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.
• 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 - $500 million 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 - 5O 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.
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.
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”.
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.
• 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.
• 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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