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LAWYERS

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

**‘Australian Update’**

Presented by Robert Clynes

Queens’ College, Cambridge

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# 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

|                                 | <b>VIC</b>  | <b>NSW/WA</b> |
|---------------------------------|-------------|---------------|
| <b>Defendant 1</b>              | 25%         | 15%           |
| <b>Defendant 2</b>              | 25%         | 15%           |
| <b>Defendant 3</b>              | 50%         | 40%           |
| <b>Party A<br/>(not joined)</b> | Nil         | 30%           |
| <b>TOTAL</b>                    | <b>100%</b> | <b>100%</b>   |

# 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?

| <b>Cause of action</b> | <b>10/01-09/02</b> | <b>10/02-09/03</b> | <b>10/03-04/04</b> |
|------------------------|--------------------|--------------------|--------------------|
| 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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