

A modern office interior with glass walls and people working. The scene is captured from a high angle, looking down a long, brightly lit corridor. The floor is made of large, light-colored tiles. On the left, there is a glass railing and a staircase. On the right, there are glass-walled offices. In the background, several people are visible working at desks. The overall atmosphere is professional and contemporary.

CLYDE & CO

# Professional Liability

Australia Update



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# Professional Indemnity in Australia

1. Market & Claims Overview
2. Professional Liability Law in Australia
3. Key Decisions



# 1. Market Overview

- a. Australian Overview
- b. Implications for PI Insurers

# Current trends in Australian PI market

## **Budget pressure driving business**

- PI market driven by internal pressure on insurers to meet budgets.
- Decreasing premiums means that more business must be written to compensate.
- Shift towards the SME market, as high-end corporate market becoming increasingly difficult to penetrate.

## **Prices forced down by competition**

- Buyer's market – premiums down 1.11% at renewal since last quarter.

## **Bonuses offered for positive claims records**

- Frequency of claims remains steady.
- Insured-friendly terms available to those with positive claims records.

# Current trend in Australian PI market – looking forward

- Market set to remain competitive.
- Rates have been on the decline for the past few years, and the market is now at saturation.
- New entrants are still replacing market drop-outs.
- Current trend in Australian PI market is anticipated high flow of Commissions of Inquiry, Royal Commissions etc (eg bushfires).

# Implications for Insurers

- Steady as she goes.
- No avalanche of claims nor radical shifts or changes in the law of liability.
- Difficult legal environment persists.

# Insurance Contracts Act 1984 (Cth)

- ss8, 52 – contracting out of ICA prohibited
- *Akai Pty Ltd v The Peoples Insurance Co Ltd* (1996) 141 ALR 374
- ss21, 28 – duty of disclosure, remedies for non-disclosure
- s40 – statutory deeming clause
- s54 – prejudice?
- ss58, 59 – expiry and cancellation
- UCTA - waiting in the wings?

## Rise in class actions

- Class actions against professional advisors, including: lawyers; accountants; liquidators; and financial advisors etc
- Policies sought to cover up to \$200 million - \$500million for class action settlements.
- Estimated settlements cost businesses \$1 billion over the past 20 years.
- *ASIC v Healey* - \$200 million payout from \$600 million PI pool.
- Anticipated rise of settlements' value by 2020
- Recent class actions in Australia:
  - Great Southern
  - Sigma Pharmaceuticals
  - Storm Financial Services
  - Centro



# Rise in ASIC instigated proceedings

- Increase in instigation of litigation.
- High profile cases
- A shark without teeth?

## 2. Professional Liability in Australia

- a. Civil Liability Legislation
- b. Consumer Legislation

## 2. Professional Liability in Australia

- **State Legislation – Civil Liability Act** – prescribes standard of care, duty etc.
  - Civil Liability legislation enacted in every state and territory in Australia.
  - Reliance is key and gives rise to third party claims from banks etc.
  - Standard of care in NSW - 50 of the *Civil Liability Act 2002* (NSW).
- **Common Law** – replaced in some regards by Civil Liability Act but still critical to interpreting the Act.

# Australian Consumer Law – Misleading & Deceptive Conduct

- **S18, Schedule 2, *Competition and Consumer Protection Act 2010* (Cth)**
- Formerly s 52 of the *Trade Practices Act 1974* (Cth)
- Equivalent versions in each state and territory in Australia

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

- The Australian Consumer Law (ACL) is uniform legislation for consumer protection, applying as a law of the Commonwealth of Australia and each of Australia's states and territories.

# Australian Consumer Law – Misleading & Deceptive Conduct

- Significantly, the consumer protection provisions of the Australian Consumer Law, including misleading and deceptive conduct, cannot be contracted out of.
- Case examples:
  - Perth mining client – relevant contract excluded claims for business interruption loss.
  - Qantas v Rolls Royce (2010)

### 3. Recent Decisions in PI

- a. ***Chubb Insurance v Glenn Roy Robinson* [2013] FCA 1420**
- b. ***Michael Kyriackou v Ace Insurance Ltd* [2013] VSCA 150**
- c. ***Australian Rail Track Corporation v QBE Insurance (Europe) Ltd* [2013] NSWCA 175**
- d. ***Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013] QCA 183**
- e. ***Austcorp Project No 20 v LM Investment Management Ltd(No 2)* [2014] FCA 44**



## *Chubb v Glenn Roy Robinson* [2013] FCA 1420

- First decision in Australia on a professional services exclusion in a D&O policy.
- Statutory declaration made by Chief Operating Officer of in support of a progress claim under a D&C contract was **not** an '*act.. in the rendering of.. professional services*' .
- Appeal heard and heard and decision pending.

# Implications for Insurers

- **If decision allowed to stand to narrowly construe the professional services exclusion in Chubb's D&O policy, the effect will be:**
  1. D&O insurance - broadening the cover; and
  2. PI - narrowing the cover (or creating considerable overlap/double insurance).

# *Michael Kyriackou v ACE Insurance Ltd [2013]*

## VSCA 150

- Mr Kyriackou had a policy of professional indemnity insurance.
- Indemnified against “*against Loss arising from any Claim in respect of civil liability for breach of a duty owed in a professional capacity ...*”
- ASIC commenced proceedings and Mr Kyriackou incurred significant legal costs defending the proceedings.
- ACE refused to indemnify Mr Kyriackou. Claimed claims by ASIC not within ambit of policy’s insuring clause.
- First instance and appeal findings.

## *Michael Kyriackou v ACE Insurance Ltd [2013]* (Cont.)

- Significantly, Kyrou AJA stated, at [141]:
  - *“in modern times, PI policies are sold to all types of businesses, including fence 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”.*

# *Michael Kyriackou v ACE Insurance Ltd [2013]* (Cont.)

## Significance of Kyriackou:

- In *GIO General Ltd v Newcastle City Council* (1996), Kirby P noted:
  - “*the term ‘professional’ ... 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*”

## *Australian Rail Track Corporation v QBE Insurance (Europe) Ltd* [2013] NSWCA 175

- Significant case for policy interpretation
- Emphasises the importance of construing policy provisions as a whole.
- Emphasises the importance of interactions between clauses and that provisions should not be considered in isolation.
- Purposive rather than literal construction of policies.



## *Bank of Queensland Ltd v Chartis Australia Insurance Ltd [2013] QCA 183*

- Insurers and insured's should construe policies in order to give the policies a businesslike meaning.
- Courts may depart from literal interpretations of clauses and read words into the policy in order to give the policy a businesslike and commercially consistent meaning.
- Consider the commercial purposes, circumstances and objectives of the clauses and policy as a whole when writing and interpreting clauses.
- Insurers must use unambiguous terms and pay careful attention to details when drafting policies.

## *Austcorp Project No 20 v LM Investment Management Ltd (No 2) [2014] FCA 44*

- Considered when a claim will constitute a ‘Claim’ under an insurance policy.
- Insured brought proceedings against third-party who asserted a set-off amount against the sum.
- Court held that the set-off did not constitute a ‘Claim’ under the policy because:
  - Did not meet definition of “Loss”;
  - Claim not ‘brought against’ insured;
  - Did not fall within definition of “Defence Costs and Expenses”

Questions/Comments?

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