the claim is not within the policy.'*

In summary, an insured's failure to notify (within the current policy period):

- a claim is cured by s 54, subject to any prejudice;
- a circumstance that may give rise to a claim:
    - is cured by s 54 if there is a deeming provision in the insurance policy, subject to any prejudice; and
    - is not cured by s 54 in the absence of a deeming provision in the insurance policy.

In practical terms due to the effect of *Australian Hospital Care* most deeming provisions have been removed from insurance policies with the result that whilst an insured who fails to notify a claim received during a policy period may still have a prima facie entitlement to cover under that policy, an insured who fails to notify a circumstance that may give rise to a claim received during a policy period will not enjoy that protection.

[377] (2003) 56 NSWLR 542.
[378] Ibid 553–554.

It is in that situation that an insured (who changed insurers) would potentially find itself without insurance cover. The earlier insurer being entitled to decline cover due to the absence of a notification, and the later insurer being able to rely on the policy exclusion for a prior known circumstance that might give rise to a claim.

Alone and in combination, the high occurrence of coverage problems arising from the failure to promptly notify pre-existing circumstances, the fact that in the absence of a deeming provision in the prior policy neither the current nor prior insurer may be obliged to respond to a claim, and the uncertainty and resultant cost in determining whether something constitutes a notifiable circumstance, highlight the importance for insureds of good internal risk management and insurance reporting/notification protocols, and the value of continuity of cover. These issues can be avoided if insureds notify promptly.

CHAPTER 7 – CAUSAL PHRASES

Causation lies at the heart of liability insurance. The insured must suffer a loss caused by an event that is insured against, and that is not caused by an excluded event.

The link between the event and the insured loss will depend on the words and phrases adopted in the policy, not only in its insuring clause, but also in the policy exclusions and other terms. In the insurance context, the word '*cause*' is often used, and in this regard the causal link is frequently equated with the '*proximate*' or '*dominant*' cause of the loss.[379]

However, other such connective words/phrases are also used in the insurance context having regard to causation, such as '*arising out of*', '*in connection with*', '*caused by*', '*attributable to*' and many others. In this section, we examine the meaning behind the concept of proximate cause, as well as how other linking words and phrases have been interpreted by the courts.

The usage of these conjunctives and the concept of causation is commonplace throughout the insurance industry and is certainly not limited to professional indemnity policies. Accordingly, while the authorities and principles considered do not all derive from analysis of professional indemnity policies, they are nonetheless of benefit to professional indemnity insurers in the interpretation of policy documents.

What are causal phrases

Causal words and phrases are those that express the scope of the relationship in insurance contracts between the event that is alleged to give rise to the insured's loss/damage, and the insured's loss/damage itself.

These words/phrases take on a number of forms, as will be seen later in this section, but can be as simple as the usage of the words '*caused by*', which will ordinarily invoke consideration of issues relating to proximate cause.

Once other causal words or phrases beyond '*caused by*' are used, it is evident that a more remote consequential relationship between the event and the loss or damage will be permitted. The contrast, for example, between the phrases '*caused by*' and '*arising out of*' was made clear in *Dickinson v Motor Vehicle Insurance Trust* (*Dickinson*),[380] when the High Court (in a joint judgment) stated the following:

> *'Whether or not the appellant's injuries were actually caused by the use of the motor car, it is sufficient to say that they arose out of such use. The test posited by the words "arising out of" is wider than that posited by the words "caused by" and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.'*

What does '*proximate cause of loss*' mean

For an insured to be liable under an insurance policy, it is incumbent on the insured to demonstrate that the loss suffered was caused by an insured peril. In liability insurance, the insured's loss will usually equate to its legal liability to pay compensation to a third party.

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[379] *Insurance Commission of Western Australia v Container Handlers Pty Ltd* (2004) 218 CLR 89.
[380] (1987) 163 CLR 500.

In the absence of any provision to the contrary, where a policy states that an insurer will indemnify the insured for losses '*caused by*' stated perils, the peril must be the proximate cause of the loss.[381] The proximate cause is not the first, or the last or the sole cause of the loss, rather it is the direct, real, effective, dominant or operative cause.[382] In this respect, the concept supposes a causal connection closer than a mere unbroken chain of causation between cause and effect.[383] Although the proximate cause need not be the sole cause of the loss, its causal contribution must be predominant among the operative causes.[384]

There is no single test for determining whether one event is a proximate cause or another. However, the '*but for*' test is a useful starting point in determining factual causation.

The '*but for*' test was described (in respect of an injury in tort) by Deane J in *March v E & MH Stramere Pty Ltd*[385] as requiring:

> *'a negative answer . . . to the question of whether the plaintiff's injuries would have been sustained but for the negligence of the defendant.'*

The '*but for*' test is not bulletproof, and it is not the exclusive test of causation.[386] According to the High Court in *March v Stramere*, common sense and public policy should also be used when analysing causation. The majority of the court used the example of a superseding cause or causes (*novus actus interveniens*) as an explanation for the potential deficiencies in the exclusive usage of the '*but for*' test in determining causation. According to Toohey, J:

> *'In particular, I share the Chief Justice's view that the "but for" or "causa sine qua non" test is not and should not be a definitive test of causation where negligence is alleged. The limitations of the test, particularly where there are two or more acts or events, each of which would be sufficient to bring about the plaintiff's injury, or where a defendant seeks to rely upon a "supervening cause" or "novus actus interveniens", are apparent.*
>
> *Where negligence is in issue, causation is essentially a question of fact, in the sense explained by the Chief Justice, into which considerations of policy and value judgments necessarily enter.'*

The principles adopted in *March v Stramere* for determining causation in cases of negligence, have been relied upon in contractual cases,[387] and more usefully for the purposes of this chapter, in insurance contract cases.[388]

Returning to the concept of proximate cause, in *Switzerland Insurance Australia Ltd v McCann*[389] the New South Wales Court of Appeal held that:

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[381] *Government Insurance Office (NSW) v R J Green & Lloyd Pty Ltd* (1996) 114 CLR 437.
[382] *State Government Insurance Commission v Sinfein Pty Ltd* (1996) 15 WAR 434*; Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd* (2005) 13 ANZ Ins Cas 61-643; *National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR 86.
[383] M Clarke*, Insurance: The Proximate Cause in English Law* (1981) 40 CLJ 284.
[384] Martin Davies, Proximate Cause in Insurance Law (1996) Insurance Law Journal.
[385] (1991) 171 CLR 506, 522.
[386] Ibid; *Lumley General Insurance Ltd v Vintix Pty Ltd* (1991) 24 NSWLR 652.
[387] *Alexander & Ors v Cambridge Credit Corporation Ltd & Anor* (1987) 9 NSWLR 310 – which predated *March* but shared the common denominator of McHugh, J.
[388] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; *Lumley General Insurance Ltd v Vintix Pty Ltd* (1991) 24 NSWLR 652.
[389] (1999) 10 ANZ Ins Cas 61-446.

> *'While the concept of proximate cause is established in insurance law, at least in causation of loss by an insured peril, the requirement of a proximate cause depends on the words used in the policy and the proper scope to be given to them in the operation of the policy.'*

As this excerpt demonstrates, it will not always be the case that the policy permits the application of proximate cause. This is due to the fact that other causal phrases may be used to link the event and the loss/damage. Before we go on to consider these causal phrases, it is worthwhile to examine in greater depth how the operation of proximate cause and the phrase '*caused by*' have been interpreted by the courts in the insurance context.

'*Caused by*' and the impact of '*directly*' and '*indirectly*'

In *Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd*[390] McColl JA (with whom Ipp JA and Tobias JA agreed) concluded that the proximate cause rule applies notwithstanding the use of the adverb '*directly*' to modify the term '*caused*' in the policy. On the proper construction of the policy, the expression '*directly caused*' required the determination of what was the proximate cause of the damage.

McColl JA said:

> *'It is consistent with this approach that the proximate cause rule is capable of applying even where the word "directly" qualifies the word "cause" in a policy. In Boiler Inspection & Insurance Co of Canada v Sherwin-Williams Co of Canada Limited (at 333) in construing a policy which responded to 'loss on the property of the assured directly damaged by such accident . . . excluding . . . (e) loss from any indirect result of an accident', Lord Porter said:*
>
> > *'Whatever meaning the word "direct" may have in qualifying the word "result", it does not imply that there can be no step between the cause and the consequence. It is unnecessary to multiply examples. Leyland Shipping Co v Norwich Union Fire Insurance Society [1918] AC 350, sets forth the principle . . . To the like effect are Lord Wright's words in delivering the judgment of the Board in Canada Rice Mills Ltd v Union Mariner and General Insurance Co ([1941] AC 55, 71): 'It is now established by such authorities as Leyland Shipping Co v Norwich Union Fire Insurance Society, and many others, that causa proxima in insurance law does not necessarily mean the cause last in time, but what is "in substance" the cause, . . . or the cause "to be determined by common-sense principles."*[391]

McColl JA was of the opinion that '*directly caused*' excluded indirect or remote causes, but it did not mean there could be no step between the fire and the damage. He further concluded that

> *'in my view the natural and ordinary meaning of the expression "directly caused by" in the Policy is that it is to be equated with "proximate cause". That construction should be preferred to a literal construction such as that which the primary judge adopted which, in my view, would defeat the object of the contract of insurance and flout commercial commonsense.'*

[390] (2005) 13 ANZ Ins Cas 61-643.
[391] Ibid 77,859.

Courts have considered that the words 'directly or indirectly caused by' (when used together) impose a lesser requirement of causal connection than proximate cause. The case of *Mitor Investments Pty Ltd v General Accident Fire and Life Assurance Corporation Limited & Australian Insurance Brokers (WA) Pty Ltd*[392] considered a policy which provided cover for fire and special perils and loss of profits caused by storm and/or tempest by flood, however there was an exclusion for cover in respect of '*destruction or damage caused directly or indirectly by the sea'*.

Mitor Investments related to damage to a hotel following a cyclone. The strong winds drove sea water into an inlet such that the level of water rose above the bund and flooded the surrounding countryside and the hotel. It was held that the flood and the damage itself were indirectly caused by the sea. Burt CJ said:

> *'if the word "indirectly" had not been used, that would seem to be a contradiction in terms requiring one to say that there were two direct causes of the damage. But the word "indirectly" cannot be ignored. That word cannot be identifying the sea as the proximate cause of the damage because one cannot have an indirect proximate cause and the only possible effect which can be given to those words – directly or indirectly – is that the maxim causa proxima non remota spectator is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause.'*

This judgment in *Mitor* provides a helpful insight into the impact that the word '*indirectly*' will have on the causative relationship, regardless of whether or not it precedes the words '*caused by*'. The decision of McColl JA in *Lasermax* indicates that the use of '*directly*' before '*caused by*' will not affect the proximate cause doctrine, while '*indirectly*' will certainly permit a greater degree of remoteness.

'Arising out of'

We have outlined earlier how the phrase '*arising out of*' can be contrasted with '*caused by*' (as was directly compared in the *Dickinson* case). Ultimately, the usage of the phrase 'arising out of' will capture more remote consequences relative to a potentially insured event than will be captured by the phrase '*caused by*'.

In *Bayer Australia Ltd v Kemcon Pty Ltd*[393] the phrase '*arising out of*' was considered to require only an indirect link between the liability of the insured to pay compensation and property damage. In *Kemcon*, the insuring clause provided indemnity *'in accordance with the Operative Clause for and or arising out of . . . Damage.'*

The court determined '*arising out of*' and '*for*' were not identical in their scope, given the usage of both terms/phrases in the insuring clause. The phrase 'arising out of' therefore only required an indirect link, while it appears that '*for*' requires a more direct causal connection. In another instance, the phrase '*arising out of*' has been taken to mean '*originating or springing from*'.[394]

Causal phrases such as '*arising out of*' will operate with the same scope when used in an exclusion in an insurance policy as they will when contained in an insuring clause. In *RAA-GIO Insce Ltd v O'Halloran*[395] the South Australian Supreme Court (in adopting the usage of the phrase '*arising out of*' from *Dickinson*) stated that the interpretation by the High Court in *Dickinson* was equally applicable to the phrase when used in a policy exclusion.

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[392] (1984) 3 ANZ Ins Cas 60-562.
[393] (1991) 6 ANZ Ins Cas 61-026.
[394] *Walton v National Employers Mutual General Insce Assn* (1973) 2 NSWLR 73.
[395] (2007) 98 SASR 123.

It is evident, based upon the abovementioned authorities, that the causal phrase '*arising out of*' gives rise to a wider degree of remoteness between event and loss/damage than phrases/terms such as '*caused by*' (viz proximate cause) and '*for*'.

'*Arising from*'

'*Arising from*' has been considered on numerous occasions,[396] as being consistent in meaning and scope as the conjunctive '*arising out of*'. Accordingly (and as is the case with '*arising out of*'), the phrase '*arising from*' requires a lesser connection than proximate cause.[397]

The relationship between proximate cause, '*arising from*' and '*arising out of*' is perhaps best tied together by the decision of Brereton J in the New South Wales Supreme Court decision of *Quintano v B W Rose Pty Ltd*[398] in which his Honour made the following comments:

> *'the words "arising from" require that there be some causal connection between the claim and the specified matter, but the requisite nexus is satisfied by a less proximate relationship than that required by the phrase "caused by".'*

The comparison of '*arising from*' and proximate cause in *Quintano*, is therefore almost identical to the comparison of '*arising out of*' and proximate cause (via the words '*caused by*') in the *Dickinson* decision. Further, Brereton, J stated that a claim will satisfy the requirement that it '*arises from*' a matter, if it: *'originates in, springs from or has its foundation in, that matter'.*

The usage of the terms '*originates in*' and '*springs from*' is apposite in any analysis of '*arising from*' and '*arising out of*', given the interpretation of the phrase '*arising out of*' in *Walton v National Employers Mutual General Insurance Association*[399] also used these terms in defining the scope of '*arising out of*'.

The decision by Brereton J in *Quintano* provides further guidance in relation to the interpretation of '*arising from*' (and therefore, by extension, '*arising out of*') given the following conclusion by his Honour:

> *'a claim can be said to arise from a matter – at least – if it has a foundation in the matter, so that the matter is one of the underlying facts that, if they exist, together justify the claim.'*

In circumstances where '*arising from*' is evidently the same in meaning and scope as '*arising out of*', it is apparent that '*arising from*' requires a lesser connection between claim and loss than proximate cause.

'*Resulting from*' and '*as a result of*'

The phrase '*resulting from*' was given consideration and compared with numerous other phrases (most notably, '*arising out of*') in *Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited.*[400] In his judgment, Einstein J made the following observations:[401]

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[396] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1996) 71 FCR 172; *Vero Insurance Ltd v Witherow* (2004) 13 ANZ Ins Cas 61-618.

[397] See *Government Insurance Office (NSW) v RJ Green & Lloyd Pty Ltd* (1966) 114 CLR 437; *SGIC v Stevens Brothers Pty Ltd* (1984) 154 CLR 552; *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500; *Lumley General Insurance Ltd v Vintix Pty Ltd* (1991) 24 NSWLR 652.

[398] (2008) NSWSC 793.

[399] (1973) 2 NSWLR 73.

[400] (2006) 14 ANZ Ins Cas 61-701.

[401] Ibid 75, 482.

> *'The Oxford English Dictionary defines "arise" as "of circumstances viewed as results: to spring, originate or result from". The same publication describes "out of" as meaning 'from (something) as a cause or motive; as the result or effect of; because or by reason of'. Combining the two definitions in participle form suggests that "arising out of" has a meaning along the lines of "springing as the result or effect of", or "originating by reason or because of".'*

While Einstein J has simply used a dictionary to define the word '*arise*', the similarity between the terms '*arise*' and '*result*' is clear. Further, the dictionary definitions appear to provide no real contrast between '*from*' and '*out of*'.

The usage of terms such as '*springing*' and '*originating*' further ties '*resulting from*' into phrases such as '*arising out of*' and '*arising from*', given the use of these terms in the *Quintano* and *Walton* decisions.

The phrase '*as a result of*' was determined to be capable of a wide meaning and broader in scope than proximate cause in *QBE Insurance Limited v Nguyen*[402] given the following passage from the judgment:

> *'The expression "as a result of" is also capable of bearing a wide meaning. The policy uses a variety of expressions, as Gray J points out. In s 2, for example, the "occurrence" must be "caused by the nature condition or quality" of products of the insured. I incline to the view that "caused by" is a narrower and more precise concept. It is obvious that QBE could have defined the required link between the bodily injury and the business of the insured more narrowly and more precisely had it wished to do so.'*

Later in the judgment in *Nguyen*, the court pointed out that the phrase '*as a result of*' was used alongside '*caused by*' and that this was indicative of an apparent contradistinction between the two phrases.

'Attributable to'

The phrase '*attributable to*' is not uncommon in insurance policies in Australia.[403] That said, there does not appear to have been significant judicial consideration of its scope and meaning. Nonetheless, Derrington and Ashton[404] cite the English decision of *Royal Exchange Assurance v Kingsley Navigation Co Ltd*[405] which states that '*attributable to*' is:

> *'wider than proximate cause and refers to any act, event or state of affairs which could properly be described as a cause, ranging according to its context from a loose causal connection to proximate cause.'*

The suggestion of a '*loose causal connection*' in *Kingsley* is similar in many respects to the characterisation of '*arising from*' in *Quintano*, where Brereton J indicated that '*arising from*' required '*some causal connection*' between the claim and the specified matter. Further it is arguable that the word '*attributable*' is synonymous with other terms such as '*originating*' that formed the background for the interpretation of the scope of '*arising from*' in *Quintano* and '*arising out of*' in *Walton*.

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[402] (2008) 100 SASR 560.
[403] Perhaps most famously featuring in a policy endorsement proviso in the Thalidomide case of *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1.
[404] Hon. Desmond Derrington, Ronald Ashton, *The Law of Liability Insurance* (LexisNexis Butterworths 3rd Ed, 2013) 498.
[405] [1923] AC 235.

Based upon the above, it appears that '*attributable to*' is most analogous to '*arising from*' and '*arising out of*', as requiring less of a connection than proximate cause.

'Occasioned by or happening through'

The phrase '*occasioned by or happening through*' is usually found in industrial special risks and other major peril policies (and within those policies, it is often featured within an exclusion). Nonetheless, it is worthwhile considering its scope as a causal phrase that may be encountered in the professional indemnity context.

The most prominent Australian decision regarding the interpretation of '*occasioned by or happening through*' was in the case of *Switzerland General Insurance Co Ltd v Lebah Products Pty Ltd*[406] where Reynolds AP said:

> *'The expression "occasioned by or happening through" provides for a very wide scope of causal relationships and it does not seem to me that the present problem calls for any attempt to define the width or the limits of its meaning.'*

The use of the words '*very wide*' by Reynolds AP suggests a scope at least as wide as '*arising out of*' and perhaps as wide as '*in connection with*'. However, his Honour's further comments that *Lebah Products* did not provide a vehicle for defining the width of the meaning of the phrase suggests that any attempt to use *Lebah Products* as a basis for precisely placing this phrase along the spectrum of remoteness may lead to error.

As was the case in *Lebah*, the phrase '*occasioned by*' was considered as part of a policy exclusion in an industrial special risks policy in *Mercantile Mutual Insurance (Aust) v Rowprint Services (Victoria) Pty Ltd*.[407] *Lebah Products* was cited in *Rowprint*, and while *Rowprint* did not, in any meaningful way, expand upon what was determined on this issue in *Lebah*, the court did not appear to take issue with the idea that the phrase 'occasioned by or happening through' at least 'stretched' the causal association between the potential excluded cause and the loss.

In *Eastern Suburbs Leagues Club Ltd v Royal & Sun Alliance Insurance Australia Ltd*[408] the phrase '*occasioned by or happening through*' implied the existence of a consequential or causal relationship, and not necessarily a direct or proximate cause. The policy in *Eastern Suburbs* excluded damage **'***caused by or occasioned through . . . Flood.'*

On the basis of this wording, it is certainly arguable that any attempt to define the phrase '*caused by*' and proximate cause congruently with '*occasioned through*' would represent a nonsensical tautology.

However, despite these authorities, in at least one instance, the phrase '*occasioned by or happening through*' has been considered the same as '*caused by*', as occurred in *Gunns Forest Products Ltd v North Insurances Pty Ltd & Ors*[409] where Mandie AJA of the Victorian Court of Appeal said:

> *'The question to be determined is not how the damage to the woodchips might be characterised but whether the damage to the woodchips was occasioned by or happened through, that is, was caused by, "contamination".'*

[406] (1982) 2 ANZ Ins Cas 60-498.
[407] [1998] VSCA 147.
[408] (2004) 13 ANZ Ins Cas 61-599.
[409] (2006) 14 ANZ Ins Cas 61–691, 75, 328.

However, it is worth noting that decisions such as *Rowprint*, *Eastern Suburbs* and *Lebah Products* were not raised (and did not form part of the judgment) in *Gunns Forest*, and that neither party appears to have taken issue with the court's lack of distinction between '*occasioned by or happening through*' and '*caused by*'.

'*In respect of*'

In the context of a liability insurance policy, the phrase '*in respect of*' is frequently used as a conduit between the event and the insured's liability to pay compensation to a third party.

This was the case in *National Vulcan Engineering Insurance Group Ltd v Pentax Pty Ltd*[410] where the New South Wales Court of Appeal held that a contractual indemnity between co-insureds to a policy (one of whom was the primary plaintiff's employer) was a claim '*for or in respect of*' personal injury. The court in *National Vulcan* held that the contractual indemnity claim was not, of itself a claim '*for*' personal injury, but that it was a claim '*in respect of*' personal injury.

It is clear based upon the decision in *National Vulcan* that the causal phrase '*in respect of*' is broader in scope than the word '*for*'. In this regard, the decision in *National Vulcan* is similar to that in *Kemcon*, in which the court found that the phrase '*arising out of*' was broader in scope than '*for*'.

On this basis, it would appear that '*in respect of*' has at least a similar reach to a phrase such as '*arising out of*'. However, numerous authorities are suggestive of the fact that '*in respect of*' is much broader than this.

In Australia, the phrase has historically had a very broad scope. As early as 1941, Mann, CJ of the Victorian Supreme Court stated the following in the decision of *Trustees Executors & Agency Co Ltd v Reilly*:[411]

> *'The words "in respect of" are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connexion or relation between the two subject-matters to which the words refer.'*

The framing of the words '*in respect of*' in this precise way was repeated by the High Court in *State Government Insurance Office (Qld) v Crittenden*.[412]

'*In relation to*'

The words '*in relation to*' import the existence of a connection or association between the two objects being linked.[413] The High Court (in a contractual, but non-insurance context) has further said that the connection or association requires an element of relevance or appropriateness.[414]

The phrase is wide in its ambit, and has been compared to similarly broad causal phrases such as '*relating to*', '*in connection with*' and '*in respect of*'.[415] There is however English authority[416] indicating that of these phrases, '*in connection with*' remains the broadest in scope. Accordingly, it would appear that '*in relation to*' will be similar in scope to a phrase such as '*in respect of*'.

[410] (2004) 20 BCL 398.
[411] [1941] VLR 110.
[412] (1966) 117 CLR 412.
[413] *Perlman v Perlman* (1984) 155 CLR 474, in which the issue was whether two separate proceedings were '*in relation to*' each other.
[414] *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301.
[415] *Hatfield v Health Insurance Commission* (1987) 15 FCR 487.
[416] *Rexodan International Limited v Commercial Union Assurance Co plc* [1999] Lloyd's Rep IR 495.

In *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd*[417] Beech AJA noted the width of the expression '*in relation to*', when he said:

> *'Given the width of the expression "in relation to" in s 13, there is, I think, merit in Speno's submission that Zurich's claim for contribution from MMI was "in relation to" the Speno Policy. It is true that the claim for contribution does not arise under the policy. However, the contribution claim only arises because Zurich indemnified Hamersley under the policy made with Speno.'*

'In connection with'

Of all the causal phrases considered the words '*in connection with*' are of the widest import, and courts in Australia have made this determination with regards to policies of insurance[418] and elsewhere, such as when interpreting contractual indemnities.[419]

The width of the phrase '*in connection with*' was considered in the New South Wales Court of Appeal decision of *Horsell International Pty Ltd v Divetwo Pty Ltd*.[420] In *Divetwo*, the court had to consider whether a claim for indemnity under a policy being made following a recreational boating accident was 'in connection with' the insured's business of scuba diving.

Having regard to the phrase '*in connection with*,' McColl JA endorsed the following observations (further to the judgment at first instance):

- the words '*in connection with*' ought be read as extending the scope of the noun that they precede;
- the words '*in connection with*' ought not be read narrowly; and
- the words '*in connection with*' merely require a relationship between one thing and another, which is real and not merely tenuous.

The final dictum above, that there simply be a relationship between one thing and another (for the two to be '*in connection with*' each other) is longstanding and oft-repeated in Australia[421] in relation to both insurance policies and statutory and contractual provisions generally.

In the insurance context, the phrase '*in connection with*' is frequently seen in the insuring clause with respect to the insured's business. From a professional indemnity point of view, this was the case in *Drayton v Martin*[422] in which a claim for dual insurance between two separate professional indemnity insurers occurred. The insuring clause of the policy relevantly provided as follows:

> *'On the terms and conditions herein contained the insurers shall indemnify the Assured up to an amount not exceeding the Sum Insured and Related Costs against all loss to the Assured (including claimants' costs) whensoever occurring arising from any claim or claims first made against the Assured during the Period of Insurance and reported to the insurers during such period, in respect of any description of civil liability whatsoever incurred in connection with the Practice . . .'*

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[417] (2009) 253 ALR 364.
[418] *Ffrench v Sestili* (2007) 98 SASR 28.
[419] *State of New South Wales v Tempo Services Ltd* [2004] NSWCA 4.
[420] [2013] NSWCA 368.
[421] *Selected Seeds Pty Ltd v QBEMM Pty Ltd and Anor* (2009) 15 ANZ Ins Cas 61-821; *Drayton v Martin* (1996) 67 FCR 1; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465.
[422] (1996) 67 FCR 1.

As can be seen, there were three causal phrases used in the insuring clause of the claims made policy. In this regard, all loss to the insured '*arising from*' any claim or claims was contemplated, and this loss had to be '*in respect of*' civil liability and the civil liability had to be '*in connection with*' the insured's practice.

In terms of interpretation, the phrases '*arising from*' and '*in respect of*' were not agitated in *Drayton*. Sackville J however interpreted '*in connection with*' as follows:

> *'The words "in connection with" have a wide connotation, requiring merely a relationship between one thing and another. They do not necessarily require a casual relationship between the two things . . .'*[423]

The similarity of the words used in *Drayton v Martin* and those used in *Horsell v Divetwo* – requiring merely a relationship between one thing and another – is not coincidental, as both decisions cited the earlier case of *Our Town FM Pty Ltd v Australian Broadcasting Tribunal.*[424]

Notwithstanding the comments made in some decisions regarding the scope of phrases such as '*in relation to*' and '*occasioned by*', ultimately on the causative spectrum of remoteness (between the insured loss and the peril event) the phrase '*in connection with*' appears to be of the broadest import. The loss and event merely require a relationship in order to fall within the ambit of '*in connection with*' and that relationship need not be causal.

[423] The similarity of the words used in *Drayton v Martin* and those used in *Horsell v Divetwo* is not coincidental, as both decisions cited the earlier case of *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465.

[424] (1987) 16 FCR 465.

CHAPTER 8 – NON-DISCLOSURE AND MISREPRESENTATION

It is well understood that an insured's obligation to disclose true and correct information to an insurer prior to the formation of a contract of insurance (including any renewal of an existing policy) is important in circumstances where most information relevant to an insurer's decision whether to enter into such a contract is known only to the party seeking insurance, and an insurer cannot be expected to make a decision whether to offer insurance (and on what terms) without knowledge of all matters relevant to its decision.

Although the duty of disclosure was established at common law, the introduction of Pt IV of the ICA, which makes provision for non-disclosures and misrepresentations, sets out the relevant disclosure obligations on both an insured and insurer.

Non-disclosure

Section 21(1) of the ICA makes it clear an insured has a duty to disclose to an insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:

- the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
- a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including, but not limited to:
    - the nature and extent of the insurance cover to be provided under the relevant contract of insurance; and
    - the class of persons who would ordinarily be expected to apply for insurance cover of that kind.

There are accordingly two limbs to the disclosure obligation, one subjective (the insured's actual knowledge) and the other objective (the knowledge of a reasonable person).

Who is an insured for disclosure purposes

The party named as the 'Insured' in the policy schedule is obliged to comply with the duty of disclosure outlined in s 21 of the ICA.

In circumstances where there are co-insureds (that is, there is more than one 'Insured' named in the policy schedule) and the information which is relevant to an insurer's decision whether to enter into a contract of insurance is held by only one of the co-insureds, it has been held that: [425]

- section 21 imposes a duty on each co-insured separately to disclose a material matter to an insurer; and
- a single remedy is available against the co-insureds. That is, a fraudulent failure by one of those co-insureds to comply with the duty of disclosure can result in an insurer avoiding the contract pursuant to s 28 (discussed in further detail below).

Knowledge of company directors and senior managers is held to be knowledge of an insured company for the purposes of disclosure.[426]

[425] *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606.
[426] *JC Houghton & Co v Nothard, Lowe & Willis Ltd* [1928] AC 1, 18–19.

Who is not an insured for disclosure purposes

Section 48(1) of the ICA provides that a third party beneficiary under a contract of general insurance has a right to recover from the insurer any loss suffered even though that third party is not a party to the insurance contract.

Further, s 48(2)(a) provides that subject to the contract, a third party beneficiary has, in relation to their claim, the same obligations as a third party would have if it were the insured.

In *CE Health Casualty & General Insurance Ltd v Grey*[427] it was however held by Clarke JA (to which Meagher JA agreed):

> *'What is clear from [s 21 and 28 of the ICA] is that the obligation to disclose, and not to make misrepresentations, is cast upon a person intending to enter into a contract of insurance and the consequences of non compliance are visited only upon persons who actually enter into such a contract. What is of greater importance is the fact that there is no obligation to disclose, or not misrepresent, before a contract is entered into, imposed upon a person entitled to recover the amount of a loss pursuant to s 48(1). . . . .'*

Accordingly, a third party beneficiary under s 48 is not required to comply with the disclosure obligations in s 21 of the ICA.

When will a '*matter*' be '*known*' to an insured

An understanding of s 21(1) requires an understanding of what will constitute a '*matter*' and when a matter will be '*known*' to an insured.

In that regard, a 'matter' is generally a fact,[428] although in some cases it may be an opinion held by the insured. In that regard, it was held in *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* that:[429]

> *'The fact that an opinion is held is something that may be known and an insurer may be influenced in its decision to accept a risk, or as to the terms on which it will do so, by the fact that an opinion is held. . . .*
>
> *Whether an opinion is relevant to the insurer's decision to accept the risk or as to the terms on which it will do so, will depend, among other things, upon the subject matter of the opinion, the identity of the person holding it, the facts or premises upon which it is based and whether those facts or premises are true or believed by the insurer to be true.'*

In *Permanent Trustee Australia Ltd v FAI General Insurance Company (in liq)*[430] it was held that *'the word "knows" is a strong word. It means considerably more than "believes" or "suspects" or even "strongly suspects"'.*

Is the '*matter*' relevant to the decision of the insurer whether to accept the risk

The question of relevance to the decision of the insurer is a question of fact in relation to which the insurer bears the onus.[431]

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[427] (1993) 32 NSWLR 25, 46.
[428] Enright WIB & Merkin RM, *Sutton on Insurance Law,* (Thompson Reuters (Professional) Australia Limited 4th edition, 2015), 526.
[429] (2013) 302 ALR 732, 756.
[430] (2003) 214 CLR 514, 531.
[431] Ibid 515.

In *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd (in liq)*, it was held:[432]

> *'The focus of attention is upon the risk, ie the particular insurance hazard . . . It is not, as such, upon the much broader question of the commercial willingness of the insurer to accept the risk, . . . Assessment of the risk, ie the insurance hazard, is susceptible to objective ascertainment.'*

Relevant matters have been held to include:

- knowledge of a previous rejection of cover;[433] and
- failure to disclose previous claims.[434]

When will an insured know a 'matter' is 'relevant' to the insurer's decision

In *Permanent Trustee v FAI* the following obiter comments were made with reference to s 21(1)(a) of the ICA:[435]

> *'. . . the knowledge of which the subsection speaks, either actual or constructive, is the knowledge of the insured, and not of any insurance intermediary, a term defined by the Act . . . This is at least to suggest that the reference to the insured is intended to be a reference to the insured personally and not to its agent or broker.'*

Accordingly, the insured must personally know of the relevance of a matter to the insurer.

An insurance broker does however have contractual obligations and a common law duty of care to its client to make proper inquiries of an insured if the broker knows issues are a matter of concern to an insurer, prior to the contract of insurance being entered. For example, in *Kotku Bread Pty Ltd v Vero Insurance Ltd & Anor*[436] it was held that a broker has a duty to warn or advise its client of matters of interest to an insurer.

When will a reasonable person in the circumstances be expected to know a matter is relevant to the insurer's decision

The requirement in s 21(1)(b) of the ICA directs attention to the state of mind of a reasonable person in the circumstances of the insured.

In *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV*[437] it was said:

> *'. . . "matter" describes anything which is known to the insured which also is known to be relevant, or that could be expected to be known to be relevant, in each case in the respects described above. This requirement directs attention to the state of mind of a reasonable person in the circumstances of the insured and protects the insurer against inadequate disclosure by an insured who is unreasonable, idiosyncratic or obtuse: CGU Insurance Ltd v Porthouse (2008) 235 CLR 103.'*

[432] Ibid 515.
[433] *Ayoub & Anor v Lombard Insurance Co (Aust) Pty Ltd* (1989) 5 ANZ Ins Cas 60-933.
[434] *Burns v MMI-CMI Insurance Ltd* (1995) 8 ANZ Ins Cas 61-287.
[435] (2003) 214 CLR 514, 531.
[436] [2012] QSC 109, [215].
[437] (2013) 302 ALR 732, 756.

Matters which do not need to be disclosed

The duty of disclosure does not require the disclosure of a matter: [438]

- that diminishes the risk;
- that is of common knowledge;
- that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or
- as to which compliance with the duty of disclosure is waived by the insurer.

Further, where a person either failed to answer or gave an obviously incomplete or irrelevant answer to a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.[439]

The mere fact that information is held on files somewhere within an insurance company is insufficient to fix that insurer with knowledge of information for the purposes of non-disclosure, unless the information can *'reasonably be said to be in the minds of those officers of the insurer who are responsible for the decision whether to contract'*.[440]

An insurer will not be held to have knowledge of a matter unless the knowledge was possessed by a responsible officer of the company who either appreciated or should have appreciated the significance of the knowledge.[441]

Notice of the duty of disclosure to the insured

The duty on an insured to disclose relevant matters will only apply if, before the contract of insurance is entered, an insurer has clearly informed the insured in writing of *inter alia,* the general nature and effect of the duty of the disclosure.[442]

If an insurer fails to do so, it may not exercise a right in respect of an insured's failure to comply with the duty of disclosure unless that failure was fraudulent.[443]

Those principles apply regardless of whether an insured is applying for a new policy of insurance or renewing an existing policy.

In practice, insurers' product disclosure statements and proposal forms are issued to ensure compliance with that obligation.

Misrepresentations

A statement will not be taken to be a misrepresentation where that statement was untrue but was made on the basis of a belief held. The belief must be one that a reasonable person in the circumstances would have held.[444]

Similarly, a statement will not be taken to be a misrepresentation unless the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, the statement would have been relevant to the decision of the insurer whether to accept the risk, and if so, on what terms.[445]

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[438] ICA s 21(2).
[439] ICA s 21(3).
[440] *Macfie v State Government Insurance Office (Qld)* (1985) 3 ANZ Ins Cas 60-606, 78,688.
[441] *Evans v Sirius Insurance Co Ltd* (1984) 4 ANZ Ins Cas 60-755.
[442] ICA s 22(1).
[443] ICA s 22(5).
[444] ICA s 26(1).
[445] ICA s 26(2).

A person shall not be taken to have made a misrepresentation by reason only that the person failed to answer a question included in a proposal form or gave an obviously incomplete or irrelevant answer to such a question.[446]

Consequences of failing to comply with the duty of disclosure

The remedies available to an insurer in the event of a non-disclosure or misrepresentation by an insured are set out in s 28 of the ICA.

That section applies where a person who became the insured under a contract of general insurance upon the contract being entered into:

- failed to comply with the duty of disclosure; or
- made a misrepresentation to the insurer before the contract was entered into.

The section will however not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

If the failure was fraudulent or the misrepresentation was made fraudulently, for example if an insured deliberately failed to disclose a matter in anticipation that disclosure would result in an insurer refusing to provide cover or increasing the premium,[447] the insurer may avoid the contract.[448]

However, the court has discretion to disregard the avoidance of a policy by an insurer on the grounds of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation if it would be harsh or unfair for an insurer to avoid the policy.[449] That discretion may only be exercised where the court is of the opinion that, in respect of the loss that is the subject of the proceedings before the court, the insurer has not been prejudiced by the failure or misrepresentation, or any such prejudice is minimal or insignificant.[450] Further, the power is only applied in relation to the loss that is the subject of proceedings before a court, and any disregard by the court of the avoidance does not otherwise operate to reinstate the contract.[451]

If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.[452]

Accordingly, where an insured innocently fails to comply with the disclosure duties set out in the ICA, an insurer may be able to reduce its liability to the level it would have been, had the insured disclosed the relevant information. An insurer may be able to reduce its liability to nil if it can prove that it would have imposed conditions or exclusions which would have excluded cover for that kind of claim, or not have offered insurance terms to the insured at all had proper disclosure been made.

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[446] ICA s 27.
[447] *Dalgety & Co Ltd v AMP Society* (1908) VLR 481, 499.
[448] ICA s 28(2).
[449] ICA s 31(1).
[450] ICA s 31(2).
[451] ICA s 31(4).
[452] ICA s 28(3).

That would require evidence from underwriting personnel of the insurer of the relevant underwriting policies and procedures as well as evidence those policies and procedures were implemented.

Where an insurer is entitled to reduce their liability to nil as a result of s 28(3) of the ICA, the insurer must account to the insured for the premium that has been paid.[453]

[453] *FAI General Insurance Co Ltd v Hendry Rae & Court* (1993) 10 WAR 322.

CHAPTER 9 – EXCLUSIONS

Just as each professional liability policy wording is unique, so too are the exclusions they contain.

It is an often repeated doctrine in insurance disputes that the insured bears the onus of proving that the insuring clause is triggered, while an insurer must prove that an exclusion clause applies. In relation to the latter, the High Court in *Wallaby Grip Ltd v QBE Insurance (Aust) Ltd* stated that *'It is well accepted that the insurer must prove that a loss falls within an exception.'* [454]

While in practice it is typically not difficult to apply the doctrine, disputes may arise (and the burden may be reversed) if the exclusion can be treated as wholly qualifying the insuring promise.[455] Accordingly, while insurers typically have the burden of proving that an exclusion applies, it is ultimately a matter of construction of the insurer's promise and the policy as a whole.

Some of the more common exclusion clauses found in professional indemnity policies include:

- prior known claims and prior known circumstances likely to give rise to a claim;
- insured versus insured;
- conduct;
- fines and penalties; and
- contractual/assumed liabilities.

Prior known claims/circumstances

As with other claims made and notified insurance policies, professional indemnity policies typically exclude known claims or prior circumstances that may give rise to a claim, before inception of the policy.

In isolation, such an exclusion simply entitles an insurer to decline cover where the insured knew or ought to have known of a claim or circumstances that might give rise to a claim prior to inception of the policy.

In practice, a number of complications can arise, for example, in relation to the question, what constitutes a '*circumstance*'?

This question was considered in detail earlier in chapter 6, in the context of notification of claims and circumstances. It is presently worth repeating that in *Attorney-General v AON New Zealand Ltd*[456] the court said the test was objective *'requiring notice when a reasonable person in the insured's position would consider there was a reasonable possibility of a claim. Notice is not required if the possibility of a claim is remote or unlikely. However, providing there is a real or definite risk of a claim, notice is required even if the claim is not probable.'*

In *CGU Insurance Limited v Porthouse*[457] the court applied an objective test to the question whether the insured was aware of circumstances that may lead to a claim, being whether a reasonable person in the insured's professional position and ignoring his personal idiosyncrasies would have thought a claim may arise.

[454] (2010) 240 CLR 444, 456.
[455] *McLennan v Insurance Australia Ltd* (2014) 313 ALR 173.
[456] Unreported High Court of New Zealand, Motions, 10 April 2008.
[457] (2008) 235 CLR 103.

The factual issues that have to be considered are often technical and complex, making it sometimes difficult to say with certainty whether a prior known *circumstances* exclusion will apply. The application of such an exclusion to a prior known claim are less problematic.

Insured versus insured/related parties

As its name suggests, an Insured versus Insured exclusion excludes any loss arising from a claim made by an insured against another insured.

That situation may arise where, for example:

- multiple companies or natural people are named insureds in the policy schedule and there is a dispute between those parties; or
- a subsidiary of an insured company commences a claim against the named insured in the policy schedule.

The application of such an exclusion in the professional indemnity context was considered in *Liberty International Underwriters v The Salisbury Group Pty Ltd (in liq) & Ors*[458] where cover was excluded for:

> *'a Claim made by or on behalf of:*
>
> *a) one Insured against another Insured;*
> *b) a Subsidiary of the Named Insured against another Insured;*
> *c) any current or former spouse or partner, parent, child or sibling of any Insured against another Insured; or*
> *d) any entity the Insured has a financial interest in.*
> *e) any legal entity who has control directly or indirectly of more than 50% of the Named Insured's equity or control of the board.'*

Ian Weaver (an authorised representative of The Salisbury Group) provided financial advice to Treadstone Developments. Mr Weaver's wife and son were directors of Treadstone, all three of his sons were shareholders of Treadstone, and Treadstone was the trustee for the Weaver Family Trust of which Mr Weaver, his wife and sons were beneficiaries.

Treadstone in its capacity as trustee of the Weaver Family Trust commenced proceedings against The Salisbury Group and Mr Weaver in relation to the financial advice provided. The Salisbury Group and Mr Weaver (in their capacity as insureds) sought indemnity under their professional indemnity policy and the insurer sought to deny indemnity by relying on the related entities exclusion clause set out above.

Having regard to the specific trust documents and deed, it was held that:

- Treadstone brought the proceedings in its own right as trustee of the Weaver Family Trust. It did not do so, as a matter of fact or law, in any representative capacity or as the agent on behalf of the beneficiaries of the trust;[459] and
- the beneficiaries of the discretionary trust were not considered to have a 'financial interest' in the trust (because the distribution of trust income or capital was at the absolute discretion of the trustee).

[458] (2014) 13 ASTLR 206.
[459] Ibid [46].

Accordingly, although it was likely the intention of the insurer to exclude such a claim, that was not the effect of the exclusion having regard to its plain and natural meaning. The court held that the insurer could have expressly excluded a claim made by a trustee of a trust of which an insured or a member of the insured's family were beneficiaries.[460]

Conduct

Another often contentious exclusion clause is that pertaining to criminal, unlawful, dishonest, reckless, fraudulent or intentional conduct.

The performance of the acts or omissions prohibited by the conduct exclusion must usually be determined by judicial finding, or by formal admission of the insured before a Conduct exclusion will be triggered.

Criminal/unlawful conduct

In the case of criminal or unlawful conduct, the doctrine of *ex turpi causa* provides that an insured cannot claim under a contract of insurance if he or she has to rely on his or her own illegality, or seeks to profit from that illegality.

The leading UK decision on this point suggests that an insurer's exclusion of cover (in that particular case) for '*the insured person's own criminal act*' should not be limited by '*a subjective test of conscious wrongdoing*', and will operate to exclude all criminal acts other than those of '*inadvertence or negligence*'.[461]

On the other hand, at least one academic view[462] suggests that equivalent expressions concerning criminal acts have '*no single or fixed meaning*', and that '*where other grounds of exclusion contained in the same clause [refer to activities requiring some element of intention], criminality may be confined to intentional acts*'. The collective expression of '*criminal, dishonest or fraudulent acts or omissions*' could be said on that reasoning[463] to require some intentional act.

However, the question often arises whether a breach of certain legislation (for example occupational/workplace health and safety legislation) constitutes criminal or unlawful conduct, where it satisfies some of the key indicia of being criminal or unlawful (such as involving a *prosecution* of an *offence* under *summons* involving the potential for *imprisonment*), whilst not falling under the criminal code or being specifically identified as criminal.

A distinction can be drawn between:

- intentional or fault based crimes involving at least an element of reckless behaviour or such as wilful blindness or indifference to the consequences of one's actions; and
- unintentional or inadvertent offences, such as those involving strict liability offences or arising from vicarious liability that have no *mens rea* (the necessary element of intent) or moral turpitude.

The second category would not seem to offend public policy and would not fall foul of the requirements for wilful or intentional conduct exclusions.

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[460] Ibid [73].
[461] *Marcel Beller Ltd v Haydon* [1978] QB 694, 707.
[462] Hon. Desmond Derrington, Ronald Ashton, *The Law of Liability Insurance* (LexisNexis Butterworths 3rd Ed, 2013) 2178.
[463] Which applies the *ejusdem generis* tool of interpretation, being that any ambiguity in the meaning of one of a group of terms is resolved by considering the contextual meaning of the other words in the group.

Dishonest, reckless, or fraudulent conduct

It may seem obvious that an insured will not be able to insure against its own deliberate or reckless breaches of its obligations, such as:

- obtaining a personal profit advantage or remuneration from the discharge of their duties; or
- engaging in any conduct which is dishonest, fraudulent or criminal.[464]

If an insurer's decision to decline indemnity can be justified by a proper analysis of the evidence and construction of the policy, then it is likely that a decision to decline indemnity in circumstances of *actual* dishonesty or fraud will be upheld.

Where a dispute arises in relation to defence costs, subject to the policy wording insurers cannot usually decline to pay merely because relevant conduct (such as fraud) is alleged; it is necessary for the relevant conduct to be proved before the right to decline arises.

Accordingly, if the policy requires an admission, determination or finding in respect of *unproved allegations* of fraud or dishonesty, then the insurer will usually be obliged to indemnify until that requirement is met. There is an obligation on insurers to continue to advance defence costs even though there is an allegation of fraud, as in *Wilkie v Gordian Runoff Limited.*[465]

If the policy does not have that requirement and affords the insurer an opportunity to refuse to indemnify, simply on an allegation of fraud or dishonesty being made (which is becoming increasingly uncommon in the current market), then the insurer will be entitled to decline to indemnify in respect of the claim including defence costs. In *Silbermann v CGU Insurance Limited*[466] the insurers were entitled to refuse to advance defence costs on the basis that, on the construction of the policy, the insurers had a *discretion* to decline indemnity for certain allegations of fraud, even if unproven.

Fines and penalties

The law does not permit an insured to be indemnified for its own criminal conduct. However, certain policies are available to cover fines and penalties arising from, for example, occupational/workplace health and safety legislation and environmental offences.

There is currently no Australian case law on the extent to which civil fines and penalties can be insured against, and the issue remains to be tested here. To some extent, the distinction between civil and criminal law is less helpful than an analysis of the ingredients of an offence.

In *Strongman v Sincock*[467] in the English Court of Appeal Lord Denning said:

> *'It is a settled principle that [someone] cannot recover for the consequences of [their] own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable.'*

More recently, the Court of Appeal in the UK decision in *Safeway Stores Ltd v Twigger*[468] confirmed that where an offence had been committed by a company '*intentionally or negligently*', it was contrary to public policy to allow the company to have an entitlement to recover the penalty from former officers of the company whose behaviour had led to the imposition of the penalty.

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[464] *Rich v CGU Insurance Limited* (2005) 214 ALR 370.
[465] (2005) 221 CLR 522.
[466] (2003) 57 NSWLR 469.
[467] [1955] 2 QB 525.
[468] [2010] All ER (D) 245.

Applying this approach, the best guidance seems to be the distinction between:

- On the one hand, intentional or fault based crimes involving at least an element of reckless behaviour or such as wilful blindness or indifference to the consequences of one's actions;
- On the other hand, unintentional or inadvertent offences, such as those involving strict liability offences or arising from vicarious liability that have no *mens rea* (the necessary element of intent) or moral turpitude.

This second category would not seem to offend public policy and would therefore not fall foul of the requirements for willful or intentional conduct exclusions.

Contractual/assumed liability

As a general rule, an insurer will not cover an insured for loss which the insured assumes completely under and by reason of any:

- contractual agreement or arrangement; or
- performance guarantee or warranty.

Accordingly, an insurer will not be liable for any loss arising from a duty or obligation assumed by an insured unless the insured is liable for that loss at law in any event.

For example, if a contract between two parties commits an insured's common law duties of care to writing so that they form a part of the contract between those parties, a claim for a breach of those contractual obligations will not trigger the contractual/assumed liability exclusion because the obligations arise at law in any event.

The exclusion is intended to apply where by agreement an insured extends the limits of his ordinary liability derived from other sources, such as by an agreement imposing liability for injury without proof of fault. The exclusion is also directed to the case where the insured assumes a liability beyond that which is normally incident to the occasion, for example, the degree of skill ordinarily expected of an expert, or the provision of a contractual indemnity for another party's own acts of negligence.

Other exclusions

Professional indemnity policies also commonly exclude cover for any claim arising from:

- personal injuries (except to the extent the personal injuries arise from a breach of professional duty), property damage and occupiers' liability (which are the domain of a public liability policy);
- a failure by a professional to disclose a conflict of interest;
- the insured's insolvency, administration, receivership or bankruptcy;
- trading losses or debts;
- disputes involving fees, charges, commissions or any other form of remuneration or consideration for professional services; and
- an employer's liability or its obligation to employees (which are usually covered by workers' compensation policies).

CHAPTER 10 – DEFENCE COSTS

Professional indemnity policies ordinarily provide cover for both third party legal liability and for defence costs.

Defence costs may or may not attract the policy excess/deductible, and may form part of the overall limit of indemnity or have an additional limit.

In respect of the entitlement to costs, a policy will usually either entitle the insurer to take over conduct of the defence at its own cost, or indemnify the insured for the costs incurred in the investigation or defence of a claim by its own solicitors.

Defence costs are often defined to comprise the reasonable legal fees and associated disbursements incurred by solicitors, barristers and experts for the purposes of defending the claim, sometimes together with any related investigation costs (usually incurred before proceedings are commenced), and can extend to public relation costs and travelling expenses; but will not ordinarily cover claim preparation costs and the time and lost business opportunity incurred by the insured providing instructions and assisting in the conduct of the defence.

A defence or investigation costs clause will be triggered by a claim being made against an insured within the policy period, or upon operation of a contractual or the statutory deeming provision (s 40 of the ICA) in respect of an earlier notification of a circumstance. The policy will not therefore respond to costs incurred by an insured in anticipation of a claim or investigation unless it has notified circumstances that may give rise to a claim/investigation and received prior consent to incur those costs under the terms of the policy, although failure to obtain prior consent can be cured by s 54 of the ICA, absent prejudice.

As one might expect, an insured is entitled to coverage for the costs of defending claims to which the policy does respond even if the underlying claim is wholly without merit, or even fraudulent.[469] If the policy does not respond to the underlying claim, there will usually be no coverage for costs.

The advancement of defence costs

One benefit that can be (but is not always) found in claims made and notified policies, including professional indemnity policies, is the requirement for the advance payment of defence costs, entitling insureds to indemnity for their costs of defending a claim under the policy even where their entitlement to coverage under the policy may involve complex issues of law and/or fact that cannot be resolved quickly, in respect of which an insurer may have reserved its rights in relation to coverage.

It can be of some benefit to an insured, affording access to funding for defence costs, notwithstanding allegations have been made that may fall within a policy exclusion, until such time as indemnity is declined by proper reference to the evidence or a finding or admission is made against the insured to that effect.

Limitations on the prohibition for the advancement of defence costs to insureds in certain circumstances are usually predicated on the basis there must be a *'finding or conclusion'* that the insured engaged in conduct which otherwise would be excluded from cover, for example, because of dishonesty.

The wording of a policy's exclusion clauses will be critical to any dispute over an entitlement to coverage for costs where cover is not available for the legal liability itself.

[469] *Cooper v Farmers' Mutual Insurance Society* [2001] OTC 652.

For example, in *Silbermann v CGU Insurance Limited*[470] the insurer had the right to withdraw coverage once fraud was proved but could not refuse to defend or indemnify defence costs merely because fraud was alleged.

Without an advancement of defence costs provision, an insured in that instance would be required to fund the often substantial costs of defending a claim (or costs arising from the preceding investigation process) itself until such time as the insurer had the opportunity to determine whether the policy responded – a process that can often take many months or even years while the litigation proceeds to trial. With advance payment of defence costs, an insurer can only decline payment of defence costs where they have determined the policy does not respond to the claim. If the insurer is still investigating cover under a reservation of rights and has neither confirmed nor denied cover, it is in the meantime obliged to make payment of reasonable defence costs, subject to the entitlement to seek reimbursement of any defence costs paid under the policy if coverage is ultimately declined (to the extent that is possible).

In a situation where there is an entitlement to an advancement of defence costs, but it is unclear whether all or only part of the claim against the insured will be covered, it appears the insured is similarly entitled to the benefit of defence costs unless and until it is established coverage is not available for the claim. Pending any judicial determination in respect of the claim itself, it is incumbent on the insurer to establish that part of the claim falls outside the scope of cover, such that there is no entitlement to an advancement of defence costs for that part of the claim.

The present Australian position with respect to the obligation of advancing defence costs was summarised by Professor Merkin based on the judgment in *Nichols v American Home Assurance Company Limited*[471] with regard to the following principles:

- the insurer's duty to defend arises where there is a *'mere possibility'* that a claim against the insured is covered by the policy. It is the insured who bears the obligation to establish that it is *possible* that the allegations made by the third party, if proved at trial, would bring the claim within the policy;[472]
- if the pleadings in the claim against the insured allege facts, which if true could require the insurer to indemnify the insured, then the insurer must provide a defence.[473] In construing the nature of the claim, the pleadings must be read realistically, not by reference to the labels and terminology employed by the pleading, but by reference to *'the true nature of the claim'*;[474]
- once these threshold requirements have been met, the insurer then assumes the obligation of establishing that the claim falls outside the coverage afforded by the policy, or that the insured is otherwise in breach of a policy condition which precludes entitlement to recovery under the policy.[475] In this regard, Professor Merkin observed:

[470] (2003) 57 NSWLR 469.
[471] (1990) 72 OR (201) 799.
[472] See also *Kerr v Lawyers Professional Indemnity Company* (1995) 25 OR (3D) 804.
[473] See also *Bacon v McBride* (1984) 51 BCLR 228.
[474] In this regard, see *Rothschild & Sons v St Paul International Insurance Company* (2004) 13 ANZ Ins cas 61-602 in which McDougall J held, determining whether a claim fell within the definition of a policy of insurance in respect of a *'wrongful employment practice'* required an examination of the *'true nature of (the claimant's) claims, and that the question whether they were claims which gave rise to a legal liability arising out of an* "employment practice" *required a consideration of their true nature and not just of the way they were pleaded.*
[475] See *Laughlin v Sharron High Voltage Incorporated* (1993) 12 OR (3D) 101.

> *'Where it is clear that the allegations in the pleadings against the assured fall outside the insuring agreement or are excluded by an applicable exclusion, the duty to defend does not arise. Importantly, if the insurers assert that they are not liable under the policy so that they are not liable for defence costs, and they lose at the hearing on defence costs, they are not estopped from relying on their substantive defence to liability under the policy at a later stage. It would seem that there is nothing to prevent the insurers from seeking at this stage a final order that it is not under any obligation to indemnify the assured, by reason of a coverage or other defence for substantive claim: this was so held in Silbermann v CGU Insurance Limited.'*[476]

In this regard, it is instructive to read the judgment of Jackson J in *Bank of Queensland Ltd v Chartis Australia Insurance Ltd*[477] where the insured's application for declaratory relief in respect of the extension of defence costs was refused on the basis that the facts upon which such a determination was to be based were not established.

- if some allegations in the pleading are covered but a dispute arises as to whether others are covered, then there is a duty to defend in full with the court to allocate the costs after the trial between the insured and the uninsured portions of the loss, subject to the following caveat. If the facts in relation to the insured and uninsured components of the claim are separate and discrete, then no obligation arises to defend the uninsured claim. The test is *'whether the two claims arise from the same actions and have caused the same harm so that the uninsured claim can be said to be derivative.'*[478] Further, as was seen in *McCarthy & Ors v St Paul Insurance Company Limited*[479] the obligation to indemnify in respect of defence costs, where there are multiple causes of loss, including the dishonesty exclusion, will not arise if that obligation to indemnify might tend to result in *'inconvenient and obviously unintended results'.*

The proper construction of professional indemnity policies in this context was given detailed consideration by Jackson J in the Supreme Court of Queensland in the *Bank of Queensland* decision.[480]

That case arose out of proceedings instituted against the Bank of Queensland by ASIC and Barry and Deanna Doyle, in which it was alleged that the Bank had engaged in unconscionable conduct, in contravention of the ASIC Act and the FTA (Qld), by entering into home loan contracts, a mortgage, and making certain credit advances to the Doyles.

These allegations arose out of the fact that the Doyles were sold investment schemes promoted by the infamous Storm Financial Limited in Townsville.

The Doyles incurred significant liabilities to the Bank as a result of the investment advice provided to them by Storm, and as Storm was insolvent and its directors impecunious, the Doyles and ASIC sought to implicate the Bank in the multitude of allegations of nefarious conduct advanced against Storm.

The Bank sought indemnity from its insurer in respect of the claim. The insurer denied the claim for indemnity on the basis of an exclusion in cl 3.9 of the policy, which provided that:

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[476] See pages 23–24 of Professor Merkin's article. Robert Merkin, 'Directors' and Officers' Insurance and the Global Financial Crisis' (speech delivered at the Australian Insurance Law Association Geoff Masel Memorial Lectures, November 2009).
[477] [2012] QSC 319.
[478] See *JAS v Gross* (1998) 231 AR 228.
[479] (2007) 157 FCR 402.
[480] [2012] QSC 319.

> *'The insurer shall not be liable to make any payment for Loss:*
>
> *Lender's liability*
>
> *Arising out of, based upon or attributable to any actual or alleged:*
>
> *i) Loan, lease or extension of credit except to the extent that such Claim arises out of a Wrongful Act in the administration of such loan, lease or extension of credit; or*
> *ii) Collection, foreclosure or repossession in connection with any actual or alleged loan, lease or extension of credit.'*

With respect to the advancement of defence costs, clause 6.6 of policy provided:

> *'Except to the extent that the Insurer has denied indemnity for any Claim, the Insurer shall advance Defence Costs in excess of the retention, if applicable, promptly after sufficiently detailed invoices for those costs are received by the Insurer.*
>
> *The Insurer may not refuse to advance Defence Costs by reason only that the Insurer considers that conduct referred to in the "wrongdoing" exclusion has occurred, until such time as there is an admission by the Insured, or, a judgment, award or other finding by a court, tribunal or other trader with jurisdiction to finally determine the matter (including the outcome of any appeal in relation to such judgment, award or other finding) which establishes the foregoing."'*
>
> *The indemnity obligation on the insurer was expressed in cl 1 of the policy in the following terms:*
>
> *"The Insurer shall pay on behalf of each Insured all Loss and Defence Costs resulting from any Claim first made during the Policy Period for any Wrongful Act."*

Clause 2.20 of the policy defined *'Wrongful Act'* as including:

> *'Act or error or breach of duty or omission or conduct (including misleading or deceptive conduct) committed or attempted or allegedly committed or attempted by or of the Insured . . .*
>
> *Without limiting its scope, Wrongful Act includes:*
>
> *a) Breach of contract for the provision of Professional Services (notwithstanding exclusion clause 3.2);*
> *b) Breach of any state or territory fair trading legislation;*
> *c) Breach of the* Trade Practices Act 1975 *(Cth) (as amended)*
>
> *. . .*
>
> *j) Breach of the* Australian Securities and Investments Commission Act 2001 *(Cth) (as amended).'*

In justifying its denial of indemnity, in particular with respect to its refusal to advance defence costs, the insurer argued that the *'Loss'* the subject of the claim arose out of, was based upon or attributable to the actual or alleged loans made by the Bank to the Doyles, and therefore fell within exclusion clause 3.9.

The Bank argued that the exclusion clause lacked sufficient precision insofar as it failed to identify **what** was required by the words *'arising out of, based upon or attributable to'*. It argued

that what was required was a *'non-coincidental nexus between the proscribed conduct and the loss'*, which, it submitted, could not be established in this case. In the alternative, the Bank argued that the loss in fact arose out of the administration of the loans, not the making of the loans themselves, and so the *'carve out'* in clause 3.9 was triggered.

The insurer successfully resisted a declaratory determination with respect to its obligation to indemnify the Bank on the basis that to do so would involve proceeding on the basis of allegations made in the pleadings which had not been proven or accepted by either party as facts which were true or binding on them.

In this regard, the insurer relied on *Bass v Perpetual Trustee Company Limited*[481] in which it was held that it was central to the purpose of a judicial determination that *'it includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy.'*[482]

In that case, the High Court stated that if a declaration is made not based on the facts either as found or agreed between the parties, it will be purely hypothetical and:

> *'. . . at best . . . do no more than declare that the law dictates a particular result when certain facts in the material pleadings are established. Also, if "the relevant facts" are not identified and the existence of some of them is apparently in dispute, the answers . . . may be of no use at all to the parties and may even mislead them as to their rights.'*[483]

Jackson J agreed with that statement of principle and held that the:

> *'. . . proper application of the principles in Bass leads to the conclusion in the present case that a declaration as to the operation and application of cl 3.9 to the claim in the Doyle proceedings for Loss under the policy should not be made because the declaration would be hypothetical.'*[484]

With respect to whether there was any obligation on the insurer to advance defence costs in circumstances in which it had declined indemnity on the grounds that the loss was not covered, the Bank argued that the obligation to advance defence costs crystallised upon the lodgement of a qualifying claim. The Bank also argued that the insurer's reliance on exclusion 3.9 did not excuse it from its obligation to extend defence costs in circumstances in which the exclusion clause only made reference to the insurer not being liable to make payment for *'Loss'* in certain circumstances, and did not make reference to and exclude a separate obligation to provide *'Defence Costs'*.

Jackson J undertook a comprehensive analysis of the state of the law with respect to the obligation to advance defence costs in circumstances in which indemnity was denied. His Honour made reference to *Wilkie v Gordian Runoff Limited*[485] in which the insurer denied indemnity in respect of both the claim and defence costs, predicated on the fraud exclusion in the policy. He noted that the High Court had held in that case that to permit the insurer to avoid the obligation of advancing defence costs in circumstances in which it relied on the fraud exclusion, there was a requirement that the fraud *be established* before the exclusion might be invoked, and so it was held that there *was* an obligation to advance defence costs '*pending a determination of the fraud claim*'.

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[481] (1999) 198 CLR 334.
[482] Ibid 355.
[483] Ibid 357.
[484] *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2012] QSC 319, [40].
[485] (2005) 221 CLR 522.

Whilst indemnity was not declined on the basis of fraud, the Bank similarly contended that the obligation to advance defence costs could not be curtailed by the insurer's decision, particularly in circumstances in which the exclusion clause was not expressly framed as excusing the insurer from an obligation to extend defence costs.

Jackson J observed that the '*high point*' of cases in which it was held that it would be '*incongruous* for an insurer to be liable to indemnify the defence costs of a claim to which liability for the loss claim was excluded' was *McCarthy & Ors v St Paul International Insurance Company Limited*.[486] That case concerned an obligation to indemnify in respect of a liability which was excluded in respect of liability arising from '*eight enumerated factors set out in the policy, including a dishonesty or fraudulent act or omission of the insured*.' That is, the question in that case was whether the insurer declining the extension of defence costs could be justified in circumstances in which the dishonesty exclusion was but one of the causes of the liability.

In upholding the insurer's declinature of indemnity in respect of both the loss and the extension of defence costs, the Full Federal Court held in *McCarthy* that a construction of the policy which *'restricted the operation of the exclusions to liability to the claimant for loss, so that there was no exclusion of liability for defence costs' would lead to 'inconvenient and obviously unintended results' . . . and that 'unlikely commercial results enforced the otherwise available construction, . . . which gives a commercial coherence and businesslike meaning to the relationship between the insuring clause and the exclusion clause.'*[487]

Jackson J also referred to the Victorian Court of Appeal's endorsement of the question put by the insurer in *Major Engineering Pty Ltd v CGU Insurance Limited*[488] that *'Why should we have to pay for costs when there is no cover under the Policy?'* and observed that ultimately the determination of the effect of the policy is a finely balanced matter which turns upon a '*businesslike and commonsensical*' construction of the policy as a whole.

In dealing with the argument as to whether the fact that there was no reference in the preamble to the exclusion section of the policy to an exclusion in respect of the obligation to advance defence costs, Jackson J therefore preferred the construction of the policy that if the insurer denied indemnity for the claim, the insurer was not obliged to pay defence costs, because: [489]

> *'a) The language of the insuring clause is that the insurer will pay "Loss and Defence Costs" resulting from any qualifying Claim;*
> *b) It seems to be an unlikely commercial result that the insurer would be ultimately liable (not just by way of advances to Defence Costs) to pay Defence Costs in respect of the claim which is not otherwise covered because of an exclusion under cl 3;*
> *c) Neither the subject matter of the policy nor the text supports the construction that it is intended that the policy deal with liability for Loss and Defence Costs differently, except for the opening words of cl 3 (which omits reference to "*Defence Costs*"); and*
> *d) The second sentence of cl 6.6 is clearly inconsistent with that construction in respect of cl 3.8.'*

[486] (2007) 157 FCR 402.
[487] *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2012] QSC 319, [70].
[488] (2011) 282 ALR 363.
[489] *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2012] QSC 319, [74].

Accordingly, Jackson J concluded:[490]

> *'Once that point is reached, it seems to me that the proper construction of cl 3.9 and cl 6.6 are resolved in a consistent or harmonious manner, and the insurer will be entitled in a proper case to deny indemnity for a Claim including liability for Defence Costs in reliance on cl 3.9 of the policy. In those circumstances, the insurer is not obliged to advance Defence Costs under cl 6.6, or to pay Defence Costs under cl 1, until the insurer's denial of indemnity is determined to be wrong as between the insurer and insured.'*

On appeal, the Queensland Court of Appeal[491] agreed with the primary judge's conclusions, emphasising in their judgment the principles to be applied when construing insurance policies. The Court of Appeal was prepared to stray from a literal interpretation of the relevant exclusion clause to give them a commercial and businesslike meaning by construing the policy as a whole, and agreed an entitlement to be indemnified the costs of defending an excluded claim would have the unintended outcome of creating two policies from one policy document.

[490] Ibid [75].
[491] *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013] QCA 183.

CHAPTER 11 – AGGREGATION CLAUSES

Aggregation clauses define the number of '*claims*' that have been made pursuant to an insurance policy. Triggering a policy's aggregation clause so as to aggregate multiple claims can affect the respective financial exposure of the insured or insurer. Aggregation clauses have application to both the limit of indemnity an insurer is liable to pay, as well as the number of deductibles payable by an insured.

If an insured is faced with a large number of small claims that individually, would not exceed the amount of the deductible payment, whether they are to be treated as one claim for the purpose of calculating the deductible, or multiple single claims, will determine whether the insured will be reap any benefit from its insurance contract.

Likewise, an insurer may seek to aggregate a number of large claims so as to only be liable to pay the limit of cover specified in the policy for any one claim, potentially leaving the insured to personally pay any amount of the claims exceeding the indemnity limit.

General principles

When considering the number of policy claims that may arise out of notified circumstances, the courts will consider the specific policy wording and the circumstances of the claim, with the factual relationship between the circumstances being the most relevant consideration. In *McCarthy v St Paul International Insurance Co Ltd*,[492] Allsop J expressly noted that it is the underlying facts and not the legal form in which the matter is constructed or pleaded that is relevant when assessing what constitutes a claim under an insurance policy.[493]

In *Thorman v New Hampshire Insurance Co Ltd*,[494] the English Court of Appeal considered how many claims under an insurance policy arose in relation to work performed by an architect in a residential development. Donaldson MR explained the issue and its association with the underlying facts in this way:[495]

> *'Let me take some examples. An architect has separate contracts with separate building owners. The architect makes the same negligent mistake in relation to each. The claims have a factor in common, namely the same negligent mistake, and to this extent are related, but clearly they are separate claims. Bringing the claims a little closer together, let us suppose that the architect has a single contract in relation to two separate houses to be built on quite separate sites in different parts of the country. If one claim is in respect of a failure to specify windows of the requisite quality and the other is in respect of the failure to supervise the laying of the foundations, I think that once again the claims would be separate. But it would be otherwise if that complaint was the same in relation to both houses. Then take the present example of a single contract for professional services in relation to a number of houses in a single development. A single complaint that they suffered from a wide range of unrelated defects and a demand for compensation would, I think, be regarded as a single claim. But if the defects manifested themselves seriatim and each gave rise to a separate claim, what then? They might be regarded as separate claims . . . It would, I think, very much depend on the facts.'*

[492] (2007) 157 FCR 402.
[493] Ibid 426.
[494] [1988] 1 Lloyds' Rep 7.
[495] Ibid 11–12.

In *Thorman*, Donaldson MR identified relevant considerations as including the relationship of the claimant with the insured, the nature of the alleged mistake and the timing of the defects and complaints. Stocker LJ also emphasised the importance of the particular facts and the context when considering the number of claims that arise from any factual matrix.

In *Haydon v Lo & Lo (a Firm)*[496] the Privy Council considered a similar issue, and again identified the underlying factual matrix as being of critical importance, as opposed to the manner in which the claim was formulated (although this was identified as an important starting point). *Haydon* concerned the theft of money and shares by an employee of a law firm from two deceased estates. The 43 instances of monetary theft (from one estate) were considered to be one *claim* for policy purposes, while the theft of various shares from the second estate was considered to constitute a second *claim*. The Court arrived at its decision having regard to the different mechanisms of theft from two different clients.

Both *Thorman* and *Haydon* were cited with approval by Einstein J in *Schipp v Cameron*[497] which concerned claims of negligence made against a solicitor by a client. The complication in *Schipp* arose because the negligent acts manifested themselves firstly in a joint venture involving the purchase of real estate and then sequentially in the sale of that real estate, a separate loan and the purchase of further real estate, on behalf of a single client.

Einstein J focused on the effect of the negligence and concluded that the acts of the insured solicitor had continued to deprive the claimant of money which she had initially invested in the joint venture and in respect of which she had issued a single demand relevant to a series of problems.[498] Accordingly, his Honour concluded that there was only one *claim* for policy purposes.

Specific policy wordings

The way in which an aggregation clause is drafted will ultimately determine the scope of the clause, with the less requirements necessary to trigger the clause facilitating a more straight forward and likely application.

Originating cause

Courts have observed that a clause only requiring claims to arise from an '*originating cause*', which concerns the underlying reason why the losses occur, as opposed to the advent of the losses themselves, opens a wide search for a unifying factor for the losses that a party is seeking to aggregate.[499]

Examples of what constitutes an '*originating cause*' include a negligently manufactured product,[500] and an employer's failure to provide adequate training to salespeople which resulted in the mis-selling of financial products.[501]

Event or occurrences

Slightly more onerous clauses may require the losses subject of the claims in issue to arise from the same '*event*' or '*occurrence*'. In this case a court will assess whether the circumstances of the losses involve such a degree of similarity as to be properly described as being (or arising out of) the same event or occurrence.

[496] [1997] 1 WLR 198.
[497] [1998] NSWSC 997.
[498] Ibid [968].
[499] *Axa Reinsurance v Field* [1996] 1 WLR 1026.
[500] *Pacific Dunlop Ltd v Swinbank* (1999) 10 ANZ Ins Cas 61-439.
[501] *Countrywide Assured Group plc v Marshall* [2003] 1 All ER 237.

In *Sealion Shipping Ltd v Valiant Insurance Co*[502] a ship suffered three separate mechanical failures, each which resulted one from another. The court, in undertaking a practical approach to the causation issues, found the reality to be that after the first mechanical failure '*one thing led to another*'.[503] The claims were aggregated and accordingly the insured was only required to pay the one policy deductible for the claims.

Conversely, in considering an aggregation clause in a combined public and products liability policy the Queensland Supreme Court found a plumber's negligent installation of 47 waterproof membranes, which caused water to escape into parts of the houses the membranes were installed in, to be separate claims under the policy, requiring the insured to make 47 payments of its $300 excess.[504]

In coming to its conclusion, the court found the unworkmanlike application of the membrane on each of the occasions could not be described as an '*event*' or '*occurrence*' because it would depart from the ordinary meaning of event which is something which has 'happened at a particular time, at a particular place, in a particular way . . . an occurrence or an incident'.[505]

Series of events or occurrences

Some clauses will aggregate an identifiable *series* of events or occurrences. The term '*series*' was considered in *Distillers Co Bio-Chemicals (Aust) Pty Ltd v Ajax Insurance Co Ltd*[506] where a chemist supplied pregnant women a pill containing thalidomide.

A number of actions were brought against the chemist on behalf of children born with deformities alleged to be caused by their mother's ingestion of thalidomide. The chemist's insurance policy had a limit of $100,000 per claim, which was insufficient to meet the aggregate amount claimed against the insured.

The policy provided for aggregation of all claims arising out of all occurrences of a series consequent or attributable to one source or original cause. The court found while the relevant '*occurrences*' were the separate instances of ingestion of the drug by the women, they were attributable to the one source or original cause, namely, the distribution of the drug.

A '*series*' was held to be established if the events are '*of a sufficiently similar kind following one another in temporal succession*' and '*similar in nature*'. Ultimately the court found there had been an occurrence of a series within the meaning of the policy and the claims were aggregated, capping the insurers' obligation to pay at $100,000.

Related series of acts or omissions

In *Lloyds TSB General Insurance Holdings v Lloyd Bank Group Insurance Company Ltd*,[507] a financial products mis-selling claim, approximately 22,000 claims were brought against the policyholder who in breach of the *Financial Services Act 1986* (UK) had failed to ensure its representatives complied with the Life Assurance and Unit Trust Regulatory Organisation's Code of Conduct.

[502] [2012] 1 Lloyd's Rep 252.
[503] Ibid [136].
[504] *QBE Insurance Ltd v MGM Plumbing Pty Ltd* (2003) 12 ANZ Ins Cas 61-555.
[505] Ibid 76, 537.
[506] (1974) 130 CLR 1.
[507] [2003] 4 All ER 43.

The House of Lords found that to be '*related*', a single act or omission must be the proximate cause of every claim. The insured asserted the breaches satisfied this interpretation of the word '*related*' because the underlying act or omission was the inadequate training of its staff. The court did not accept this argument, instead finding a general failure to ensure compliance with the Code of Conduct was not sufficient, particularly having regard to the unique breaches which occurred at different times, by different representatives and by different means.

Similar acts or omissions in a series of related matters or transactions

The standard aggregate claims provision contained within English and Welsh solicitors' professional indemnity insurance policies was considered by England's Commercial Court in *AIG Europe v OC320301 (formerly the International Law Partnership LLP)*.[508] Satisfaction of the clause in question was particularly onerous because as well as requiring the claims to arise from '*similar acts or omissions*', they also had to have been '*in a series of related matters or transactions*'.

The case involved individual claims lodged by hundreds of investors, who lost money due to a failed system devised by the defendant law firm which was intended to protect their money in property development investments in Turkey and Morocco.

The case was appealed, with contentions centred on the meaning of the second limb in the aggregation clause '*in a series of related matters or transactions*.'[509] The case was remitted back to the Commercial Court to determine in accordance with the guidance provided by the Court of Appeal on the meaning of the clause.

Similar act or omission

In construing what is '*similar*', the court ruled the requisite degree of similarity must be appropriate having regard to the object of the clause, which was to permit claims to be aggregated for the purpose of applying the limit of the insurers' liability per claim. In light of this the court required the requisite degree of similarity to be a real or substantial degree of similarity as opposed to being fanciful or insubstantial.

All the claims involved the local development company failing to pay the vendors of the respective land, the investors' monies being released and exposed to losses in the event that the developments failed, and the firm's scheme failing to provide security for the investors.

At first instance Justice Teare found there to be a real and substantial degree of similarity in the failures which was neither fanciful nor insubstantial, and for the purposes of the policy there were '*similar acts or omissions*.'

While the appeal did not turn on the meaning of '*similar acts of omissions*,' the court did give permission for the parties to present arguments on the meaning of this limb of the clause having regard to the new focus on an '*intrinsic relationship*' between the matters or transactions discussed below.

In a series of related matters or transactions

The Commercial Court said that to satisfy the meaning '*a series of related matters or transactions*' the transactions alleged must be '*dependent*' on each other. In applying that definition to the present case the court held it was common ground that the individual transactions were not conditional or dependent upon each other.

[508] [2015] EWHC 2398.
[509] *AIG Europe Ltd v OC320301 LLP* [2016] All ER (D) 121 (Apr).

The court again considered the context of the clause, namely, an aggregation clause in a solicitors' insurance. With this in mind, the natural meaning of *'a series of related matters or transactions'* was found to sensibly be a series of matters or transactions that are in some way dependent on each other.

The court therefore found the claims were not to be aggregated, because although they did arise out of similar acts or omissions, they did not also meet the additional requirement of being in a series of related transactions, because the terms of the transactions were not conditional or dependent upon each other.

On appeal, this interpretation was found to be incorrect, and the correct view was that there had to be a connection between the transactions themselves to be '*related*'. It followed that there had to be an '*intrinsic*' connection rather than a remote relationship.

As an example, transactions will unlikely be related by virtue of them all referring to the same parcel of land in one of the countries where the developments occurred. Alternatively, if the transactions also refer or envisage each other, then they may be related and the clause may respond.

The case was ultimately remitted back to the Commercial Court as the factual circumstances surrounding the contracts between the law firm and the investors, and the way in which the scheme operated were critical to determining whether the aggregation clause applied.

At the time of this publication, the Commercial Court has not yet reconsidered the matter. When it does however, it will be required to apply the Court of Appeal's '*intrinsic connection*' test, and that test will likely be instructive for future interpretation of aggregation clauses requiring matters or transactions to be '*related*'.

CHAPTER 12 – ALLOCATION OF LOSS

Allocation of loss clauses emphasise that an insurer is only liable to indemnify loss covered by the policy.

If a claim comprises various losses and costs only some of which are covered, the policy typically requires the insured and insurer to act in good faith to attempt to agree a fair allocation of insured and uninsured loss and costs, to be determined by a QC or senior counsel in the absence of agreement.

The decision of *Vero Insurance Ltd v Baycorp Advantage Ltd*[510] considered that an allocation clause in such terms (involving agreement on a fair and proper allocation of loss) was an *agreement to agree* and was therefore unenforceable, being void for uncertainty. There was no other relevant allocation provision in the policy in that instance that remained effective. The consequence was that the insured, one of a number of related defendants to underlying proceedings all with joint legal representatsion, was entitled to indemnity for the entirety of legal costs incurred defending the proceedings notwithstanding the legal costs also benefited the uninsured defendants.

If an allocation clause contains other provisions that, if construed objectively, continue to limit cover to that part of the total loss that can be attributed to an insured party or insured component of the claim, without being an agreement to agree, it may still be effective at allocating loss. A common example is where cover is limited to liability (or defence costs) incurred *solely and exclusively* by an insured or in respect of a covered claim.

Depending on the particular wording of the provision, an allocation assessment should be based on each party's relative legal and financial exposure to the claim, and the benefits obtained by the parties from the defence of the claim.

For example, an insured may be alleged to have been both negligent and fraudulent. As we have seen, an advancement of defence costs may be available even though fraudulent conduct is excluded, until such time as there is a finding or admission of fraud. If an adverse finding on the issue of fraud is made, an allocation will be necessary unless the insured can prove the defence costs were attributable to defending the allegations of negligence (to which the policy did respond) and were not increased by reason of the allegations of fraud.[511]

In *McCarthy v St Paul International Insurance Co Ltd*[512] the claim against the insured comprised both insured and uninsured (fraud) components. Relying on the well known *Wayne Tank*[513] principle, the insurer argued that as there were two proximate causes of the loss, one of which was covered by the insuring clause but the other being expressly excluded, there was no liability at all for defence costs. On the particular wording of the policy in question however, the court considered the claims to be separable, with the result that defence costs were payable in respect of the insured aspects of the claim (and where the costs were attributable to both the insured and uninsured components).

In *Vero v Baycorp* this principle was considered in the context of there being an insured and an uninsured defendant. In that case defence costs were incurred on behalf of the insured directors and uninsured company. The court noted that where an insured would have incurred the same costs (for example, in preparing pleadings, statements and obtaining expert evidence) whether or not there was an additional uninsured party, the insurer is required to pay the entirety of the costs without contribution from the uninsured party.

[510] (2005) 23 ACLC 199.
[511] *John Wyeth v Cigna* [2001] Lloyd's Rep IR 420.
[512] (2007) 157 FCR 402.
[513] *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57.

CHAPTER 13 – DUAL INSURANCE

What is dual insurance

Dual or double insurance occurs when two (or more) insurance policies cover the same interest, subject matter, risk and loss. It is often discussed in terms of there being '*co-ordinate liabilities*' between insurers who have a common obligation to make good the one loss.[514] Essentially where liabilities are co-ordinate it places the parties on an equal footing such that they should bear the burden of the risk pro-rata.[515]

It therefore arises from principles of equity (and common law) which prevent one party being unjustly enriched at the expense of another who is also liable in respect of the same loss. So where payment by one insurer discharges the obligation of another such that the second insurer is no longer required to meet its promise to the insured, dual insurance arises.

The leading Australian authority on double insurance is *Albion Insurance*. In that case an employee was injured in a car accident during the course of his employment. The accident was a result of the negligent driving of another employee. The employer had a workers compensation policy with Albion. That policy had a common law damages extension. The employer also had a CTP policy for the vehicle with GIO.

The employee sued the employer. Albion paid the claim (following judgment) under the common law extension and sought contribution from GIO based on dual insurance.

GIO accepted that if the employee had claimed against the CTP policy, GIO would have been liable to meet the claim. However it resisted the claim for contribution on the basis that the subject matter of the policies was so fundamentally different that dual insurance could not arise (essentially it was argued that the Albion policy covered the employer against the risk of injury to the employee in the course of employment irrespective of negligence, whereas the GIO policy covered anyone becoming entitled to damages arising from the negligent use of the motor vehicle).

In finding that dual insurance existed, the majority held:[516]

> *'There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each of the policies. The insured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of contribution between insurers has evolved . . . The doctrine however only applies when each insurer insures against the same risk, although it is not necessary that the insurances should be identical. Thus one insurer may only insure properties A and B against fire and the other insurer may only insure property A against fire . . . The element essential for contribution is that, whatever else may be covered by either of the policies, each must cover the risk which has given rise to the claim. There is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which has given rise to the insured's loss or liability.'*
>
> (our emphasis)

[514] *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.
[515] *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342.
[516] Ibid 345.

The fundamental points that emerge from this passage are that:

- the insured cannot recover more than its loss – this enshrines the fact that the indemnity principle is a fundamental tenet of dual insurance;
- the insured may claim from either insurer – the insurer cannot control which policy is claimed against (enshrined in s 76 of the ICA, discussed below);
- the insurances must insure the same risk, but they do not need to be identical;
- each insurer must be liable, although they do not need to be liable for the whole of the loss.

Kitto J summarised the position as follows:[517]

> *'What attracts the right of contribution between insurers, then, is not any similarity between the relevant insurance contracts as regards there general nature or purpose or the extent of the rights and obligations they create; but is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained . . .'*

More recently, the Victorian Court of Appeal in *QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd*[518] summarised the general principles applicable to dual insurance as follows:

- both insurers must insure a common insured (it does not matter that the policies may also insure others and that not all of the insureds are covered by both policies);
- both policies must cover the same risk or same liability (it does not matter that one or both of the policies may also cover other risks that are not the subject of the claim);
- the common insured suffers a loss or incurs a liability that is covered by both policies (either in whole or in part);
- the first insurer has indemnified the insured for its loss or liability in accordance with the terms of its policy; and
- the second insurer has not indemnified the insured for its loss or liability in accordance with the terms of its policy;
- whether the loss is covered by both policies is to be determined at the time of the insuring clause event, so events subsequent to the insuring clause event (e.g. failure to make a claim under the second policy; cancellation of the second policy) will not affect the first insurer's right to contribution; and
- where the loss falls within an exclusion clause of the second policy, there is no entitlement to contribution.

Common insured

The important aspect here is that the person suffering the loss need only be an insured under both policies. It is not necessary that the person is the contracting party or policyholder in both policies. So much was established following *Esanda v Colonial Mutual*[519] where dual insurance was found to apply where Esanda was a named insured under one policy but only had its interest noted under another.

However consideration also needs to extend beyond whether a person is specifically named or falls within a category of persons for whom the policy provides indemnity. It is also necessary to examine the full scope of the '*Insured*' definition, and whether it may include participants up or down a contractual chain, or an insured's consultants or agents.

[517] Ibid 352.
[518] [2009] 24 VR 326.
[519] (1993) 217 ALR 180.

Another common qualification to the definition of insured which gives rise to confusion is that additional insureds are only covered for the '*respective rights and interests*'. In a building context it was previously argued that such a qualification meant that additional insureds were insured only in respect of the work they performed and therefore where that work damaged other parts of the project works, no cover was available to them. However in *Co-operative Bulk Handling v Jennings Industries Ltd*[520] the Supreme Court of Western Australia held that the respective right and interest of each project participant was an interest in the whole the works. Therefore, qualifications of this type are unlikely to impact dual insurance claims.

Same risk

As the court in *Albion Insurance* decided, it is not necessary that the policies be of the same nature or that each policy insure all of the same risks for dual insurance to arise. Provided that the risk which has given rise to the liability is covered under both policies then dual insurance will apply.

Another interesting example where the courts have considered co-ordinate liabilities (albeit in the context of contribution in circumstances other than dual insurance) was in *Speno Rail Maintenance v Hamersley*.[521] Speno took out liability insurance with Zurich Australia in its own name and in the name of Hamersley as part of its contractual obligations. The policy did not cover Speno in relation to the contractual indemnity it gave to Hamersley.

One of Speno's workers was injured as a result of Hamersley's negligence. The worker sued Hamersley, who in turn sought indemnity from Speno and from Zurich under the policy. Zurich claimed contribution from Speno on the basis that both were liable to indemnify Hamersley. The court rejected the claim on the basis that Zurich's and Speno's liabilities were not co-ordinate i.e. the same (critical to that conclusion was the fact Zurich's liability arose under a contract of insurance whereas Speno's did not).

A similar situation arose in *HIH Claims Support Limited v Insurance Australia Limited.*[522] The case concerned the collapse of HIH Group, which resulted in the Government backed HIH Claims Support Scheme being established to enable HIH policyholders to access funds that would have otherwise been payable by the failed insurer.

The Scheme made a claim payment on behalf of a HIH insured, and in turn sought contribution from a second insurer (IAL) on the grounds of dual insurance. The High Court considered the basic principles of equitable contribution and made reference to *Albion Insurance* where Kitto J stated, *'persons who are under co-ordinate liabilities to make good the one loss . . . must share the burden pro rata*.'[523] The High Court also considered whether a common obligation *'of the same nature and to the same extent'* would arise if one insurer's obligations arose under statute and the other insurer's obligations arose under contract.[524]

Caledonia North Sea Ltd v British Telecommunications plc[525] established that obligations regarding indemnity under a contract and under an insurance policy do not constitute obligations *'of the same nature and to the same extent*,' the obligations under a contract being primary and the obligations under the insurance policy being secondary.[526] Overall, on review of the relevant authorities the High Court found '*that equity will not intervene in the absence of a common legal burden or co-ordinate liabilities.'*

[520] [1996] 17 WAR 257.
[521] (2000) 23 WAR 291.
[522] (2011) 244 CLR 72.
[523] (1969) 121 CLR 342, 350.
[524] *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* 1987 SLT 345.
[525] [2002] 1 Lloyd's Rep 553.
[526] Ibid 559.

Both insurers must be liable

For dual insurance to apply, both insurers must be liable to the insured under their respective policies. Where the first insurer makes an *ex gratia* payment under its policy, it cannot claim contribution from the second insurer because the first insurer was not liable to make the payment under its own policy.

However, principles of equity can intervene in those circumstances and the first insurer may exercise rights of subrogation against the second insurer on the basis that the payment by the first insurer effectively discharged the second insurer from its burden to indemnify the insured.

Rateable contribution clauses also create particular difficulties. In *GRE Insurance Ltd v QBE Insurance Ltd*[527] the purchaser of a property obtained a fire policy covering the interests of the purchaser and the vendor. The vendor obtained a separate fire policy from QBE. Each policy contained a clause whereby if at the time of the damage there was another policy covering the property, the insurer would not be responsible for more than its rateable proportion of the loss. When the property was damaged by fire the first insurer paid the claim and sought contribution from QBE.

QBE argued that it was not liable to contribute because the first insurer, having paid more than its rateable contribution could not seek contribution for the excess payment. The court rejected that argument as being contrary to principles of equity and justice on which claims for dual insurance and contribution are based.

Notwithstanding, the insurer from whom contribution is sought is still entitled to challenge the first insurer's settlement on the basis that it was not sound in law or was excessive. Although in the context of liability insurance, it is not necessary for the first insurer to prove that the insured was liable to the third party, only that the settlement was reasonable.

The operation of s 54 of the ICA can be invoked by one insurer to set up putative liability of another insurer to an insured, as a basis for a claim for dual insurance contribution.[528] In that instance, an insurer will be unable to avoid a claim for dual insurance on the basis its policy would not have responded to the claim were it to be made by the insured, if the insured would have been able to invoke the protection of s 54.

Making and defending claims for contribution

Fundamentally, the approach to a dual insurance claim is really no different from making or dealing with any other claim against a policy. It requires detailed consideration of the terms of both policies. Obviously that will have been done in relation to the first policy (i.e. the policy of the insurer making the claim for contribution) when the claim under that policy is resolved. However a similar analysis needs to be made of the second policy to determine whether it would have responded if the claim for indemnity had been made against it.

Once it is determined that dual insurance applies, the first insurer may pursue a claim against the second insurer. It is important to remember that a claim for contribution based on dual insurance is a claim between the insurers directly. It is not a subrogated claim in the name of the insured.

[527] [1985] VR 83.
[528] *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* [2016] FCAFC 150.

The right is expressly recognised by s 76 of the ICA. Where dual insurance applies, an insurer is entitled to contribution for the payments made by way of indemnity. There is also no reason in principle why an insurer should also not be able to recover contribution towards those expenses it reasonably incurred investigating and resolving an insured's claim (at least to the extent that the other insurer has benefited from those costs). Those costs may include legal, loss adjuster's, and consultant's costs.

In first party claims it is the responsibility of the insurer claiming contribution to establish that it is liable under its policy. Therefore when the initial claim is adjusted and paid, it should be done against the various heads of cover under the policy so that it does not need to be done retrospectively. Furthermore as the policy from which contribution is sought may often have similar heads of cover, adjusting a claim in this way may make the process of obtaining contribution more streamlined.

Invoices for costs incurred should contain sufficiently detailed narrations so that the nature of the work performed is properly understood. For insurers responding to a claim of contribution, these invoices should be considered in detail. For instance, contribution will not generally be available for:

- costs which have been incurred in dealing with a claim by a party that is not an insured under the second policy; and
- legal and adjusting costs dealing with indemnity issues under the first policy.

In the case of defence costs incurred on behalf of an insured, many insurance contracts provide that they are covered by an insurer only if permission is obtained to incur costs. In a contribution action, the second insurer will not usually have authorised the legal costs. In *Government Insurance Office (NSW) v Crowley*,[529] GIO had incurred legal costs in defending a negligence claim against the Sydney Turf Club. GIO sought contribution from the club's workers' compensation insurer. Although GIO was successful in recovering contribution, it could not recover legal costs because the workers' compensation insurer had not consented to the legal costs.

Notably however, this case pre-dated the ICA. As noted in the *Watkins Syndicate* decision above, s 54 of the ICA could likely be invoked by the insurer seeking contribution in this instance.

Often each policy's memoranda will provide for different limits and sub-limits. This can be an issue where indemnity payments made under the first policy are greater than the limit/sublimit of the policy from which contribution is sought. When defending a claim for contribution it is therefore worth seeking details of how all indemnity payments were allocated within the memoranda in the relevant policy.

Calculating contribution

Remember that in dual insurance situations, contribution will only be available for amounts which are covered under both policies. Any amounts which will not be covered under the policy from which contribution is sought, must therefore be deducted from the total indemnity payment before contribution can be calculated.

[529] [1975] 2 NSWLR 78.

Those amounts for which contribution is not available may include:

- amounts excluded under the second policy;
- indemnity payments to non-insured parties;
- ex gratia payments;
- costs incurred in dealing with indemnity/underwriting issues under the first policy.

Once those deductions have been made the amount of contribution can be calculated. There are two recognised methods for calculating contribution: the maximum potential liability method and the independent actual liability method.

The following example demonstrates how each method operates in practice.

Policy A limit: $1,000,000
Policy B limit: $200,000
Loss: $300,000

Maximum potential liability method

Policy A pays: $\frac{\$1,000,000}{\$1,200,000} \times \$300,000 = \$250,000$

Policy B pays: $\frac{\$200,000}{\$1,200,000} \times \$300,000 = \$50,000$

Independent actual liability method

Policy A pays: $\frac{\$300,000}{\$500,000} \times \$300,000 = \$180,000$

Policy B pays: $\frac{\$200,000}{\$500,000} \times \$300,000 = \$120,000$

There are very few cases that actually deal with the question of which method is to be used, although the generally accepted approach is the independent actual liability method.[530] However the courts have left open the use of the maximum potential liability method. In *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd*[531] Johnson J said:

> *'It is apparent from the authorities that the apportionment of liability between insurers with co-ordinate liability is a matter of discretion. However, the discretion must be exercised reasonably and fairly so as to achieve a just and lawful accommodation of the competing interests of the two insurers. In achieving that aim the Court is entitled to take into account all matters which go towards ensuring that the result is equitable. Despite the fact that the authorities generally acknowledge two methods of determining contribution, the maximum potential liability method or the independent actual liability method, I accept that the Court is entitled to apply some variant of these two methods if there are particular circumstances which make it necessary to depart from the principal methods in order to achieve a just result.'*

[530] Ibid.
[531] (2007) 209 FLR 247.

However, the court ultimately found the independent actual liability method the most suitable method of calculation, considering the application of the maximum potential liability method of apportionment would produce a gross distortion of reason, justice and fairness because Zurich would bear so little of the total liability.

As a rule of thumb under the independent actual liability method, where all of the payments made are less than the limits/sub-limits of both policies, equal contribution will apply.

CHAPTER 14 – OTHER INSURANCE

Indemnity insurance policies commonly contain other insurance provisions which provide that an insurer's liability for the claim will be excluded or limited where other insurance applies to the same loss. The obvious problem is that if both policies contain such a clause an insured could be left without cover.

Section 45 of the ICA seeks to avoid any potential injustice to an insured, and provides that where a provision included in a policy has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other policy, the provision is void. The section does not however apply in relation to a policy that provides insurance cover in respect of some or all of so much of a loss as is not covered by a policy that is specified in the first-mentioned policy.

The section therefore renders such clauses void unless they specifically identify the other policy, for example where an insured takes out excess layer insurance in addition to its primary policy, and that excess policy is specifically noted to be in excess of the primary layer policy.

The application of s 45 arose in *Zurich Australian Insurance Limited v Metal and Minerals Insurance Pty Ltd*[532] which was the High Court appeal arising from the circumstances in the *Speno v Hamersley* case discussed in chapter 13. To briefly recap on the facts, Hamersley engaged Speno to maintain its rail tracks. Two workers employed by Speno were injured through Hamersley's negligence while performing work under the contract. Both of the workers made a claim against Hamersley for damages.

When it received the claims, Hamersley had two relevant insurance policies available to it. First was its own policy which it entered into with MMI. Secondly, there was Speno's policy which was effected with Zurich in accordance with the terms of the maintenance contract. The Zurich policy extended to Hamersley as a named insured. Hamersley sought indemnity from Zurich under the Zurich policy and Zurich subsequently paid the claims.

Zurich then sought contribution from MMI based on the principles of double insurance. MMI countered by relying on the other insurance clause in its policy and argued that the MMI policy was excess to the Zurich policy.

MMI's other insurance clause provided that *'in the event of the insured being indemnified under such other insurance effected by or on behalf of the insured . . . this policy shall be excess insurance*'. Zurich argued that s 45(1) of the ICA rendered the MMI other insurance clause void.

The key to understanding s 45 is to start by ensuring that you are considering the correct '*other insurance*' clause. In *Zurich* it was the other insurance clause in the MMI policy which was under challenge.

The focus of the argument was whether Hamersley had *'entered into some other contract of insurance'* (being the Zurich policy) as contemplated by s 45. The Zurich policy was arranged by Speno on behalf of Hamersley. Hamersley was a non-contracting party.

The High Court found that the phrase *'entered into'* was limited to the circumstances where the insured is a party to the relevant contracts of insurance. The High Court said that s 45 did not allow room for an interpretation which included a non-party insured among those who had *'entered into the relevant contract'.*

[532] (2009) 240 CLR 391.

Therefore, since Hamersley had not entered into the Zurich policy but was instead a non-party insured, s 45 did not operate to render the other insurance clause in the MMI policy void. MMI was therefore able to defeat the Zurich double insurance claim.

A good way to understand the *Zurich* decision is to look at what would have occurred if Hamersley had elected to claim under its own MMI policy to begin with instead of claiming under the Zurich policy.

Had that occurred, MMI would have paid the claim and then sought contribution from Zurich based on dual insurance. Zurich would in turn have raised its other insurance clause to establish that the Zurich policy was excess to the MMI policy. The Zurich other insurance clause would have been subject to the operation of s 45(1) of the ICA.

The net result would therefore have been different. Hamersley has clearly entered into the MMI policy in the relevant sense and the Zurich other insurance clause would have been void. Therefore, dual insurance would have applied.

Following the limitation placed on the application of s 45 by the High Court, in *Nicholas v Wesfarmers Curragh Pty Ltd*[533] the Queensland Supreme Court has however distinguished the case from circumstances in which a policy is effected by a parent company covering the interests of a subsidiary.

Wesfarmers Curragh was a named insured and a party to the policy, although which had been obtained by its parent company (Wesfarmers). The court held that entry into the policy by Wesfarmers on behalf of its subsidiary should be viewed as an entry into that contract by the subsidiary itself for the purposes of s 45, for two reasons.

Firstly, the relationship between Wesfarmers and its subsidiary was properly characterised as that of agent and principal, and no legal distinction is made between a transaction effected through an agent as opposed to one effected directly by the principal.

If the application of s 45 was confined to policies which were entered into directly by an insured party and not through an agent, its operation would become contingent upon a matter irrelevant to the statutory intention. The court referred to the ALRC Report on Insurance Contracts (No 20, 1982) which identified that the mischief s 45(1) was intended to avoid, was the prospect of an '*other insurance'* clause rendering a primary layer policy an excess layer policy without an appropriate reduction to the premium.

The court stated in this regard, '*Parliament can hardly have intended to ignore entirely commercial convenience and practice*,' recognising that it is common place for insurance to be effected through brokers or other agents.

Secondly, the High Court majority in *Zurich* indicated a willingness to extend the meaning of the words '*entered into*' in appropriate circumstances, notwithstanding they found in that case that the phrase could not extend to include beneficial third parties.

The court therefore found that entering into a contract of insurance by a parent company on behalf of itself and subsidiaries was an '*entering into*' the contract of insurance by the subsidiary, for the purposes of s 45(1).

[533] [2010] QSC 447.

CHAPTER 15 – PRIOR WRITTEN CONSENT

Professional indemnity policies commonly stipulate that an insured not take certain steps without first obtaining the *prior written consent* of an insurer. The two most common examples involve not making any payment, settlement or admission of liability, and not incurring defence costs.

The obligation is generally imposed in one of two forms, either as a condition precedent to cover (as part of the insuring clause or its related definitions) or by separate contractual obligation (such as a *claims condition*) prohibiting the conduct.

Where an insured promptly notifies a matter and an insurer appoints defence counsel on the insured's behalf the issue of consent to act will not usually be contentious, as the insurer will be associating effectively in (if not directing) the conduct of the defence.

Where problems arise however is if an insured retains conduct of proceedings but neglects to keep the insurer informed of developments, or more commonly where there has been a failure to promptly notify a claim (in other words, an insured having already committed the offending act before notification occurred).

Section 54

A failure to obtain an insurer's consent ordinarily disentitled an insured to cover, as it meant either an insuring clause was not engaged or that there was otherwise breach of a policy condition.

The effect of an insured's failure to obtain prior written consent has now largely been ameliorated by s 54 of the ICA which, as noted in previous chapters, prevents an insurer from refusing to pay a claim by reason of some act (or omission) of the insured.

This is best illustrated by the High Court's decision in *Antico v Heath Fielding Australia Pty Ltd*[534] in this context.

In *Antico* the insured sought indemnity under a directors and officers legal expenses policy in respect of legal expenses incurred in defending legal proceedings brought against the insured as a director. The insurer rejected the claim because the legal expenses were incurred, in breach of the policy, prior to obtaining the insurer's consent. In response the insured relied on s 54 of the ICA.

On appeal to the New South Wales Court of Appeal, Kirby P considered the failure of the insured to obtain consent of the insurer and the suggested application of s 54 of the ICA to relieve against that failure.[535] Having held that the insured was entitled to rely on s 54 to relieve against his failure to seek consent from the insurer, his Honour noted that the requirement under the policy that the insured '*obtain*' the consent of the insurer required both the act of the insured in seeking consent and the act of the insurer in granting consent.[536] Kirby P concluded thus: [537]

> *'Since s 54 only deals with the conduct of the insured, it cannot assist where the insurer does not grant consent . . . Section 54 allows a court to prevent an insurer from denying liability on account of some act or omission of the insured. It does not allow the courts to intervene and take control of the insurer's other rights under the contract.'*

[534] (1997) 188 CLR 652.
[535] *Antico v CE Health Casualty and General Insurance Ltd* (1996) 38 NSWLR 681.
[536] Ibid 707.
[537] Ibid 707–708. The remaining members of the Court of Appeal, Priestly and Powell JJA agreed with Kirby P on this point.

On appeal to the High Court, the approach taken by the New South Wales Court of Appeal to this issue was however rejected.

The High Court emphasised the remedial nature of the legislation but also considered that the issue turned on the terms of the policy in question, which obliged the insurer to meet the insured's legal costs provided there were reasonable grounds for defending the proceedings or reasonable grounds for the successful outcome of the matter.

Chief Justice Brennan accordingly provided a qualified answer, concluding that the omission of the insured to seek (as opposed to obtain) the consent of the insurer to the incurring of legal expenses was an omission to which s 54 applied, but only if, before those expenses were incurred, either of those two pre-conditions were satisfied.

The majority (Dawson, Toohey, Gaudron and Gummow JJ) delivered a joint judgment, in which their Honours identified the threshold issue of whether the Court of Appeal was correct in holding that the insured's failure to obtain the consent of the insurer to the incurring of legal fees was not an act or omission to which s 54 applied. In the joint judgment it was held that the failure of the insured to do so, which was required before the insurer was obliged contractually to meet the claim, was a situation to which s 54 was addressed.

Antico accordingly stands today as authority for the application of s 54 of the ICA to a failure to obtain consent to incur defence costs.

Although the question of whether s 54 will apply equally to an insured's failure (omission) to obtain consent to a settlement is yet to receive any judicial consideration, there is no reason why it should not.

Of course, an insurer's liability in these circumstances will be capable of being reduced by the extent of any prejudice suffered by reason of the insured's conduct.

The prejudice to which s 54 refers consists of the existence of a liability which would not have been borne, in whole or in part, by the insurer if the act had not been done or the omission had not been made.[538] Its quantification in these circumstances requires identifying the amount of actual damage, insofar as it can be expressed in a monetary sum, that an insurer has suffered as a result of the insured's act or omission.[539]

In other words, the inquiry is directed to what better or different position an insurer would have occupied had consent been sought. It requires examination of whether the amount of the costs incurred, or the amount of the settlement reached, could have been less had consent been sought.

In *Moltoni*, the High Court set the threshold test for an insurer to establish prejudice in the following terms:

> *'The relevant prejudice suffered is to be measured by reference to what <u>would</u> have happened (as distinct from what <u>could or might</u> have happened) if the act or omission had not occurred.*
>
> *. . .*

[538] *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332.
[539] *Moltoni Corporation Pty Ltd v QBE Insurance Ltd* (2001) 205 CLR 149.

> *It is only if, first, [a] right would have been exercised, but was not, and secondly the insurer has suffered resulting prejudice that can be represented in monetary terms that the provision of s 54(1) allowing reduction in the insurer's liability is engaged. If the right would not have been exercised, the insurer has not suffered prejudice, let alone prejudice that can be measured in monetary terms. And in the setting of a trial, this last proposition amounts to saying that if the insurer does not prove, on the balance of probabilities, that it would have exercised the right in question, it fails to demonstrate that its liability for the claim should be reduced.'*
>
> (our emphasis)

It seems clear therefore, that an insurer needs to be able to point to more than just steps that it may have taken which may have produced a different result. An insurer needs to prove, on the balance of probabilities, not only that it *could* but that it *would* have taken certain steps, and which *would* have produced a bette r or different result.

As a practical consideration, the court in *Moltoni* was not persuaded by the insurer's evidence as to what course would have been taken had consent been sought, which it concluded was effected by hindsight. Absent any contemporaneous evidence of similar action taken in similar matters prior to the events in question, the insurer failed to establish any prejudice. This demonstrates the evidentiary difficulties an insurer may face in seeking to establish prejudice as a result of a failure to obtain consent.

In the case of incurring defence costs without consent, an insurer might seek to argue that the costs incurred would have been less, had consent been sought. Generally speaking, if an insured's defence costs are reasonably incurred an insurer will likely face some difficulty establishing any material prejudice (in *Antico*, the court held that a measure of prejudice in these circumstances depended on the question of whether there were reasonable grounds to defend a claim).

Another avenue of prejudice may rest in a comparison of the respective rates charged by an insured's solicitor and those of the insurer's. Establishing prejudice in this manner would require the insurer to establish that had consent been sought it would have been entitled to (and would have) instructed defence counsel to assume conduct of the matter, or would have been entitled to limit the availability of cover to the applicable rates of the insurer's defence counsel. This will very much depend on the specific wording of the policy.

In the case of an insured effecting a settlement without consent, an insurer may seek to argue that it would not have resolved the claim (on any basis) and would have instead defended the matter to trial, or would only have settled for a different sum or on materially different terms.

The reasonableness of the insured's decision to settle (and in turn the reasonableness of the settlement sum or terms involved) will therefore be the primary consideration. This is explored further below.

Declinature of cover/'prudent uninsured'

A similar scenario arises where an insured's conduct (for instance, incurring defence costs or reaching a settlement) occurs at a time when an insurer has (wrongfully) declined indemnity for a claim, or is not yet in a position to confirm or decline cover but has directed an insured to act as a *'prudent uninsured.'*

In the case of a denial of indemnity, the available authorities draw a distinction between whether an insurer's declinature amounts to a repudiation of the policy (that is, denying the policy's existence) or simply a repudiation of liability under it (but accepting the existence of a binding contract).

In *Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Company Ltd*[540] Justice Menzies acknowledged that *'the insured may make a reasonable settlement where the insurer breaches the contract by denying liability and refusing to defend or settle'*. In that instance however there had been no repudiation of the policy, so the insurer was able to rely on the compromise clause.

Conversely, in *General Omnibus Company Ltd v London General Assurance Company Ltd*[541] (which was cited in *Distillers*), it was held that a compromise clause could not be relied upon by an insurer who had denied liability in respect of a particular claim which the insured had subsequently settled on reasonable terms.

More recently, in *Commercial Union Insurance Company Limited v Willetts Radio & TV Limited*[542] the New Zealand Court of Appeal also found the insurer's denial of indemnity amounted to a repudiation of the policy, thereby disentitling the insurer to rely on a compromise clause. The court explained the distinction between a repudiation of the policy and a repudiation of liability in the following terms:

> *'The distinction lies between the insurer saying, on the one hand, that there is no contract between it and the insured named in the policy in respect of the loss resulting from a particular occurrence, that such occurrence is outside the terms of the policy altogether, and saying, on the other hand, that because of some failure to comply with a term of the policy, or, with a policy such as the present one, because it considers that the insured has not become liable to another, notwithstanding that the risk is one coming within the policy, the insurer is not liable. The first is a repudiation of the policy, the second of liability; in the first it cannot raise as a defence to a claim by the insured failure on the latter's part to comply with the conditions of the policy, in the second it can.'*

In the latter instance, provided an insured can establish a settlement is reasonable, it will be entitled to indemnity.

A similar situation may arise when an insured is directed to act as a *'prudent uninsured.'* In *CGU Insurance Ltd v AMP Financial Planning Pty Ltd*[543] Justices Gleeson and Crennan, in adopting the reasoning of Justice Gyles from the proceeding below, said that:

> *'To act as a prudent uninsured is, for relevant present purposes and leaving aside onus, similar to the position of an insured denied cover in breach of contract. A prudent uninsured might arrive at an objectively reasonable settlement in the light of its potential liability and pay accordingly.'*

The use of the oft quoted phrase, without clarification by the user as to precisely what is intended, may have the unintended effect of preventing reliance on a compromise clause, where a settlement is otherwise objectively reasonable.

What then constitutes a reasonable settlement?

In *CGU v AMP* Justices Gleeson and Crennan said *'the objective reasonableness of the settlements, bearing in mind the circumstances of haste and external pressure under which they were reached, could not be divorced from the question whether AMP was . . . liable to the investors.'*

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[540] (1974) 130 CLR 1.
[541] [1936] IR 596.
[542] (1985) 3 ANZ Ins Cas 60-677.
[543] (2007) 235 CLR 1.

What is required therefore is a reasonable evaluation of the prospects of a successful defence to a third party claim.[544] The standard of reasonableness is objective, to be assessed at the time the settlement is reached. So, an insured cannot be disadvantaged if subsequently discovered events demonstrate that a settlement was more favourable than it would have been had those events been known at the time.

Evidence of legal advice received by an insured influencing its decision to settle (and on what terms) becomes relevant, but is not proof in itself of the reasonableness of the settlement advised. The factors which lead to the giving of the advice and the reasoning supporting it are equally relevant factors to any determination.[545]

So, what might become relevant in any particular case could include things such as:

- the strengths and weaknesses of the available evidence;
- the likelihood of success of a claim;
- the availability of particular defences (the settlement in *CGU v AMP* was judged unreasonable in light of the insured's failure to raise a statutory defence available to it) or third party rights of contribution (*Broadlands Properties Ltd & Anor v Guardian Assurance Co Ltd*[546]).

An insured is also obliged to not do anything which may prejudice an insurer's interests (bearing in mind the duty of good faith under s 13 of the ICA), meaning an insurer's interests are relevant to the question of reasonableness. So, therefore, in *Broadlands Properties Ltd & Anor v Guardian Assurance Co Ltd*[547] it was held that a settlement was neither reasonable nor bona fide *vis-a-vis* the insurer, absent any consideration of the insurer's rights of subrogation.

At the same time the court in *Broadlands* noted the settlement was unreasonably influenced by matters extraneous to the insured's legal liability, such as its repudiation and desire to promptly resolve the matter. Similar considerations were made in *CGU v AMP*, the settlement in that case also being influenced by a desire to hastily achieve settlements before the insurer could take over defence of the claims and pressure from an industry regulator.

The principle applies equally to incurring defence costs. In *Wesfarmers Federation Insurance Ltd v Stephen Wells t/as Wells Plumbing*[548] it was held that an insurer's declinature of cover and recommendation that the insured immediately take steps to protect its interests, including obtaining legal representation, constituted consent under the policy to incur defence costs. It was found there was no repudiation of the policy itself in that instance.

Section 41

Section 41 of the ICA affords further protection to an insured in relation to settlement of claims. It effectively prevents an insurer from declining cover by reason of an insured's breach of a policy requirement to obtain consent to an admission or settlement, where the insurer fails to respond within a reasonable time to a request to admit liability under the policy and confirm whether the insurer proposes to assume conduct of the defence of a claim.

[544] (1974) 130 CLR 1.
[545] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603.
[546] (1984) 3 ANZ Ins Cas 60-552.
[547] (1984) 3 ANZ Ins Cas 60-552.
[548] [2008] NSWCA 186.

The section was introduced to overcome the problem exemplified in *Distillers*, where an insurer, who has not repudiated a policy (but has not admitted any liability to indemnify an insured) can rely on a compromise clause. The section is designed to prevent an insurer from *fence sitting* by compelling it to make a decision to either accept or reject liability. Where the insurer does not elect within a reasonable time or rejects liability, the insured is relieved from its obligations under the compromise clause.

Conversely, it was considered in *Drayton v Martin*[549] that the section is not intended to address a case where an insurer has wrongfully repudiated a policy, as in those circumstances an insured is able to settle or compromise a claim absent an insurer's consent without adverse consequences (as in the cases *General Omnibus Company v London General Assurance Company* and *Commercial Union Insurance Company Limited v Willetts Radio*).

In the event s 41 is invoked, an insured is of course under a duty to act in good faith to an insurer, to have proper regard for its interests and to establish that any settlement effected is objectively reasonable.

[549] (1996) 67 FCR 1.

CHAPTER 16 – SUBROGATION

The doctrine of subrogation

The doctrine of subrogation refers to the entitlement of one person or entity to exercise rights and remedies held by another person or entity, against third parties in relation to a claim.[550]

In an insurance context, it is essentially the right of an insurer, once it has indemnified an insured, to exercise any rights or remedies of the insured to recover any claim payment from a culpable third party.

An insurer can therefore step into the shoes of an insured and pursue claims or other rights of that insured.

The insurer will not obtain any greater rights than the insured itself holds. An insurer may not commence subrogated proceedings in its own name.[551] Rather, any proceedings, and judgment in a subrogated action remains in the name of the insured.

Sources of the right of subrogation

The right of subrogation is invariably expressly stated in the wording of an insurance policy. However, an equitable right exists even if it is not reduced to writing in the policy.[552]

Insurers cannot pursue a claim in the name of an insured unless and until the insured has been fully indemnified under the relevant policy,[553] unless agreed otherwise. Accordingly, the doctrine of subrogation cannot be invoked by an insurer in circumstances where a decision on indemnity has been reserved.

However, many policies include an express condition permitting insurers to commence a subrogated claim in the insured's name even if negotiations about the extent of the entitlement to indemnity have not been concluded.

Subrogated rights

In *Santos*[554] it was held that an insurer who has indemnified an insured has two specific rights, being the right to:

- oblige the insured to pursue a remedy it may have against a third party for the benefit of the insurer; and
- recover from the insured any benefit received by the insured in extinction or diminution of the indemnified loss.

[550] *Meacock v Bryant & Co* [1942] 2 All ER 661.
[551] *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia)* [1989] AC 643.
[552] *Orakpo v Manson Investments Ltd* [1977] 3 All ER 1.
[553] *Santos Ltd v American Home Assurance Co* (1987) 4 ANZ Ins Cas 60-795, 74-877.
[554] Ibid 74,876.

However where losses are partially covered, the general position is that an insured is entitled to retain control of the proceedings although it will ultimately depend on the portion of loss covered.[555]

By way of example, in a case where an insurer indemnifies an insured for losses arising from that insured's breach of professional duties, an insurer will be able to seek to recover those losses from a third party who may also be responsible for causing the loss.

Similarly, if an insured were to receive a claim payment pursuant to the terms and conditions of its insurance policy as well as a subsequent contribution towards the loss from a third party, that subsequent contribution from a third party will usually be payable by the insured to the insurer because an insured should not gain a windfall by receiving the benefit of both a claim payment under a policy of insurance and damages from a culpable third party.[556]

An insurer is not however obliged to pursue those rights if it chooses not to. That is, an insurer may elect not to pursue a remedy that an insured has against a third party.

Prejudice by the insured

An insured has a general duty not to engage in conduct which would prejudice an insurer's right of subrogation.

Prejudice by an insured is often considered in the context of any settlement entered by the insured.

In *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd*,[557] Barwick J said:

> *'It is . . . settled law that an insured may not release, diminish, compromise or divert the benefit of any right to which the insurer is or will be entitled to succeed and enjoy under his right of subrogation. On occasions an attempt by the insured to do so will be ineffective against the insurer because of the knowledge of the circumstances which the person under obligation to the insured may have. On other occasions, when the insured's act has become effective as against the insurer, the insured will be liable to the insurer in damages, or possibly, on some occasions for money had and received. But such conduct on the part of the insured will not in general avoid the insurer's liability to indemnify, though in some circumstances the insurer may be entitled to set off the amount of the damages against the amount otherwise payable under the indemnity.'*

Accordingly, if an insured prejudices an insurer's right of subrogation, it may be accountable to the insurer for damages or an insurer may set off those damages against the amount to be indemnified under the policy.

It is however arguable that such a settlement would not prejudice an insurer's rights if, before indemnity is confirmed, an insured is instructed to act as a prudent uninsured and in doing so, enters into a settlement agreement.

Distribution of the proceeds of a subrogated recovery action

Section 67 of the ICA governs the priority of distribution of any funds recovered by way of subrogation, depending on whether the insurer or the insured had responsibility for the conduct (and cost) of the recovery action.

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[555] Ibid 74,877.
[556] *British Traders' Insurance Co v Monson* (1964) 111 CLR 86, 94–95.
[557] (1969) 123 CLR 228, 241.

Under s 67(2), if an amount is recovered by an insurer exercising its right of subrogation, distribution is in the following order:

- firstly, reimbursement of the insurer's actual legal costs and outlays incurred in pursuing the recovery;
- next, to the extent available, reimbursement of the insurer's indemnity payment to the insured;
- next, to the extent available, reimbursement of the insured's uninsured losses (including any policy deductible); and
- finally, any balance to the insurer.

If however the insured recovered damages from a third party s 67(3) is relevant, which effectively reverses the order of priority, as follows:

- firstly, the insured is entitled to recover the actual legal and administrative costs incurred in connection with the recovery;
- next, the insured is entitled to recover its uninsured loss (but not more);
- next, the insurer is entitled to recover the amount paid to the insured by way of indemnity; and
- finally, the insured is entitled to the remainder (if any).

Sections 67(5), 67(6) and 67(7) provide for situations where an amount is recovered by an insurer and an insured jointly.

The order of distribution outlined in s 67 of the ICA is subject to the specific terms and conditions of the relevant insurance policy and any agreement between the insurer and insured after the loss occurred.[558]

Limitations on an insurer's right of subrogation

Pursuant to the doctrine of subrogation, an insurer has all of the rights that an insured has against a third party (insofar as they are relevant to the loss). However, those rights can be constrained by the insured's relationship with the third party and the relevant insurance policy.

Contractual arrangements between an insured and third party

Contractual modifications or limitations of the insured's rights will apply equally to an insurer's right of subrogation. Accordingly, if the insured is prevented from making a claim against a third party, the insurer is similarly prevented from commencing recovery proceedings.

An insurer will also be unable to pursue a recovery action in the name of an insured where:

- the insured has not suffered any loss because it has been fully indemnified under a contract with a third party; or
- an insured's claim against a third party is out of time, either by way of contractual provision or applicable statutory limitation period. It is therefore important for insurers to consider whether any recovery action is to be pursued early in the claim for indemnity.

Waiver of subrogation

An insurance policy may include a clause to the effect that an insurer agrees not to pursue its right of subrogation against a named third party or type of party.[559] Such clauses are common in the construction context and can include a waiver of any right of subrogation against an employee, agent or contractor.

[558] ICA s 67(9).
[559] *Woodside Petroleum Development Pty Ltd v H & R–E & W Pty Ltd* (1999) 20 WAR 380.

Provisions of the *Insurance Contracts Act 1984* (Cth)

Section 65 of the ICA limits an insurer's rights of subrogation against a party whom the insured has a family or other personal relationship with.

Section 66 of ICA states that an insurer has no right of subrogation against an insured's employee provided that the conduct of the employee giving rise to the loss:

- occurred in the course of or arose out of the employment; and
- was not serious or wilful misconduct.

Section 66 may therefore defeat any purported subrogated action by an insurer against a co-insured who was also an employee.

Further s 68(1) of the ICA has the effect that where an insured has entered into an agreement with a third party that limits a right of the insured to recover damages from a person other than the insurer in respect of the loss, an insurer cannot rely on a term or condition in the policy which limits or excludes its liability because the insured has entered into such an agreement, unless the insurer clearly informed the insured in writing, before the contract of insurance was entered into, of the effect of the policy term or condition.

Section 68(2) of the ICA provides that the duty of disclosure does not require the insured to disclose the existence of a contract that limits the insured's rights, to the insurer.

Practical considerations

Recovering losses by way of subrogation is an important consideration in seeking to minimise an insurer's exposure in respect of a claim. However, prior to commencing recovery proceedings, consideration must be given to the anticipated costs of such a recovery action. A recovery action may not be viable if the costs of pursuing that recovery are disproportionate to the amount sought to be recovered.

Further, recovery actions can quite often become protracted, ultimately resulting in additional unforeseen expenses.

Recovery actions are also often important to insureds where the amount of loss indemnified under a policy may impact on future premiums paid, or where uninsured loss has been incurred. Recovery actions also become central to limiting such losses.

If a decision is made to pursue a recovery action, consideration should also be given to entering a sharing agreement between an insurer and insured. That agreement should set out:

- the strategy and method to be adopted in the recovery action;
- a formula for sharing the costs and distribution of damages recovered so as to avoid any disagreements at the conclusion of the claim; and
- a mechanism to resolve any disputes which might otherwise arise between the insurer and insured during the recovery action.

Other important matters to include in a sharing agreement include co-operation clauses and agreed channels of communication and reporting.

CHAPTER 17 – COMMON INTEREST PRIVILEGE

Legal professional privilege and waiver

Confidential communications between a client and the client's legal adviser are privileged if made for the dominant purpose of giving confidential legal advice (whether connected with litigation or not) or for use in existing or anticipated litigation.

This privilege, which is that of the client, exists at common law (and now under relevant statutes) '*to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers*'.[560]

Generally, if a document subject to legal professional privilege is given to someone else so that the content ceases to be confidential, the privilege is lost. This is because the act of giving the document to a third party is, in the particular circumstances, inconsistent with any continuing intention to maintain confidentiality,[561] and amounts to a '*waiver*' of the privilege and any associated rights.

One exception to the waiver arises where the person entitled to the privilege and the person to whom the disclosure is made have such a commonality of interest in relation to the subject matter of the privilege that sharing of the content is consistent, rather than inconsistent, with an ongoing intention to preserve confidentiality and privilege.[562]

This exception is known as *common interest privilege*.[563]

Common interest privilege is recognised both at common law and under statute,[564] and bears relevance to the sharing of information between insurers and insureds in the insurance claims context.

Establishing a common interest

The relationship of insured and insurer evolves throughout a matter. At the stage where indemnity is being considered the insured's interest is to be afforded cover while the insurer is interested in its position under the policy and whether it should extend or decline cover. In these circumstances it could not be said that the insured and insurer have a commonality of interest such to invoke the common interest privilege.

Once indemnity has been confirmed the respective interests of insurer and insured become aligned. Both parties are interested in defending the claim and therefore it follows that in sharing any confidential legal advice the parties are not intending to forfeit any legal professional privilege.

Courts have acknowledged that common interest privilege is not a '*rigidly defined concept*'[565] and therefore whether an insured and insurer will have the requisite common interest will be assessed on a case by case basis by reference to the surrounding circumstances.

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[560] *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 per Gleeson CJ, Gaudron and Gummow JJ, 64.
[561] *Mann v Carnell* (1999) 201 CLR 1.
[562] *Marshall v Prescott* [2013] NSWCA 152, [57].
[563] Michael Durrant, 'Legal professional privilege: a comment', (2006) *AMPLA Yearbook* 306, 307.
[564] *Evidence Act 1995* (Cth) s 122(5)(c).
[565] *Farrow Mortgage Services Pty Ltd v Webb* (1996) 39 NSWLR 601, 609.

The onus of establishing the privilege will generally lie with the party asserting it.[566]

In *Marshall v Prescott*,[567] the New South Wales Court of Appeal canvassed the authorities on common interest privilege and made the following observations:[568]

- Having a common solicitor is not a necessary element of common interest privilege;
- Insurers will have a common interest with their insured in litigation brought against the insured because they, as underwriters of the insured's liability, have an interest in seeing the insured mount the most effective defence; and
- Insurers have an interest even **before** they decide to accept indemnity because, upon making that decision, they become subject to steps taken earlier in the litigation.

A presently existing common interest will not be destroyed if there is potential for future divergence of interests.[569] This is significant for the insured and insurer relationship because there are a number of sources capable of causing future disputes between the two parties, such as documents coming to light that alter the indemnity position, and disputes regarding an insurer's right to reimbursement where an insured has recovered money relating to an insurance claim.

Even where there is a conflict of interests and the insured and insurer no longer enjoy common interest privilege, both parties are entitled to maintain a claim for common interest privilege in relation to documents exchanged prior to the parties' interests conflicting that meet the requirements of common interest privilege.

In *Asahi Holdings Australia Pty Ltd v Pacific Equity Partners Pty Ltd (No. 2)*,[570] the insured (via a nominee) agreed to purchase the shares in a beverage company. It was a condition of the sale that the insured obtain insurance in respect of certain warranties given by the sellers. The insured took out a warranty insurance policy which provided cover for the insured and its nominee against breaches of those warranties by the sellers. Pursuant to the policy, the insurer was liable to indemnify the insured for any loss it would have been entitled to claim against the sellers for breach of the insured warranties.

The insured later made a claim under the policy for loss caused by alleged breaches of a number of the insured warranties. It also commenced proceedings against the sellers and a number of their directors and employees, claiming they breached certain warranties and misrepresented the financial position of the company in which the shares had been purchased. The insured's solicitors had prepared a report for the insured in anticipation of the litigation, containing a number of memos which particularised the conduct alleged to have caused the Respondents to misrepresent the financial position of the company, such as inflating or overstating the company's earnings. A complete copy of the report was voluntarily provided by the insured to its insurer to support the claim made under the policy, with many (but not all) of the pages marked '*Privileged and Confidential*'.

A redacted copy of the report was also disclosed to the respondents (the parties sued by the insured) during the course of the litigated proceedings. The respondents sought disclosure of the unredacted version, however the insured resisted the request on the basis the redactions attracted legal professional privilege. The respondents asserted that the protection conferred by the privilege was lost when a copy of the full report was provided to the insurer, a third party.

[566] *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30, 44.
[567] [2013] NSWCA 152.
[568] Ibid [60].
[569] Ibid [62].
[570] [2014] 312 ALR 403.

In holding that the insured had waived privilege in the report, Bromberg J gave weight to the respondents' submission that there was *not* a commonality of interest between the insurer and the insured. Unlike many situations involving an insurer and insured, such as when an insurer assumes the conduct of litigation on behalf of an insured, the insurer's interests in this case aligned not with the insured, but rather with the respondents in disproving the allegations of misleading or deceptive conduct. Consequently, there was a divergence of interests between the insured and the insurer, and the insured's voluntary disclosure of the hitherto privileged report to a potential opponent (the insurer) was held to have been inconsistent with maintenance of the privilege.

Determining whether privilege has been waived

Marshall v Prescott provides a three step process for determining whether the legal professional privilege in a document is lost by providing it to a third party.

Step one: Is the document privileged

Common interest privilege prevents waiver of privilege that already exists in a document. Therefore, privilege must first attach to the document in question.

As noted above, legal professional privilege protects the disclosure of communications or documents between clients and their legal advisers which are confidential and are brought into existence for the dominant purpose of either:

- seeking or giving confidential legal advice (advice privilege); or
- existing or anticipated litigation (litigation privilege).

It is therefore necessary to determine whether the dominant purpose for which the document was created is one of the above categories.

Step two: Was the relationship between the parties sufficiently close that the transmission of the documents should not be held to amount to an implied waiver of the privilege

This step involves considering the relationship between the parties (that is, the client which holds the privilege and the party to whom disclosure is made or contemplated), as well as the nature and purpose of the disclosure and whether there could be held to be an objective intention to waive privilege on the part of the holder.

Where a party's interests are '*selfish*' and potentially adverse to the interest of the other party there will be no common interest privilege.[571]

Step three: Is it reasonable in the circumstances to conclude that there was an implied waiver of privilege

The role that legal professional privilege plays within the administration of justice requires that it should not be overborne lightly, and therefore the ultimate question must be whether it is reasonable in the circumstances to conclude that there was an implied waiver of privilege.

An implied waiver of privilege will be found where the act of communicating the privileged communication is '*inconsistent*' with maintaining the confidentiality that legal professional privilege protects. What constitutes '*inconsistent*' in this context will depend in part, upon the context in which the disclosure is made.[572] If no such implied waiver can be found, the court will not interfere.[573]

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[571] *Rich v Harrington* (2007) 245 ALR 106.
[572] *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, [23].
[573] *Marshall v Prescott* [2013] NSWCA 152, [64].

Where common interest privilege exists, normally all persons sharing the common interest must join in the waiver, however while waiver by one does not automatically mean all parties have waived the privilege, fairness may require this result in particular circumstances.[574]

Methods of maintaining privilege

As the court's analysis of whether privilege has been waived centres on the conduct of the parties and whether that conduct is inconsistent with maintaining privilege, parties may develop stronger grounds to rely on common interest privilege and rebut any suggestion that privilege has been waived by:

- ensuring correspondence containing legal advice does not also contain non-legal matters;
- not referring to any part of the legal advice in non-legal documents or public statements;
- not sharing legal documents with parties who do not share the requisite common interest; and
- marking documents as privileged and asserting that disclosure of the document does not purport to waive privilege and that the material is to be kept on a confidential basis.

[574] *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601.

CHAPTER 18 – THIRD PARTY BENEFICIARIES

The longstanding doctrine of privity provides that only parties to a contract are legally entitled to sue under it, otherwise enforce it, or be bound by it.[575] While there may be situations where a third party is directly or indirectly benefited or burdened by a contract as a matter of fact, as a matter of law a third party cannot enforce the contract nor be subject to liabilities imposed by the contract.[576]

This position becomes troublesome in the realm of insurance contracts where a policyholder may intend for its policy to indemnify a number of persons or entities that may not strictly speaking be a '*party*' to the policy, and may even not be known at the time of policy inception. This arises most often in the case of cover for contractors, consultants or agents of the policyholder.

Common law

The High Court in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[577] considered whether a public liability policy which defined '*the insured*' to include the company's contractors responded to a claim made against a contractor of the company who was not a contractor when the policy was issued.

Mason CJ and Wilson J in a joint judgment found '*the likelihood of some degree of reliance on the part of the third party in the case of a benefit to be provided for him under an insurance policy is so tangible that the common law rule should be shaped with that likelihood in mind.*'[578] The contractor despite not being an '*insured*' at the inception of the policy was nonetheless able to rely on the indemnities provided.

While this decision was in the specific context of a public liability policy the court acknowledged the broader application of the reasoning to other types of insurance policies.[579]

Section 48

Section 48 of the ICA abrogates the doctrine of privity in respect of contracts of insurance coming within the ambit of the Act, which includes professional indemnity policies.

The section provides that a third party beneficiary has a right to recover from the insurer in accordance with the contract, the amount of loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.[580]

The third party has in relation to the claim, the same obligations to the insurer as they would have if the third party were the insured and the third may discharge the insured's obligations in relation to the loss.[581]

An insurer may defend a claim under s 48 with the same defences it would have available if the claim was made by the insured.[582]

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[575] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 853.
[576] Lindy Willmott, *Contract Law* (Oxford University Press, 3rd ed, 2009) 409.
[577] (1988) 165 CLR 107.
[578] Ibid 123–124.
[579] Ibid 127 per Brennan J.
[580] ICA s 48(1).
[581] ICA s 48(2).
[582] ICA s 48(3).

Who is a '*third party beneficiary*'

The *Insurance Contracts Amendment Act 2013* (Cth) (**2013 Amendments**) introduced a definition of '*third party beneficiary*', being '*a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends*'.[583]

In considering whether a particular entity is a third party beneficiary, or alternatively a party to the contract, courts employ an objective analysis of what the parties should be taken to have agreed upon. It is therefore necessary to look at the construction of the contract, and most commonly (but not always), the question will be answered by the policy definition of '*the insured*' or any reference to 'the insured' contained within the policy schedule.

ABN AMRO Bank NV v Bathurst Regional Council[584] provides an example where a subsidiary of a policyholder was **not** considered a party to the contract despite being described as an '*Insured Entity*' by way of an endorsement. In coming to the conclusion that the subsidiary was a third party rather than a party to the contract, the court had regard to the fact that only the policyholder had completed a proposal form, and there was nothing to suggest it had negotiated on behalf of the subsidiary as agent.

Ultimately the question will be decided by reference to the terms of the policy in question and the surrounding circumstances. It will not necessarily follow that a party to a policy will be insured under it, and likewise, a person who is entitled to cover need not be a party to the contract.

Another mechanism that depending on the circumstances may attract the operation of s 48 is the practice of simply '*noting the interest*' of a party in the policy. A common example is a lender noting the interest of a mortgagee in its policy.[585]

Obligations of a third party beneficiary

A third party is subject to the same obligations the party would have if the third party was an insured '*in relation to their claim*'. Section 48(2)(b) of the ICA entitles the third party beneficiary to discharge the insured's obligations in relation to the loss subject of their third party claim.

Because the third party's obligations are confined to those in relation to its claim, the pre-contractual obligations of the insured (such as the duty of disclosure) do not apply.[586]

Obligations that are imposed on a third party beneficiary include those relating to subrogation and the obligation to account to the insurer for any amount of obtained by way of recovery.[587] The provisions of the ICA regarding the insurer's right to subrogation are also extended to third party beneficiaries pursuant to s 64 of the ICA.

Defences available to the insurer

Originally judicial divergence arose as to the defences an insurer was entitled to rely on in a claim by a third party beneficiary.

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[583] 2013 Amendments s 11(1).
[584] (2014) 309 ALR 445.
[585] See for example *V L Credits Pty Ltd v Switzerland General Insurance Co* [1990] VR 938.
[586] *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445.
[587] *Estate of Watson v Conolly* [2012] NSWSC 741.

One interpretation was that the insurer was entitled to defend a claim with any of the defences it would have against the insured but it would have to prove that the third party was responsible for the act or omission giving rise to the defence. In other words, the conduct of the policyholder or insured would not impede the third party's right to recovery.[588]

The competing interpretation was that the phrase '*same defences*' meant that the insurer's defences against the insured were equally applicable to the third party beneficiary's claim, and the insurer would be entitled to rely on any act or omission by the insured in defending the third party beneficiary's claim.[589]

The 2013 Amendments have now made it clear that all defences the insurer has available against the insured can be relied on against a third party beneficiary, regardless of when the conduct of the insured occurred.

It follows that all third party beneficiaries wishing to bring a s 48 claim pursuant to a contract of general insurance entered into or renewed after 28 July 2014[590] may have their claim defeated by the conduct of the insured including a breach of the insured's disclosure obligations, fraud or a breach of the policy.

On the same token however, s 54 of the ICA can be invoked by a third party to cure acts or omissions of the insured that might otherwise entitle an insurer to decline cover for the claim, in seeking to claim directly against an insurer pursuant to s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).[591]

Other provisions relating to third party beneficiaries

The recognition of third party beneficiaries as a stakeholder in contracts of insurance is evident from their express inclusion in other provisions of the ICA, including those relating to the duty of utmost good faith,[592] the requirement to obtain an insurer's consent before settling a claim,[593] and claims against a third party beneficiary who may not be found.[594]

[588] *VL Credits Pty Ltd v Switzerland General Insurance Co Ltd* [1990] VR 938.
[589] *Commonwealth Bank of Australia v Baltica Insurance Co Ltd* (1992) 28 NSWLR 579.
[590] A year after the 2013 Amendments received royal assent.
[591] *Gorczynski v W&FT Osmo Pty Ltd* (2009) 258 ALR 189.
[592] ICA s 13.
[593] ICA s 41.
[594] ICA s 51.

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