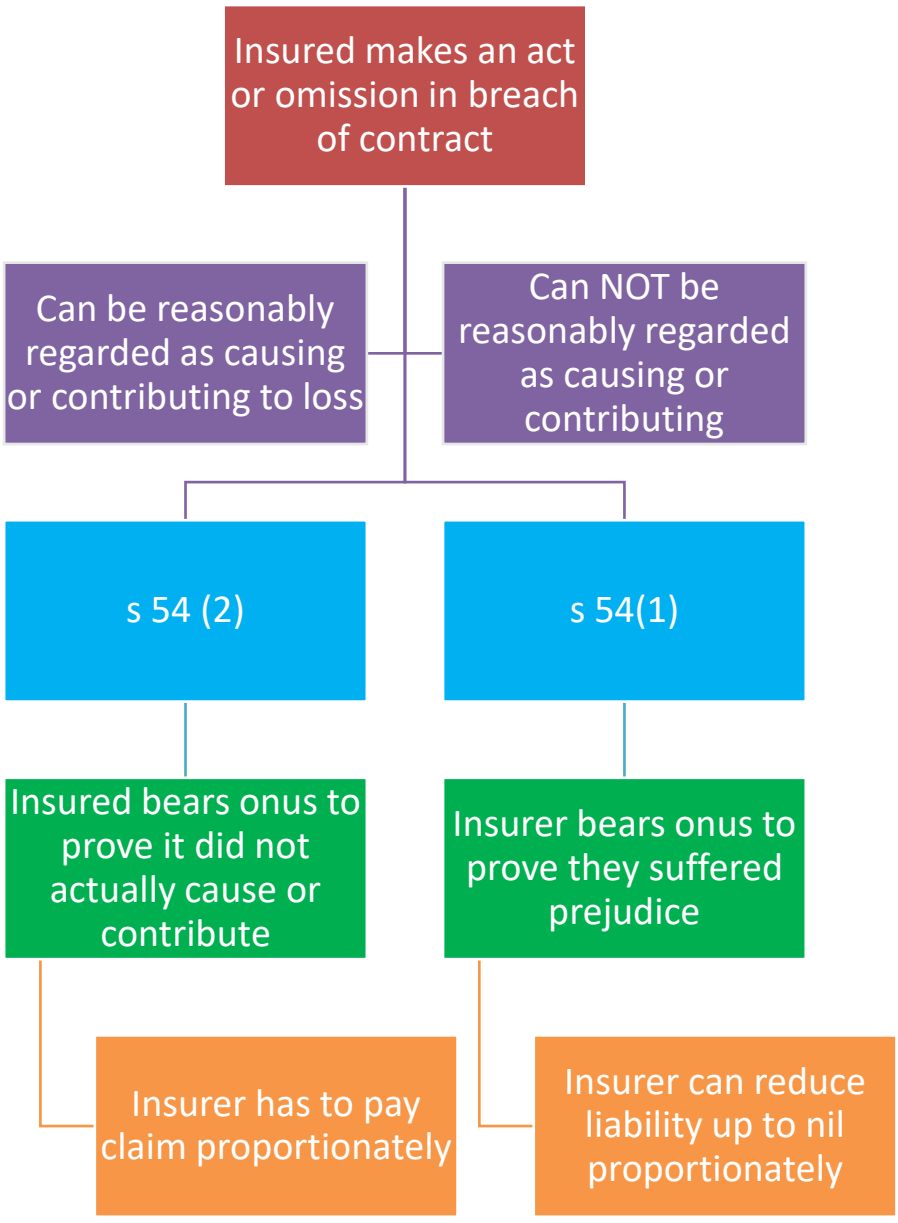
S.54 – INSURER NOT LIABLE DUE TO CONTRIBUTING OR CAUSING LOSS:

- Rationale behind s 54 on p. 361
- This is one of the most important provisions. It takes into account the prior to the ICA ability of the insurer to refuse to pay for a non-causative breach or a non-compliance with a contractual term which was not the effective cause of the loss.
- For s 54 to apply, it **always** relates to a claims situation
    - s.54 is only concerned with what happens **post-contractually.**
- How s 54 works:



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ALRC REPORT GIVING RISE TO INTRODUCTION OF S 54:

Five features in relation to s 54 what the ALRC said in para 228

- (1) Where the conduct of the insured might have in principle caused or contributed to the loss, a casual connection should be adopted.
    - Conduct of insured would have caused or contributed to the loss (casual connection) between the incident and the loss – only then can you deny liability
- (2) The justification for imposing this – difficulties are justified by need to strike a fair balance between insurer and insured.
    - The need for **a causal connection makes it more difficult for the insurer to deny liability for unrelated situations**
- (3) The actual test should be for the prejudice for the insurer
    - Would it really have mattered – did it cause or contribute to the loss?
    - If there's **no prejudice to insurer from unrelated fact, then it is not possible to use it as a pretext to avoid the claim**
- (4) Damages should be measured by reference to the prejudice suffered by the insurer as a consequence of the insured's conduct
    - Was that feature present to cause the loss at that time?
    - If it was, then the insurer was prejudiced and can deny the claim
- (5) The right to damages should be exercisable only as by way of a reduction of the claim
    - If insurer says had I known that that the particular eventuality would occur, and would be contributory or the sole cause of this particular loss, I would never had accepted this cover – then you can reduce the claim to the extent that would put insurer in same positon
    - If this would just be a higher premium, then insured pays higher premium and goes about business as usual
- The ALRC stated at para 228:
    - "Where the conduct of the insured might in principle have caused or contributed to a loss, a causal connection should be adopted. As between termination and damages in these cases, there may not be a great deal to choose. But damages provide a more flexible remedy in those rare cases where the insured's conduct caused or contributed to only part of the loss. Given the insured's superior knowledge concerning the circumstances of most losses, he should bear the burden of proof. Where the insured's conduct could not in principle have caused or contributed to the loss, the insurer should also be limited to a right to damages. Those damages should be assessed by reference to ordinary contractual principles. That would presumably, involve an application of the principle of proportionality. The Commission recognises that, in some cases that principle might be difficult to apply. But it believes that those difficulties are justified by the need to strike a fair balance between the insurer and the insured in the relatively few cases to which the principles would apply. The actual test should be in terms of prejudice to the insurer. Damages should be measured by reference to the prejudice that the insurer has suffered as a consequence of the insured's conduct. As in the case of misrepresentation and non-disclosure, the right to damages should be exercisable only by way of a reduction of a claim".

WHEN DOES S 54 APPLY?

- S 54 is only triggered if;
    - The **insured** proves that the circumstances fall within the scope of the policy

- The **insurer** persuades the court that it is entitled to refuse to pay part or all of a loss because
  - The insurer has discharged the relevant onus of proof (by being an excluded peril or outside the limit of cover)

  OR

  - Insured has failed to discharge the relevant onus of proof (cannot prove estoppel or cannot prove exception to exclusion).

(4B) UTMOST GOOD FAITH:

- Three points
  - (1) S 12, 13 and 14 give pre-contractual disclosure from insured to insurer
  - (2) This can be extended by the policy itself seeking continuing disclosure during the currency of the policy by the insured to the insurer in the event there are any material facts which would increase the risk
  - (3) The duty of good faith runs both ways.
    - Insurers duty of good faith is one continuing stream in that the insurers duty not only carries on from the time cover is incepted, but continues on right through the claims process (to include accepting liability and making payment)
- The principle was well settled by the case of *Carter v Boehm* (1766) 3 Burr 105; 97 ER 1162 where Lord Mansfield said at 1910; 1164:
  - "Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary".
- Duty to act honestly and to disclose all material facts at all times
- Common misconception – good faith only flows one way, from insured to insurer
- The introduction of the Insurance Contracts Act requires
  - Insurer must provide a product disclosure statement which outlines the scope of the cover in plain English
  - Insurer must carefully set out what is payable within the policy (what is covered and what is excepted)
  - High degree of transparency demanded of the insurer as well

COMMON LAW DUTY OF GOOD FAITH POST-CONTRACTUAL

- The cases are unhelpful. This is because cases involving duty of good faith involving an interpretation of the ICA (1984) (Cth), render an implicit duty of good faith under ss.12, 13 and 14.
- Duty of good faith is tended upon duty of insured to insurer up until contract is incepted
  - Conventionally this is the most vulnerable period for the insurer

HOW LONG DOES THE DUTY LAST?

- The key thing to remember is that in any post-contractual scenario, the common law duty of good faith may arise in the following outlined instance:
  - An insures his dwelling house with B. The policy is for a year's duration. During that period the insurance policy has a clause which reads:

        - *"The insured is duty bound to disclose any facts which would during the currency of the policy increase the nature of the risk that is insured".*
        - Then there is a duty cast upon the insured to notify the insurer of any circumstances which would increase the risk
    - **If parties have specifically agreed under such circumstances that the insured will disclose any feature that may increase the risk during the currency of the policy** (e.g the building of an oil refinery in close proximity to the property) **then, a duty to disclose subsists.**
    - However, if nothing is agreed or stipulated for the post contract period, then the insured is **not** bound to disclose anything in that post- contractual period.
- Insurer is **prevented** from **imposing** terms **mid-stream unless they give adequate notice**
    - It is possible to impose, but must comply with the notice provisions
- **Slight disadvantage insurer labours under, but this more levels the playing field**
- *Black King Shipping Corp and Wayang Panama S. A. (The Litsion Pride)* [1985] 1
    - The plaintiff shipowner failed to provide notice that the vessel was going to make a voyage to the War Zone in the Persian Gulf.
    - Insurer had asked – which waters will you travel, and insured had failed to notify that it was a warzone.
    - First trip after cover was the warzone
    - Therefore, insurer had every right to deny liability
    - The finding was that the Plaintiff had fraudulently failed to give the appropriate notice.
- *New South Wales Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1985) 4 NSWLR 107
    - Held by Rogers J. in the New South Wales Supreme Court that in the "*Litsion Pride" there was a live obligation to disclose on the part of a party to the contract.*
- *GIO Insurance Ltd v Leighton Contractors Pty. Ltd* (1996) 8 ANZ Ins Cas 61-293
    - Held in the NSWSC that that there must be a continuing obligation which attaches after inception for implied duty of good faith to attach in the post-contractual period.

GOOD FAITH UNDER THE ICA (1984) (CTH)

- The duty of good faith is paramount.
- S 12, 13 and 14 – pre-contractual duty of disclosure from insured to insurer
    - This can be extended by the policy itself seeking continuing disclosure during the currency of the policy (by the insured to the insurer) in the event that there are any material facts which will increase the risk
- Duty of good faith runs both ways
    - Insurers duty of good faith is one continuing stream, it not only carries on from time cover is incepted, but through the entire claims process
- When disclosures are being made it is the insured who knows all the material facts, and so is duty bound to disclose

S 12:

- In the Notes to Draft Insurance Contracts Bill 1982 which contains a description of s.12 of the ICA it states as follows:

    - "The duty of utmost good faith is paramount. The fact that further or other duties are imposed by the ICA on the parties to an insurance contract does **not** displace the duty of utmost good faith".
- In *CIC Insurance Ltd v Barwon Region Water Authority* (1999) 10 ANZ Ins Cas 61-425, Ormiston JA stated at 74, 774:
    - "Section 12 being the first statutory provision dealing with the duty of good faith, expressly states that Part 11 does not have the effect of imposing on an insured, in relation to the disclosure of a matter to the insurer, a duty other than the duty of disclosure.

On their face the words are curiously expressed but the reference to duty of disclosure of a matter to the insurer, 'a duty other than the duty of disclosure'. On the face the words are curiously expressed but the reference to 'duty of disclosure' is confined by the definition in s.11(1) of the Act to the duty referred to in s.21 of the Act namely the first and principle section contained in Part iv in relating to the duty of disclosure. The obligation to disclose