THE INSURANCE AND REINSURANCE LAW REVIEW

EIGHTH EDITION

Editor
Peter Rogan

THE LAWREVIEWS

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PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Although 2019 looks likely to be benign in terms of insured losses from natural catastrophes, there is continuing concern that climate change will see a long-term increase in the number and severity of such losses; the scope of the Australian wildfires at the end of the year may be a portent of things to come. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation, for example, to aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

Aggregation may also be an area of uncertainty in relation to the treatment of catastrophic losses such as the coronavirus outbreak originating in China but with worldwide consequences.

The year 2019 saw no respite in the number or scale of cyber events, including the huge data breaches at Facebook and at other global organisations such as Microsoft, Capital One, First American Corporation and government organisations in countries ranging from Bulgaria to Singapore. Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues, and new points for the courts and arbitral tribunals to consider. Most recently the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2020 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence.

I hope that you find this eighth edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand today's legal challenges, and I would like once again to thank all the contributors.

Peter Rogan
Ince
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Chapter 5

AUSTRALIA

David Gerber and Craig Hine[1]

I INTRODUCTION

Australia has a developed insurance market that is effectively divided between registered life insurance and reinsurance companies, authorised general insurance and reinsurance companies (including Lloyd's underwriters), registered health insurers and insurance intermediaries.

At the end of September 2019, there were 28 registered life companies (including both direct insurers and reinsurers) in Australia with combined assets of A$202.9 billion,[2] and 97 authorised general insurers (including both direct insurers and reinsurers, but not including Lloyd's Australian operations) with combined assets of A$128.3 billion.[3] There are currently 38 registered health insurers in Australia.[4]

The Australian insurance market is highly regulated by statutes, delegated legislation, guidelines and codes.

II REGULATION

i The insurance regulator

The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the financial services industry. It is also responsible for administering the Financial Claims Scheme in the Insurance Act 1973 (the Insurance Act).[5]

The Australian Securities and Investments Commission (ASIC) is the corporate regulator. It monitors and promotes market integrity in the financial system. The ASIC also has functions and powers related to consumer protection that are conferred on it by or under the Corporations Act 2001 (the Corporations Act), the Australian Securities and Investments Commission Act 2001, the Insurance Contracts Act 1984 (the Insurance Contracts Act) and the Life Insurance Act 1995 (the Life Insurance Act).[6]

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1 David Gerber is a partner and Craig Hine is a special counsel at Clayton Utz.

2 See https://www.apra.gov.au/sites/default/files/Quarterly%20Life%20Insurance%20Performance%20Statistics%20September%202019.xlsx.

3 See https://www.apra.gov.au/sites/default/files/Quarterly%20General%20Insurance%20Performance%20Statistics%20September%202019.xlsx.

4 See https://www.privatehealth.gov.au/dynamic/insurer.

5 Australian Prudential Regulation Authority Act 1998 (Cth), Section 8.

6 Australian Securities and Investments Commission Act 2001 (Cth), Section 12A.

ii Regulation and authorisation of general insurers and life insurers

The Insurance Act regulates general insurance business through a system of authorisation. Subject to a few exceptions, it is an offence for a person or body corporate (other than a Lloyd's underwriter) to carry on 'insurance business' if the person or body corporate is not an authorised general insurer.[7]

A body corporate may apply in writing to the APRA for authorisation to carry on insurance business. Lloyd's is specifically authorised to carry on insurance business under, and to the extent specified in, Section 93 of the Insurance Act. General insurers authorised to conduct insurance business must comply with the Insurance Act.

The Life Insurance Act regulates life insurance business through a system of registration. A person other than a registered life company must not issue a life policy (which is a specified type of contract of insurance relating to life insurance) or undertake liability under such a policy.

A body corporate may apply in writing to the APRA for registration to carry on life insurance business. Companies registered under the Life Insurance Act must comply with that Act.

Both general insurers and life insurers are subject to prudential supervision by the APRA and must comply with applicable prudential standards. The APRA sets prudential standards that deal with matters such as minimum capital requirements, reinsurance management, risk management, outsourcing and governance.[8]

The Insurance Contracts Act regulates some, but not all, contracts of insurance and proposed contracts of insurance in respect of both general and life insurance.[9]

The Corporations Act regulates the sale of certain general and life insurance products by imposing uniform licensing, disclosure and conduct requirements. Those requirements are found in Chapter 7 of the Corporations Act and associated regulations. Every person who carries on a financial services business, which includes the business of insurance, must hold an Australian financial services licence, be an authorised representative of an Australian financial services licensee or fall within an exemption from the requirement to be licensed.

There is other legislation that applies more specifically to certain types of insurance, such as the Marine Insurance Act 1909, which regulates marine insurance.

iii Regulation and authorisation of health insurers

There is a substantial regulatory distinction between health insurance on the one hand, and life and general insurance on the other. However, health insurers are also subject to prudential supervision by the APRA.

The Private Health Insurance Act 2007 and Private Health Insurance (Prudential Supervision) Act 2015 regulate private health insurance business. A body corporate may apply to the APRA for registration as a private health insurer.[10] The private health insurance regime

7 Insurance Act, Sections 9 and 10.

8 See Section 32 of the Insurance Act and Section 230A of the Life Insurance Act.

9 See Section 9 of the Insurance Contracts Act, which excludes several types of contracts of insurance, including contracts of reinsurance.

10 Private Health Insurance (Prudential Supervision) Act 2015 (Cth), Section 12.

sits alongside and is closely linked to the government-funded Medicare scheme. Medicare is a Commonwealth scheme administered by the Department of Health in accordance with the National Health Act 1953.

iv Position of non-admitted insurers

General insurance

Foreign general insurers and reinsurers are subject to Australian licensing and regulatory requirements by virtue of Section 10(1) of the Insurance Act. However, there are some exemptions to the obligation to be authorised.

Generally speaking, an entity is prohibited from conducting insurance business in Australia unless it is authorised. Under the Insurance Act, 'carrying on insurance business in Australia' includes the insurance business of an insurer carrying on business outside Australia through an agent or broker in Australia, except where the insurance business of the insurer is solely a business of reinsurance.[11]

There are exemptions from the need to be authorised for certain types of insurance business. Part 2 of the Insurance Regulations 2002 specifies a number of types of insurance contracts that do not constitute 'insurance business' where the insurer is a non-admitted insurer. Those types of insurance contracts include:

a contracts for which the policyholder is a 'high-value insured' (as defined by the regulations);

b contracts for specified atypical risks;

c contracts for other risks that cannot reasonably be placed in Australia; and

d contracts required to be issued by an insurer, or a kind of insurer, under a law of a foreign country where they are authorised or permitted to do so.

Life insurance

Foreign life insurers and reinsurers may operate in Australia by establishing a locally incorporated subsidiary to carry on life insurance business in Australia. Alternatively, they may, if they are from a jurisdiction specified in the Life Insurance Regulations 1995, seek to operate in Australia through a branch as an 'eligible foreign life insurance company'. In either case, there are a number of different prudential and other requirements that the foreign life insurer will need to satisfy.

v Position of brokers

Brokers are regulated under Chapter 7 of the Corporations Act to the extent that they provide a financial service. Brokers usually provide the financial services of dealing in a financial product (which includes a contract of insurance) and providing financial product advice. However, a broker may also provide other types of financial services. Brokers that carry on a financial services business must hold an Australian financial services licence, unless they fall within a relevant exemption.

Reinsurance brokers usually do not need to hold an Australian financial services licence because reinsurance does not constitute a financial product under the Corporations Act.

11 Insurance Act, Sections 3(6) and 3(6A).

vi Regulation of individuals employed by insurers

Individuals employed by an insurer that holds an Australian financial services licence are exempt from the requirement to be licensed pursuant to Section 911A(2) of the Corporations Act.

vii Compulsory insurance

There is some insurance that is compulsory for persons or entities based on their circumstances. For example, employers who meet the relevant threshold in a state or territory are required by the legislation in that jurisdiction to hold workers' compensation insurance that meets certain minimum requirements. Motorists are required to purchase compulsory third-party personal injury insurance in order to be able to register a motor vehicle.

viii Compensation and dispute resolution regimes

The APRA administers the Financial Claims Scheme, the purpose of which is to protect policyholders of general insurance companies from potential loss owing to failure of the insurer. The scheme is structured so that an insurance claimant becomes entitled to be paid by the APRA in place of the insurer if the insurer is insolvent. This entitlement is subject to the rules in the Insurance Act and the regulations as to eligibility. The scheme also provides for a month of continued policy coverage to give policyholders time to find alternative insurance cover.

The Australian Financial Complaints Authority (AFCA) is a dispute resolution body established by legislation, overseen by the ASIC, and formed on 1 November 2018 by the amalgamation of the Financial Ombudsman Service, the Superannuation Complaints Tribunal, and the Credit and Investment Ombudsman. The AFCA resolves disputes between its members, which are financial services providers across the spectrum of the financial services industry, and consumers. Policyholders and other insurance consumers can refer disputes related to certain life or general insurance contracts, including complaints related to life insurance acquired through superannuation, to the AFCA. The AFCA has jurisdiction to resolve insurance disputes involving prescribed maximum amounts, agreed by the insurance industry with the approval of the ASIC. For the general insurance industry, the AFCA administers and monitors compliance with the General Insurance Code of Practice 2014 (the General Insurance Code), which is applicable to general insurers writing certain domestic and personal classes of insurance who are signatories to the General Insurance Code.

ix Other notable regulated aspects of the industry

The general and life insurance legislation deals with portfolio transfers between Australian insurers. Under the Insurance Act, a general insurer may not transfer its rights and liabilities under policies to another Australian regulated insurer, except under a scheme confirmed by the Federal Court of Australia.[12] Similarly, under the Life Insurance Act, a life company may not transfer to, or amalgamate with, another life company its life insurance business, except under a scheme confirmed by the Federal Court of Australia.[13]

For both general insurers and life insurers, acquisitions of 15 per cent or more of an insurer's book of the assets of the company are regulated by the Insurance Acquisitions and Takeovers Act 1991 and require approval by the APRA.

12 Insurance Act, Division 3A.

13 Life Insurance Act, Section 190.

There are also regulations that affect the acquisition of an Australian insurance company more generally. Such acquisitions must be in accordance with provisions of various pieces of legislation, including the Financial Sector (Shareholdings) Act 1998, the Foreign Acquisition and Takeovers Act 1975 and, if applicable, the Insurance Acquisitions and Takeovers Act 1991.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Insurance and reinsurance law in Australia derives from the general law of contract and common law insurance principles, many of which originated in jurisprudence from the United Kingdom. These principles are modified to some extent by the Insurance Contracts Act and other legislation, but only in respect of insurance contracts to which the legislation applies.

ii Making the contract

Essential ingredients of an insurance contract

The characteristics of a contract of insurance are not defined in statute. There are a number of judicial pronouncements that have identified several characteristics that ought to be present for an agreement to be considered one of 'insurance'. The essential ingredients of an insurance contract are as follows:

a the insured must have a contractual right to be indemnified;[14]

b the insurer must be legally obliged to pay money (or its equivalent) to the insured in the event of a specified event occurring;[15]

c it must be uncertain whether the specified event will occur, or the time at which it will occur;[16] and

d the contract must be for some consideration: usually, but not necessarily, periodical payments called premiums.[17]

Traditionally, it was a requirement of insurance that the insured have a legal or equitable interest in the subject of the insurance. However, this requirement has essentially been removed in relation to most contracts of general and life insurance by the Insurance Contracts Act.[18]

The principles governing the formation of an insurance contract are essentially the same as the principles that govern the formation of ordinary contracts. However, the principles are modified by statute in some cases. For example, for contracts to which the Insurance Contracts Act applies, the insurer must supply a variety of statutory notices to the insured pursuant to Sections 22 and 37 of the Insurance Contracts Act.

14 See, for example, *Department of Trade and Industry v. St Christopher Motorists Association Ltd* [1974] 1 WLR 99, 102 and 103; *Medical Defence Union v. Department of Trade* [1979] 2 All ER 421; *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) (the 'Good Luck')* [1988] 1 Lloyd's Rep 514, 545. As to the extension to a statutory right to be indemnified, see *R v. Cohen: Ex parte Motor Accidents Insurance Board* (1979) 27 ALR 263.

15 *Medical Defence Union Ltd v. Department of Trade* [1979] 2 All ER 421, 429.

16 *Prudential Insurance Co v. Inland Revenue Commissioners* (1904) 2 KB 658, 663.

17 ibid.

18 Insurance Contracts Act, Sections 16 to 18.

The Insurance Contracts Act prescribes terms and conditions that certain consumer contracts must provide, unless the insurer modifies the statutory standard cover in accordance with the legislation.

Utmost good faith, disclosure and representations

There is a duty of utmost good faith in respect of both contracts of insurance and contracts of reinsurance. For contracts of insurance that are subject to the Insurance Contracts Act, there is also a duty implied by statute into those contracts of insurance under Section 13(1) of the Insurance Contracts Act. The duty under the Insurance Contracts Act is described as a duty requiring each party to act towards the other party, in respect of any matter arising under or in relation to the contract of insurance, with the utmost good faith.

There is also a duty of disclosure. At common law, this duty requires the insured to reveal all material facts of which it is aware in the negotiations leading up to the formation or renewal of the contract.[19] The duty of disclosure ends once the contract is concluded, unless the parties specifically agree otherwise. Under the Insurance Contracts Act, the insured must disclose matters it knows to be relevant to the decision of the insurer (or which a reasonable person in the circumstances could be expected to know to be relevant) whether to accept the risk and, if so, on what terms.[20]

The common law regarding misrepresentations is impacted by the Insurance Contracts Act. Misrepresentations are treated differently depending on whether they are fraudulent or innocent. A fraudulent misrepresentation is a false representation, made knowingly or recklessly, without regard for its truth or falsity. The legislation restricts a general insurer's right to avoid a contract in the circumstances of an innocent misrepresentation by an insured.[21] The Insurance Contracts Act also modifies the common law rights of life insurers in relation to misrepresentations, non-disclosures[22] and misstatements of age.[23] A court may disregard avoidance in certain circumstances.[24]

Recording the contract

Contracts of insurance and reinsurance are usually evidenced by a written policy. For contracts of insurance to which the Insurance Contracts Act applies, an insurer is required to give to the insured a statement in writing that sets out all the provisions of the contract upon written request by the insured.[25] Prudential standards issued by the APRA regulate the documenting of contracts of reinsurance.

iii Interpreting the contract

General rules of interpretation

The ordinary rules applying to the interpretation of commercial contracts in general apply equally to insurance contracts.[26] The ordinary rules include that:

19 *Carter v. Boehm* (1766) 97 ER 1162.
20 Insurance Contracts Act, Section 21.
21 Insurance Contracts Act, Section 28(3).
22 Insurance Contracts Act, Section 29.
23 Insurance Contracts Act, Section 30.
24 Insurance Contracts Act, Section 31.
25 Insurance Contracts Act, Section 74.
26 *Australian Casualty Co Ltd v. Federico* (1986) 160 CLR 513, [6] (Chief Justice Gibbs).

a as a commercial contract, an insurance policy will be given a 'business-like' interpretation[27] – words and phrases are to be given their ordinary and natural meaning[28] unless they have a technical meaning or the sense in which they are used suggests that such a meaning is inappropriate;

b the contract is read as a whole, taking into account the text, context in which words appear and the purpose of the policy's provisions, which, if appropriate to consider, may include relevant surrounding circumstances;[29]

c the main object or commercial purpose of the contract is to be taken into account;[30] and

d any ambiguity is to be resolved against the party who drafted the contract (the *contra proferentem* rule).[31]

Another rule relevant to the interpretation of insurance contracts is the parol evidence rule. This dictates that evidence of a party's intention extrinsic to the written document should not be considered to explain or vary the written terms within it.[32] The rule is subject to a number of exceptions. For example, extrinsic evidence may be considered to resolve inherent ambiguity.[33] Extrinsic evidence may also be adduced to prove that a policy does not express what was clearly agreed by the parties to it[34] or that there is a collateral contract that contains a separate undertaking.[35]

Types of terms in insurance contracts

The terms 'condition' and 'warranty' can have different meanings in insurance law than in general contract law. They can both refer to clauses for which the insurer may repudiate the contract for breach. Whether a term is in fact a condition or warranty is a question of construction. The use of the word 'condition' or 'warranty' will not be conclusive.[36] In construing the contract, the courts will seek to ascertain the intention of the parties.

The effect of breaching a condition or warranty may be impacted by Section 54 of the Insurance Contracts Act. In summary, Section 54 restricts an insurer's ability to refuse to pay a claim, in whole or in part, by reason of a post-contractual act of the insured or some other person. Section 54 provides that the act must reasonably be regarded as capable of causing

27 *McCann v. Switzerland Insurance Australia Ltd & Ors* [2000] 203 CLR 579, [22] (Justice Gleeson); See also *Todd v. Alterra* [2016] FCAFC 15, [42] (Chief Justice Allsop and Justice Gleeson).

28 *Australian Casualty Co Ltd v. Federico* (1986) 160 CLR 513, [6] (Chief Justice Gibbs). See also *Todd v. Alterra* [2016] FCAFC 15, [42] (Chief Justice Allsop and Justice Gleeson).

29 *Electricity Generation Corporation v. Woodside Energy Ltd* (2014) 251 CLR 640, [35] (Chief Justice French and Justices Hayne, Crennan and Kiefel). See also *Todd v. Alterra* [2016] FCAFC 15, [42] (Chief Justice Allsop and Justice Gleeson).

30 *Electricity Generation Corporation v. Woodside Energy Ltd* (2014) 251 CLR 640, [35] (Chief Justice French and Justices Hayne, Crennan and Kiefel).

31 *McCann v. Switzerland Insurance Australia Ltd & Ors* [2000] 203 CLR 579, [74] (Justice Kirby).

32 *Codelfa Construction Pty Ltd v. State Rail Authority (NSW)* (1982) 149 CLR 337, 340.

33 *L & M Electrics Pty Ltd v. SGIC (Qld)* (1985) 3 ANZ Ins Cas 60-641, 78, 946.

34 *Griffiths v. Fleming* [1909] 1 KB 805, 817.

35 *Gates v. City Mutual Life Assurance Society Ltd* [1982] 2 ANZ Ins Cas 60-485.

36 *ANZ Banking Group Ltd v. Beneficial Finance Corp Ltd* (1982) 44 ALR 241, 246.

or contributing to a loss covered by the contract of insurance before the insurer may refuse to pay the claim.[37] If this is not the case, the insurer's liability will be reduced by the amount that fairly represents the extent to which the insurer was prejudiced as a result of the act.[38]

iv Intermediaries and the role of the broker

Conduct rules

Brokers and other intermediaries regulated under the Corporations Act are subject to the various conduct requirements in Chapter 7 of the Corporations Act.

Insurance brokers who are members of the National Insurance Brokers Association (NIBA) are also bound to comply with the Insurance Brokers Code of Practice (the NIBA Code). This is an agreement between the NIBA and its members. Other brokers who are not members of the NIBA may also subscribe to the NIBA Code. The Code sets minimum service standards that clients can expect from brokers, and outlines how complaints and disputes regarding potential breaches of the Code can be resolved.

Agency and contracting

Brokers usually represent insureds. However, insurance intermediaries may act for either the insurer or insured. In some cases, they operate under a binder that gives them the authority to bind insurers by entering insurance contracts on their behalf.

Where intermediaries act on behalf of insurers, they typically do so as an authorised representative or distributor of the insurer, and enter into formal written agreements that record that arrangement.

v Claims

Notification

The requirement to notify insurers of a loss or claim is generally dictated by what is required under the insurance or reinsurance contract. However, there is a statutory extension to the notification rights of an insured.

Section 40(3) of the Insurance Contracts Act, which applies in respect of certain contracts of liability insurance (essentially, claims made and notified insurance policies),[39] has the effect of attaching coverage where an insured notifies circumstances within the policy period.

If an insured fails to notify facts or circumstances to an insurer in accordance with a contractual requirement (e.g., a circumstance notification or 'deeming' provision), the failure may be remedied by Section 54 of the Insurance Contracts Act.

Good faith and claims

The statutory duty of utmost good faith applies in connection with claims. If an insurer has failed to comply with the duty of utmost good faith implied under Section 13(1) of the Insurance Contracts Act in the handling or settlement of a claim under a contract of insurance, the ASIC is effectively empowered to treat the insurer as being in breach of the conditions of its Australian financial services licence. In those circumstances, the ASIC may

37 Insurance Contracts Act, Section 54(2).

38 Insurance Contracts Act, Section 54(1).

39 Insurance Contracts Act, Section 40(1).

exercise its powers of enforcement against the insurer. In sufficiently serious cases, the ASIC has the power to vary, suspend or cancel an Australian financial services licence, and to ban persons from providing financial services.

Dispute resolution clauses

Australian financial services licensees must have a dispute resolution system in place as a condition of their licence. That system must meet the standards prescribed by the ASIC. Accordingly, the dispute resolution clauses in many contracts of insurance are governed by these standards.

Some insurance policies, particularly professional indemnity and directors' and officers' liability policies, commonly have clauses that provide for expert determination by a senior counsel or senior lawyer with relevant experience. These clauses typically apply to disputes, such as whether a third-party claim should be contested or settled, or the allocation of defence costs between insured and uninsured parties.

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

It is common for parties to a contract of insurance or reinsurance to submit to the courts of a selected jurisdiction and agree to be governed by its laws.

Jurisdiction clauses typically identify whether the nominated jurisdiction is an exclusive or non-exclusive jurisdiction. If a jurisdiction clause identifies courts that are the natural forum for a dispute, this is a factor that would support the clause being read as an exclusive jurisdiction clause. In a contract of insurance, ambiguity as to the jurisdiction tends to be interpreted in favour of the insured.[40] Where a contract is subject to the Insurance Contracts Act, any provision purporting to specify an alternative jurisdiction may be void under Section 52 of the Insurance Contracts Act, which prohibits contracting out of the Act.[41]

Parties may also agree that disputes are to be determined by arbitration. Under Section 43(1) of the Insurance Contracts Act, arbitration clauses in insurance contracts governed by that legislation are void. This does not prevent parties from agreeing to arbitrate after a dispute has arisen. Arbitration clauses in reinsurance contracts are generally enforceable.

Jurisdiction, choice of law and arbitration clauses, where they may be used, need to be drafted clearly to ensure that they are not unenforceable because of uncertainty.

ii Litigation

Litigation stages

Litigation stages, including appeals, differ depending on the particular court in which the litigation is taking place.

Typically, proceedings are conducted by an exchange of pleadings. Court rules may allow, or one or more parties may seek orders for, discovery of documents. Discovery requires the party that is subject to the order to undertake a search for particular documents that are relevant to the issues in dispute, including those that may be adverse to their case. Following

40 See, for example, *ACE Insurance Ltd v. Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Justice Brereton, 31 July 2009).

41 See, for example, *Akai Pty Ltd v. The People's Insurance Co Ltd* (1996) 188 CLR 418.

discovery, or in some courts before discovery, parties will usually be required to exchange evidence in preparation for trial. The final stage is a trial that usually involves evidence (including cross-examination) and legal argument.

Depending on the relevant jurisdiction, the parties may agree to attend, or be ordered by the court to attend, mediation at any stage of the proceedings.

An unsuccessful party at the trial may, subject to the rules applicable to the court, appeal a judgment or order to a higher court. In some cases, this may require the leave of the court.

Evidence

Witness evidence usually takes the form of a signed statement recording the oral evidence to be given at trial. For a party to rely on witness evidence, the witness must be called to give oral evidence in court and may be cross-examined by the other parties. Witness evidence may also include the evidence of an expert who has been asked to provide an opinion on one or more particular issues relevant to the proceedings. Parties may also seek to rely on documentary evidence, which in many cases is simply the business records of a party to the proceeding.

The rules of evidence differ depending on the court in which evidence is being adduced.

Costs

An order to pay costs usually follows an award, so that the unsuccessful party is required to pay the reasonable costs incurred by its opponent. If the amount is not agreed, the costs are assessed by the court. An award of costs may not cover the full amount actually incurred by the successful party.

iii Arbitration

Format of insurance arbitrations

In Australia, the format of insurance arbitrations depends on whether the arbitration is an international or domestic arbitration. There is a separate statutory regime for each. Domestic arbitrations are regulated by mostly uniform state-based legislation. International arbitrations are regulated by the International Arbitration Act 1974, which ensures that arbitration practice in Australia complies with internationally accepted norms. The format of insurance arbitrations generally does not differ from the format of other commercial arbitrations.

The Australian Centre for International Commercial Arbitration (ACICA) is a leading international arbitration institution. It is common for parties to adopt, and conduct arbitrations in accordance with, the ACICA Arbitration Rules or ACICA Expedited Arbitration Rules.

Procedure and evidence

An arbitral tribunal is permitted under the ACICA Arbitration Rules to conduct an arbitration in the manner it considers appropriate. The procedure and evidence may be tailored to meet the requirements of the parties. The procedure is bound only by the requirement to give effect to the principles of procedural fairness and natural justice.

The role of witnesses may be limited by agreement of the parties. The process may be similar to a court procedure, and allow for oral testimony of witnesses with the ability of the

other party to cross-examine each witness. Conversely, the parties may agree that only written evidence is allowed. Similarly, sometimes oral submissions may be made or, as is the case under the ACICA Expedited Rules, oral submissions may be prohibited.

Costs

In respect of both domestic and international arbitrations, the tribunal is empowered to determine and award costs at its discretion, unless otherwise agreed by the parties. The relevant legislation does not offer any guidance as to how a tribunal should exercise that discretion. As a general rule, and consistent with the ACICA Arbitration Rules, in most cases costs will generally follow the event.

iv Mediation

Mediation is commonly used as a way for the parties to attempt to resolve disputes without being bound by the decision of a third party, such as a judge or arbitrator. In some circumstances, mediation may be ordered by a court before court proceedings can continue to trial. It is more common for parties to agree voluntarily to attend mediation.

For claims that meet the relevant criteria, insureds may have the option of pursuing the claim through the AFCA.

V YEAR IN REVIEW

i Regulatory changes

There have been several recent regulatory developments affecting the insurance industry in Australia following the conclusion of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which culminated in the issuing of a final report on 1 February 2019. The Royal Commission's broad terms of reference included an inquiry into, among other things, whether conduct of financial services entities (including insurers) amounted to misconduct and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant government agency, and whether such conduct fell below community standards and expectations. The terms of reference also included an inquiry into the adequacy of existing laws and policies of the Commonwealth, the internal systems of financial services entities and forms of industry self-regulation. In that context, and in respect of the insurance industry, the final report of the Royal Commission made a number of recommendations which are in the process of being implemented. Some of the key recommendations included:

a the prohibition of the hawking of insurance products, including by way of unsolicited offers and sales;

b the implementation of a deferred sales model for the sale of any 'add-on' insurance and a cap on commissions paid to vehicle dealers;

c the replacement of the existing statutory duty of disclosure (under the Insurance Contracts Act) with a duty to take reasonable care not to make a misrepresentation to the insurer (essentially, adopting the duty enacted under the UK Consumer Insurance (Disclosure and Representations) Act 2012, which introduced a duty in the terms recommended by the UK Law Commission and the Scottish Law Commission in their 2009 report entitled 'Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation');

d a change to the circumstances in which a life insurer may avoid a contract on the basis of non-disclosure or misrepresentation;

e the application of 'unfair contract terms' legislation to certain insurance contracts; and

f legislative changes to make insurance claims handling subject to the Corporations Act licensing regime and regulation by the ASIC under the Corporations Act.

ii Key case

In *Australian Securities and Investments Commission v. Westpac Securities Administration Limited*,[42] the Full Court of the Federal Court delivered a judgment that addressed the characterisation of 'general advice' and 'personal advice' under the Corporations Act. The characterisation of these two distinct legislative concepts is significant because additional legal obligations arise where 'personal advice' is provided, including additional disclosure obligations and the need to comply with a best interests duty.

The case concerned a marketing campaign which the Court found was designed to convince customers to consolidate multiple superannuation accounts into a single account by giving no more than general advice. The marketing campaign involved telephone calls during which no express recommendation was given to the customer to consolidate their accounts.

The Court found that the telephone exchanges had to be considered as a whole and that, by doing so and taking into account that the customers were making a decision on consolidation during the call, there was an implied recommendation in each call that the customer should consolidate.

The judgment potentially impacts upon the approaches taken across the financial services industry to drawing a distinction between general advice and personal advice in marketing campaigns. We understand that it has prompted industry participants to review practices for marketing and distributing products as well as the scope of their licensed activities.

VI OUTLOOK AND CONCLUSIONS

The insurance industry in Australia is constantly adapting to regulatory and other changes. Consumer protection through the regulation of both sales and claims conduct has been a focus of insurance regulators in recent times and the Royal Commission. Substantial regulatory change has followed the Royal Commission and has affected the industry. Regulators have taken action against a number of insurers for the sale of 'junk' insurance products and, combined with legislative and other changes, many insurers are changing their business models and product offerings. These changes, which are likely to continue in the foreseeable future, have also contributed to some banks selling their life insurance arms and have given rise to questions as to the future of the bancassurance model in Australia. There will be more regulatory change for the insurance industry over the next year.

42 [2019] FCAFC 187.

Appendix 1

ABOUT THE AUTHORS

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David Gerber is a partner in the Sydney office of Clayton Utz. He is a specialist insurance lawyer with experience in both general and life insurance, including reinsurance. In 2014, he was named a 'Rising Star' for insurance and reinsurance in *Expert Guides: Insurance and Reinsurance*. According to *Best Lawyers*, for the past seven years he has been selected by his peers for inclusion in *The Best Lawyers in Australia* in the area of insurance law. From 2016 to 2020, he has been ranked by *The Legal 500 Asia Pacific* as one of Australia's 'Leading Individuals' in insurance. *Chambers and Partners* ranks Mr Gerber as a Band 4 Insurance practitioner in the Asia-Pacific region.

Mr Gerber helps clients both with their corporate insurance issues and resolving disputes, including insurance coverage disputes. This includes advice on policy interpretation, insurance claims, indemnity and risk issues, insurance regulation, product development and distribution, captives, reinsurance, portfolio transfers, the insurance aspects of major projects, M&A and other commercial transactions, and regulatory investigations. He also acts for the insurance industry in corporate restructuring and insurance-linked securities transactions, alternative risk transfer arrangements, regulatory engagement and enforcement matters, and has advised local and international clients on regulatory compliance.

He holds bachelor of arts and bachelor of laws degrees from the University of Natal, South Africa. He is admitted to practise in the Supreme Court of New South Wales and the High Court of Australia.

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He has experience assisting clients with both corporate insurance issues and dispute resolution. His experience includes advising on insurance and risk issues in commercial transactions, advising on insurance placements and policy wordings, advising on licensing, the distribution of insurance products and other regulatory compliance issues, and conducting insurance litigation in the Federal Court of Australia.

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