



MinterEllison

LAWYERS

The Eighth Professional Indemnity Forum Conference
The Dawn of a New Sunset

‘Australian Update’

Presented by Robert Clynes

Queens’ College, Cambridge

5-7 July 2004

LEGISLATIVE CHANGES

- emergence of a culture of blame in Australian society;
- increasing levels of duty imposed by Courts;
- Court-driven increases in damages;
- significant premium increases following the collapse of HIH in March 2001;
- significant premium increases driven by the global insurance response to 9/11

Changes include caps and thresholds, changes to negligence laws (foreseeability, assumption of risk, causation & contrib. neg) and capping plaintiffs' lawyers' costs

IPP INCONSISTENCIES & BETWEEN STATES/TERRITORIES

(a) GDs: 15% 'most extreme case'

ACT	NSW
\$12,000-\$20,000	15%-24%

(b) Earning capacity capped at 2 x ordinary earnings

ACT	SA
3x	Capped at \$2.2m

(c) Three yr + 12 yr long stop limitation period

ACT	NT
3 yrs + spec. period minors	remains 3 yrs

PROPORTIONATE LIABILITY

	VIC	NSW/WA
Defendant 1	25%	15%
Defendant 2	25%	15%
Defendant 3	50%	40%
Party A (not joined)	Nil	30%
TOTAL	100%	100%

COMMONWEALTH REFORMS

Section 54 Insurance Contracts Act

- late notification of claims under claims made policies
- late notification of circumstances

Commonwealth's solution

1. Abolish late notification of circs only
2. Extend for 45 days time to notify circs
3. Obligation on insurer seven days prior to lapsing to tell insured of right to notify circs

IMPACT OF LEGISLATIVE CHANGES

ACCC monitoring

Reports of July 2003 and January 2004 suggest premiums and claim costs continue to increase.

This was because claims under professional indemnity policies tend to reflect economic loss rather than personal injury...

Is this result distorted through excluding medical malpractice results?

Cause of action	10/01-09/02	10/02-09/03	10/03-04/04
Medical negligence	372	1798	19
Public liability	1032	1734	19
Slipping	254	553	4

D&O CLAIMS

Does a standard wording provide 'up front' indemnity for defence costs?

See *Silbermann v CGU* (special leave granted 17/06/2004)

The insuring promises

'The Insurer will pay on behalf of the Directors and Officers any Loss for which the Directors and Officers may not be legally indemnified by the corporation arising out of any claim by reason of any wrongful act ...

'Where the Insurer has not confirmed indemnity and elects not to take over and conduct the defence or settlement of any Claim, it may, in its discretion, pay Defence Costs as they are incurred and prior to the finalisation of the Claim ...'

SILBERMANN V CGU

The exclusion

• *This Policy does not [indemnify against] any Claim ... brought about by, contributed to by, or which involves:*

- (i) the dishonest, fraudulent or malicious act or omission or other act or omission committed with criminal intent of such director or officer ...'.*

It goes on to say:

'However, this exclusion shall only apply to the extent that the subject conduct has been established by a judgment or other final adjudication adverse to the director or officer'.

BARRISTERS' IMMUNITY

In *D'orta-Ekenaike v Victoria Legal Aid & Mclvor*, the High Court heard a special leave to appeal application on 10 June 2004. It heard the special leave application and the argument on its merits at the same time.

LIABILITY OF BUILDING PROFESSIONALS IN NEGLIGENCE FOR PURE ECONOMIC LOSS

See *Woolcock Street Investments Pty Limited v CDG*, High Court 11 April 2004

- High Court refuses to re-open *Bryan v Maloney*
- Says no dependency or reliance by Woolcock
- Suggests Woolcock could have engaged expert inspection
- Why did Woolcock not take assignment of warranties from original owner?
- No allegation or appearance of 'very significant investment'



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