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Australia
Trends & Developments
Michael Polorotoff, Catherine McAdam, Andrew Toogood and Daniel Coloe
Moray & Agnew

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Trends and Developments

Contributed by:
Michael Polorotoff, Catherine McAdam, Andrew Toogood and Daniel Coloe
Moray & Agnew see p.7

Australia is a federation of states and territories bound together by the Australian Constitution. It has an overarching federal system of government with its own courts, although each state and territory within the federation has its own system of government and courts.

Like most countries that formed part of the British empire, Australia's system of government is modelled on the Westminster system with a central hallmark being an independent judiciary. Australia's legal system was also inherited from common law of the United Kingdom. Insurance and reinsurance law are no different, albeit there have been statutory and regulatory modifications including the enactment of the Insurance Contracts Act 1984 (Cth) (ICA) and the Corporations Act 2001 (Cth). The ICA aims to strike a fair balance between the interests of insureds, insurers and other members of the public, and to ensure that provisions in contracts of insurance and the practices of insurers in relation to such contracts operate fairly.

Against this backdrop, the Australian insurance industry and its participants are presently grappling with numerous market, economic, legal, regulatory and environmental challenges. These include:

- the devastating bushfires in late 2019 and early 2020 as well the La Nina weather pattern;
- the advent of the global COVID-19 pandemic and the consequential economic, health and social displacement issues;
- the hardening market/capacity issues, and the effect on performance and earnings;
- the fall-out from the Royal Commissions into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC), Historical Institutional Child Sexual Abuse and the Aged Care and Disability sectors;
- the ever-increasing regulatory oversight over industry players.

This article will provide a high-level snapshot of the key issues, and likely trends and developments facing industry participants and various lines of business.

Liability, Industrial Special Risk and Property

Liability

The law relating to liability (injury and property) throughout Australia has been relatively stable since reforming legislation was introduced in the early 2000's. Such reforms essentially codified tests of causation and negligence, and to provide additional specific defences (including proportionate liability for non-injury claims). These reforms were to address an "insurance crisis" arising from steep premium increases and a perception that court judgments did not reflect public expectations.

The body of case law surrounding this state-based legislation continues to develop incrementally to provide increasing certainty to those in the industry. As there has not been a repeat of those steep premium increases or the same media criticism of court judgments, these reforms have effectively had a stabilising effect.

Liability claims

The nature of liability claims however changed with the 2017 Royal Commission report into Historical Institutional Child Sexual Abuse leading to a surge of historic abuse claims against state departments and religious bodies. While a National Redress Scheme provides for no-fault compensation, the abolition of limitation periods for such abuse claims and the ability to set-aside prior confidential settlement agreements has facilitated these challenging claims being brought.

Further, latent/exposure injury claims have not diminished despite the use of asbestos products effectively being banned approximately 40 years ago given the presence of those products from prior use (with Australia having the highest use in the world) and the emergence of fibrotic silicosis claims for workers in the artificial stone industry.

The complexity and uncertainty surrounding liability for work related accidents continues with diminishing no-fault workers compensation benefits and limitations on recovering damages from employers encouraging injured workers to pursue non-employers and attempts to maximise their potential compensation. This is further exacerbated by the increasing use of contractors or labour-hire work forces (including on mining and infrastructure projects) which effectively shifts liability to entities not directly involved in the work system or site, including by means of contractual assumption of risk. The permutations of potential outcome for these claims adds to the uncertainty for insurers.

Property

Australian property insurers continue to be affected by volatile and increasing natural risks, with bushfire, storm and flood damage claims a large feature of 2020. Prior uncertainty and inconsistency as to flood cover has largely been resolved through the use of a standard definition of the exclusion. Against the background of climate change concerns, the insurance industry continues to call for improved regulation and action to avoid or mitigate the impact of these natural risks as a more economic approach than increased premiums.

The industry's exposure to COVID-19 business interruption claims has increased following an industry-initiated test case seeking clarification of the effectiveness of standard pandemic exclusions in business and ISR policies which referenced the repealed Quarantine Act, rather than the current Biosecurity Act. The industry was disappointed when it was unanimously held in November 2020 that reference to the repealed Act was not sufficient to enliven the exclusion, despite the apparent intention of this exclusion to exclude declared pandemics. The judgment resulted in market announcements and revised provisioning by a number of Australian insurers, and for one insurer a capital raising of almost AUS1 billion (USD700m).

An appeal to the High Court of Australia has been announced. However, given business insurance cover in Australia is generally triggered by property damage or prevention of access to property, there remains a number of hurdles to be addressed before cover would be available to most businesses. A significant issue is likely to be the cause of any business interruption loss and the industry will no doubt heed the UK High Court's rejection of the approach in Orient Express Hotels which diminished an insured's rights to cover.

Recent and current concerns

Combustible cladding claims have been emerging over the past three years, with the building owners and the construction and insurance sectors grappling with the unexpected cost of replacing cladding. It remains a significant legacy exposure for builders and insurers. Continuing concerns with the performance of engineers and builders, and challenges with legal recourse against them for defects, led to the introduction in NSW of legislation to impose (if not, confirm) a duty of care on builders and designers with a ten-year retrospective limitation period. The object is to improve building standards or otherwise hold participants responsible, but an incidental effect is increased exposure of insurers for building defect claims. This reform also has significant implications for construction professionals (including architects and building surveyors) and their PI insurers, discussed below.

The insurance industry continues to aspire to hold itself to high standards and meeting community expectations through its own Code of Practice, for which a revised version commences in January 2021. That revised Code partly arises out of issues identified by the FSRC but also includes standards for customers affected by domestic violence or financial hardship. New legislation has also been earmarked, which will deem "claims handling" to be a financial service within the meaning of the Corporations Act, which will impose additional compliance and regulatory burdens on insurers across many lines of business.

Life Insurance and Superannuation

Design and Distribution Obligations

From 5 October 2021, distributors and issuers of most financial products will have to comply with Design and Distribution Obligations (DDO) to ensure that retail product distribution is consistent with consumer needs, pursuant to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth). The legislation is similar to recently imposed UK legislation.

Issuers of financial products must develop a Target Market Determination (TMD) for products, which identifies a target market for the product, being consumers for whom the product is suitable. Distributors must ensure that distribution is consistent with the TMD.

Financial products cannot be distributed until a TMD has been made. Issuers must review the TMD to ensure it remains appropriate and notify the Australian Securities and Investment Commission of any significant dealings in a product which are not consistent with the product's TMD.

The DDO does not apply to default superannuation, ordinary shares in companies and margin lending schemes.

Removal of default "opt in" insurance cover for the under 25s

In Australia, minimum levels of default Death and Total and Permanent Disability (TPD) cover are provided alongside employer funded compulsory superannuation. This insurance is provided on a default basis, namely an "opt out" basis. However, the premiums are deducted from superannuation contributions. For members with low superannuation account balances, typically members under 25 years of age, the effect of this can significantly erode their superannuation balances.

To address this issue, the scheme for the provision of insurance was changed in 2019 following the enactment of the Treasury Laws Amendment (Putting Members' Interests First) Act 2019. This removed default Death and TPD cover for members aged under 25, with superannuation balances of less than AUD6,000 or with inactive accounts. The long-term effects of this change are expected to be significant including more people being underinsured and increasing premiums for remaining members

given the younger members typically subsidise the premiums of older members.

Changes to non-disclosure and avoidance rights

With life insurance contracts entered into (or varied, but only to the extent of the variation) on or after 1 January 2021 (or the date of Royal Assent, if later), the duty of disclosure in respect of life insurance contracts will be changing in response to one of the recommendations of the FSRC. That recommendation was that the duty of disclosure should be replaced with the duty to take reasonable care not to make a misrepresentation. Prior to this amendment taking place, the test has been what the insured knew to be relevant or what "a reasonable person in the circumstances could be expected to know to be a matter so relevant".

A duty to take reasonable care not to make a misrepresentation to an insurer places the burden on an insurer to elicit the information that it needs in order to assess whether it will insure a risk and at what price. The duty does not require an individual to surmise, or guess, what information might be important to an insurer. In reality, this will mean that specific questions need to be asked in application forms. "Catch all" type questions can no longer be used.

Another change arising out of the FSRC relates to insurers' avoidance rights for breach of the duty of disclosure. Specifically, Section 29(3) of the ICA will be amended so that an insurer may only avoid a contract of life insurance on the basis of an innocent breach of the duty of disclosure, if it can show that it would not have entered into a contract on any terms. In reality, this is simply a reversion to the requirements prior to the 2012 changes to the ICA. This change will apply to contracts entered into (or varied, but only to the extent of the variation) on or after 5 October 2021, unless the insurer opts in earlier.

Pandemic exclusions in policies and COVID

The life insurance industry has faced recent scrutiny over its response to COVID-19, after one insurer announced it had added an exclusion clause in respect of claims resulting from COVID-19 to a small number of new policies and that the same exclusion could be applied to more customers who had recently travelled abroad, were showing symptoms of COVID-19, or were in high risk groups. That insurer subsequently stated that such exclusion would not apply to new customers including doctors, nurses and other frontline health workers.

Since then, the Australian insurance industry has attempted to reassure customers that COVID-19 would be of little impact to their cover, with the Financial Services Council (the representative of Australia's large insurance companies) announcing that there would be no restrictions in coverage of medical workers who purchased life insurance during the pandemic.

Unfair Contract Terms

After much lobbying, the laws governing Unfair Contract Terms (UCT) in Australia will now extend to insurance contracts, including life insurance contracts, entered into on or after 5 April 2021 (or renewed or varied after that date, but only to the extent of the variation). The move has been in response to the FSRC. Insurers have previously argued that insurance contracts are a different form of contract to the typical contracts subject to the UCT regime and that, unlike those typical contracts, insurers are already subject to a duty of good faith which would arguably overlap with the UCT regime.

From 5 April 2021, however, the central elements of the existing UCT regime will apply to insurance contracts where:

- at least one party to the contract is a consumer or a small business; and
- the contract is a standard form contract.

An insurance contract will be a standard form contract even if a consumer can choose between several options, such as levels of cover, provided the consumer does not have the ability to negotiate the underlying terms and conditions. It will, therefore, generally apply to retail life insurance contracts and direct life insurance contracts but it is expected that group insurance contracts should be exempt as they are negotiated and owned by a superannuation trustee.

Although there is an exception to the UCT regime for the main subject matter of a contract, this has been defined narrowly as what is being insured – that is the insured person and the sum insured, such that nearly all terms of an insurance contract will be subject to the UCT regime. This will create uncertainty in the industry for some time.

Payment of Job Keeper and offset of Income Protection Benefits

In response to the economic impacts of COVID-19, the Australian Government introduced the Job Keeper Scheme in March 2020. The scheme supports Australian businesses significantly affected by COVID-19 to help keep people in jobs. The government subsidises salaries for businesses who suffer a significant downturn due to COVID-19 with the aim of permitting those businesses retain their staff. The scheme runs until March 2021 subject to any further extensions.

The issue for insurers is whether the Job Keeper payments can be offset from Income Protection Benefits, assuming the terms of the offset clause permit that. However, even where it is permissible to offset the payments, community sentiment is that insurers should not profit from the scheme.

The alternate arguments as to whether Job Keeper should be offset are:

- the payments were made by the government to keep people employed and protect the economy, not for insurers to profit by reducing the money they pay out on claims; and
- if Job Keeper payments are not offset, some claimants would receive a windfall, as they recover their full entitlement to Income Protection Benefits, and in addition to that, Job Keeper.

Anecdotal evidence suggests that insurers are approaching this issue on a case by case basis, with some insurers offsetting the Job Keeper payment where the claimant is receiving a windfall, but not otherwise.

Directors and Officers, Professional Indemnity and Financial Institutions

There has been significant amounts of litigation and regulatory investigations over the past few years. This is very likely to continue over the coming years for various reasons.

Australia's friendly class action regime. Specifically, the lucrative profits to be earned by litigation funders and the relatively low barriers to entry for such funders. This has been coupled with more and more opportunistic law firms willing to investigate and pursue class actions, and generating significant fees in the process.

The fallout from the FSRC. The Royal Commissioner has made several recommendations for reform including treating claims handling as a financial service. Otherwise, the FSRC has proved to be a fertile ground for plaintiff law firms, litigation funders, the corporate regulator (the Australian Securities and Investments Commission (ASIC)) and the prudential regulator (the Australian Prudential Regulation Authority). One recent example included the Federal Court of Australia declaring that a building and contents insurer breached its utmost duty of good faith by failing to handle and finalise a policyholder's claim in an expeditious manner. Such claims handling issues might lead to further referrals for declaratory relief and insurers reviewing their claim procedures.

In the regulatory context, ASIC has adopted a "Why not litigate?" mantra. More and more frequently, investigations and proceedings against companies and their officers seeking pecuniary penalties, disqualification orders and related orders have been brought, especially against the large Australian banks and other financial service providers. One recent example includes ASIC bringing a civil penalty proceeding against a financial services provider for failing to have adequate cybersecurity systems in place, which is understood to be the first kind of complaint. It is also common for plaintiffs and funders to rely on any findings or agreed facts in third-party claims that are brought in tandem with regulatory actions or subsequently.

In the D&O (Side A/B/C) context, this has seen much activity and attention especially the class action risk. There are no signs of this slowing.

Summary of headline points

- Competing class actions continue to be a vexed issue. This is where different plaintiff law firms and litigation funders bring multiple claims against the same defendant in respect of the same, or substantially the same, subject matter. There was a developing practice for courts to have a proverbial "beauty parade" whereby the plaintiff law firms and funders were given the opportunity to convince the judge to allow their class action to proceed over the other claim(s) on the basis that their model represented the best value/return for group members. However, at the time of writing this article, the High Court of Australia has reserved judgment in the Wigmans v AMP case on whether Courts have the power to hear and determine such carriage motions.
- The Federal Government recently announced a licensing regime for litigation funders that was fiercely resisted. This includes a requirement for litigation funders to obtain an Australian Financial Services Licence under the Corporations Act 2001 (Cth) for funded representative proceedings. It is also likely that class actions will have to operate as managed investment schemes. This is all against the backdrop of various law reform reports and a Federal Parliamentary Inquiry into Litigation Funding and regulation of the class action industry.
- The introduction of contingency fees in the State of Victoria entitling plaintiff law firms to claim a percentage of the amount recovered for the costs, subject to certain provisos. It is likely that plaintiff law firms will engage in forum shopping and it remains to be seen whether the other jurisdictions introduce similar legislation.
- In late 2019, the High Court of Australia declared that Section 33ZF of the Federal Court of Australia Act 1976 (Cth) and Section 183 of the Civil Procedure Act 2005 (NSW) do not empower the Federal Court of Australia and the Supreme Court of New South Wales respectively to make common fund orders in representative proceedings at a relatively early stage. Such orders entitled litigation funders to know in advance of trial or settlement that they would receive a fixed percentage of any monies ultimately recovered in the proceedings, irrespective of whether all group members entered into funding agreements. Common fund orders were frequently made at a relatively early stage of representative proceedings. This decision has led to considerable uncertainty as to whether common fund orders can be made at any stage of the proceedings and this

uncertainty will continue to remain pending further judicial or legislative intervention.
- The Side C insurance has been targeted by a proliferation of shareholder class actions including the general acceptance of market-based causation theory for such claims. While the vast majority of these claims settle before judgment, there have been two recent victories for the defendants in the Myer litigation and the Worley Parsons litigation (subject to an appeal), which offer some encouragement to insureds and their insurers. This also follows two recent interlocutory judgments where courts have dismissed the plaintiffs' applications seeking disclosure of the defendant's insurance policies, which is a welcome development. But this has not always been uniform.
- There is a developing trend of claimants bringing claims targeting the Limits of D&O and prospectus liability insurance policies as part of the same action with a view to maximising returns.
- Following the onset of the COVID-19 pandemic, the Federal Government passed emergency relief providing certain relief to public companies and their officers from the continuous disclosure regime. Directors and officers have also been granted temporary relief from insolvent trading laws from March 2020. Otherwise, COVID-19 is likely to see a spike in claims for insider trading with market turmoil, for insolvent trading and financial mismanagement, for EPL/workplace safety claims, for unpaid tax liabilities and other debts, and possibly for cyber related exposures.
- Professionals are not immune from class action risk, particularly auditors and lawyers have been and will remain potential targets.

Professional indemnity

In the professional indemnity space, non-compliant cladding looms large and several claims have been brought against construction professionals including the Lacrosse decision. This trend is expected to continue as more properties undergo remedial works crystallising losses for owners and tenants.

Also, the COVID-19 pandemic has resulted in extreme share market volatility in recent months. As a consequence, financial planners, investment managers and superannuation trustees are likely to come under the spotlight from aggrieved clients and beneficiaries, which have suffered significant losses on their investment portfolios and superannuation balances. This represents fertile ground for PI claims against wealth professionals. Auditors and accountants are likely to face increased scrutiny. Specifically, it remains to be seen whether auditors will be prepared to sign off on unqualified audit statements and questions about going concern considerations, especially once the government relief and assistance measures wind down and cease.

Also expected is ever more social engineering fraud and other cyberfraud claims being brought against professionals, including those who hold funds on trust on behalf of their clients.

Marine Law

Marine law in Australia has remained relatively settled for the last 30 years. Marine insurance in Australia is governed by the Marine Insurance Act 1909 (Cth) (MIA). This was based on the relevant UK law in place at the time, although the ICA excludes pleasure craft from the operation of the MIA. In 2015, the UK significantly reformed its Marine Insurance Act. While the Maritime Law Association of Australia and New Zealand has proposed that the MIA be amended to ensure that Australia's marine law is consistent with international law, there is no current legislative proposal to amend the MIA, but it may be the case of watch this space in the next few years.

Otherwise, the Admiralty Act 1988 extended the admiralty jurisdiction from the Federal Courts to the State and Territory Supreme Courts. The Carriage of Goods By Sea Act 1991 (COGSA) gives effect to a modified version of the Hague Visby Rules. Importantly, Section 11 of the COGSA sets out that:

- parties to a sea carriage document relating to the carriage of goods from Australia to a place outside Australia, or to a non-negotiable document, are taken to have intended to contract according to the laws in force at the place of shipment; and
- an agreement which purports to contradict that position, or preclude or limit the jurisdiction of a court of Australia or of a state or territory in respect of a sea carriage document or a non-negotiable document, or which precludes or limits the jurisdiction of an Australian court in respect of a sea carriage document or a non-negotiable document relating to the carriage of goods from any place outside of Australia to any place in Australia, is of no effect.

COVID-19 has had a huge effect on all aspects of marine life, and it is anticipated it will have a significant effect on marine law in the next few years. The cruise industry has been significantly affected with most cruise liners being docked around the world. Container ships have been delayed and containers being transported for shipment have been delayed resulting in businesses around the world suffering losses.

Clarkson Research reports that the global effects of COVID-19 have caused in a decline in world seaborne trade of around 1 billion tonnes. It is anticipated that significant litigation will arise in relation to supply chain disruption causing spoiling and loss of cargo and subsequent lost profits.

Moray & Agnew is a well-regarded specialist insurance law firm. The firm's insurance practice includes 88 partners and 191 other lawyers working exclusively in insurance law and related areas, representing all the major Australian and international insurance participants, including local carriers, Lloyd's of London, brokers, reinsurers, claims managers, all tiers of Australian government and insureds. Moray & Agnew's specialty focus is acting in defence of third-party claims, pursuing recoveries and advising on complex coverage issues in a cost effective and pragmatic manner. The firm's extensive "real world" experience means it is one of few firms with visibility of the full range of risk management, regulatory and legal issues confronting industry participants today.

Authors

Michael Polorotoff is an experienced and accomplished insurance law practitioner. He specialises in defending professionals across a broad range of industry sectors and advising local and international insurers and reinsurers on complex coverage issues, especially in the D&O and FI areas. He is well regarded for his tenacious, yet considered and strategic, approach in advancing his client's interests. Michael has defended a wide variety of professionals, including financial advisers and planners, investment managers, superannuation trustees, accountants, auditors, real estate agents, mortgage brokers, and construction professionals. The latter has included architects, construction managers and surveyors/certifiers in combustible cladding claims.

Catherine McAdam leads the Sydney life insurance practice. Her expertise extends to all aspects of life insurance, including conducting litigation, advising regarding remedies available under relevant legislation and life insurance advisory work. A testament to Catherine's expertise is the longevity of her client relationships. Clients value Catherine's commercial and pragmatic advice in this often-sensitive area. She is highly aware that the financial services industry faces increasing regulation and scrutiny, and that litigation has potential reputational and financial costs to insurers. Catherine conducts disputes with an eye to achieving the best possible outcome while enhancing the reputation of her clients.

Andrew Toogood is an accredited specialist in commercial litigation with over 20 years' experience representing and defending insurers' interests in property liability, property damage and recoveries claims, including considerable success in obtaining excellent recovery outcomes in large-scale property damage cases. His experience with property damage claims, fraudulent claims and recoveries covers a wide range of situations and circumstances, including site contamination, train derailments, major loss fires (over USD30 million), electrical and mechanical malfunctions, floods and water ingress, oil spills, defective building products and works. In his wider practice, Andrew has successfully handled product and public liability claims, construction disputes, commercial litigation, dust disease and toxic tort claims and seafarers' claims.

Daniel Coloe has extensive experience acting in all public liability claims, including personal injury, property damage and product liability claims. In addition, he regularly acts in complex and technical recovery proceedings, predominantly in the marine insurance sphere. Daniel has extensive experience in marine recovery claims in all state and federal jurisdictions, including recently resolving recovery claims in favour of clients in the Federal, Federal Magistrate and County Courts. Daniel is currently the preferred lawyer to handle nearly all marine recovery proceedings on behalf of two major global insurers.

Moray & Agnew

Level 24
233 Castlereagh Street
Sydney
NSW 2000
Australia

Tel: +61 2 9232 2255
Fax: +61 2 9232 1004
Email: info@moray.com.au
Web: www.moray.com.au