

1. PRELIMINARY CONSIDERATIONS

- ❖ Section 8: Application of act
 - If proper law of k is OZ/NSW – then ICA applies
 - *Akai v People's Insurance of China*: unless parties chosen proper law, ICA applies – Exclusive jurisdiction clause rendered void – ICA applies
- ❖ Section 9 ICA does not apply to:
 - Reinsurance
 - Private health insurer/friendly society
 - Marine Insurance Act
 - Section 9A: MIA does not apply to pleasure craft (ICA applies) unless k made in connection with its capacity as cargo
 - Parasailing governed by MIA: *Gibbs v Mercantile*
 - Worker's compensation
 - Non-compulsory cover is subject to ICA: *Moltoni Corporation v QBE Insurance*
 - Bundle of compulsory cover with cover under rule of CL for employment-related personal injury entirely exempted from ICA: s 9(1)(f)
- ❖ Insurable interest
 - Section 16: k of general insurance not void just because insured no interest in subject-matter when k entered
 - Section 17: k of general insurance – insured suffered pecuniary/economic loss because of property damage – insurer cannot avoid liability just because insured no interest at law/equity in property at time of loss
 - Person not party to k (beneficiary under s 48) may be able to rely on s 16 & 17 in absence of II as suggested by Teague J in *Pacific Dunlop v Maxitherm Boilers*
 - Section 18: insurable interest not required when k entered into for k of life insurance
 - Section 20: persons benefiting under k x have to be named
- ❖ Section 52: Contracting out prohibited
 - *Hadchiti v NRMA*: provision in arbitration agreement after dispute not subject to s 52
 - *Akai*: jurisdiction clause rendered void through s 52
 - *Pech v Tilgas*: no k out as exclusion clause does deal with non-disclosure
- ❖ Section 53: Insurer cannot vary k unilaterally.
 - Does not apply to (Regulations 31 of ICR): k insuring failure to pay debt, life insurance, superannuation, sickness/accident insurance/export payments/aviation liability

2. THIRD PARTY AND INSURANCE INTERMEDIARIES

A) THIRD PARTY BENEFICIARIES

- ❖ **Common Law**: *Trident General Insurance v McNiece* – narrower than s 48 and relies more on policy terms – policy needs to identify assured in terms that evidence intention of both insurer and assured that policy will indemnify – in which case k may sue even though no consideration given

Section 48: 3rd party beneficiary of general insurance k

- ❖ (1) 3PB general insurance – can recover from insurer – in accordance with k even not party to k
 - 3PB and not party to k
 - *Barroora v Provincial Insurance*: policy contained definition of 'the insured – referred to person 'so named in cert.' – person not named in cert. – subjective intention irrelevant, view objectively – person not named determinative of issue
 - *ABN v AMRO Bank v Bathurst Regional Council*: subsidiary of insured included in policy by way of

endorsement as 'insured entity' – 3PB and not party to k – no evidence that insured acted in negotiation for k of insurance as agent of subs. – even though named as insured, but it is 3PB

- *Carden v CE Heath Casualty*: express intention of *parites* – directors and officers are k parties – they paid premium, was for their benefit, directors heavily involved in arrangement of insurance (*Green v CGU Insurance*)
- In accordance with k
 - *General Motors v RACQ Insurance*: policy covers damage by accident – burning of vehicle not accident – s 48 claimant must take policy as found
- ❖ (2) 3PB has same obligations to insurer as insured and can discharge insured's obligation in relation to loss;
 - *Watson Estate v Conolly*: 3PB must pay insurer amount recovered under principles of subrogation
- ❖ (3) Insurer has same defence as in action by insured
 - Non-disclosure:
 - *CBA v Baltica General Insurance*: insurer can avoid k against 3PB because of fraudulent non-disclosure by insured (focus on absence of protective provision in legislation; co-insured)
 - Cf. with *Carden v CE Heath Casualty*: refused to follow case above – non-disclosure by insured will not restrict rights of 3PB D&O (focus on purpose of Act) – **but** – later decided D&O are k parties not 3PB - in obiter on appeal: support *CBA v Baltica* – depends on terms of k of insurance and whether s 48 claimant is to be fixed with consequence of the conduct
 - Breach of policy term (s 48 and 54)
 - *CE Heath Casualty v General Insurance*: obiter – s 54(6) mentioned act/omission of insured/some other person but s 65(3) and (4) only insured.
 - *GIO Australia v P Ward*: unlicensed driver s 48 claimant cannot rely on indemnity policy
 - Fraud
 - If insured and s 48 claimant joint severally (e.g. mortgagee and mortgagor) – and not jointly – insurer cannot rely on fraud of insured against innocent s 48C (*CE Heath v Grey* – **insured set fire own premises – s 48 mortgagee can claim**)
 - *VL Credits v Switzerland General Insurance*: insurer cannot have defence against s 48 claimant only by proving arson by insured – arson needs to be by s 48 claimant

Section 48A: 3rd party beneficiary of life insurance

- ❖ (1) 3PB Can recover from insurer under k even though not party to k
- ❖ (2) 3PB has same obligations to insurer as insured and may discharge insured's obligation

B) DIRECT ACCESS CLAIMS

Section 51: Claims in respect of liability of insured/3rd party

- ❖ (1)(a) If insured/3PB (k of liability insurance) is liable in damages to another person (3rd party) and
 - 'Liable in damages'
 - Persuasive authority in *Webb v Estate of Darryl*: arguable that s 51 x require 3rd party to determine either by way of judgment/settlement liability against insured before instituting proceeding (also in obiter in *Hancock Memorial Foundation v Fieldhouse*: section is remedial and should be given purposive construction)

- But note: *Bayswater Car Rental v Hannell* – indemnity only operated on court judgment
- *Vollstedt v Calibre*: HIH argued x ‘liable in damages’ as real estate agent (insured) to be liable in damages to accountant (3rd party), accountant needed to have direct liability for wrong which is either tort or breach of k – court said no – wider meaning and **extended to any liability insured had to contribute** towards any damages 3rd party may be found liable to pay
- ❖ (b) k provides insurance cover i.r.o. liability and
- ❖ (c) insured/3PB has died/**cannot after reasonable inquiry be found**, the other person may recover from insurer amount equal to insurer’s liability under k
 - ‘Cannot be found’
 - *Norsworthy v SGIC*: extended to deregistration of corporate insured (but probably use s 601AG)

Corporations Act Section 601AG: claims against insurers

- ❖ Person can recover from insurer of deregistered company an amount that was payable to company under insurance k if (a) company had liability to person and (b) insurance k covered that liability immediately before deregistration
- ❖ *Tzaidas v Child*: McCallum J held that ‘liability’ is not confined to liability that is ascertained, crystallized or determinate immediately before deregistration

Bankruptcy Act s 117: policies of insurance against liabilities to 3rd parties

- ❖ (1) Where (a) bankrupt is/was insured under k of insurance against liabilities to 3rd parties, and (b) liability so insured has been incurred (whether before/after became bankrupt), right of bankrupt to indemnity vests in trustee and any amount received by trustee shall be paid in full to 3rd party

Law Reform Act 1946 (NSW) s 6: charge over proceeds of liability insurance k

- ❖ (1) if any person (insured) has entered into k of insurance by which person is indemnified against liability to pay any damages/compensation, the amount of person’s liability shall in event giving rise to claim for damages/compensation, notwithstanding amount x yet determined, be a charge on all insurance moneys that are payable i.r.o. that liability
 - ‘entered into k’ suggests that 3PB cannot rely on this section (only parties to k)

C) INSURANCE INTERMEDIARIES

Common Law

- ❖ Liability of insurance agent (k/tort)
 - To insurer client
 - Governed by terms of agency agreement
 - Also CL duty to exercise reasonable care/skill in performance of agreement
 - To insured
 - Duty of care = commensurate to that owed by anyone who sells any product with technical qualities beyond knowledge of general public (*Caldwell v JA Neilson* – no duty to **bring insured’s attention to exclusions**)
 - Will have duty of care if they say/do something indicating to insured that they assume responsibility for insured’s interest in relation to a transaction (e.g. complete insurance proposal accurately)
- ❖ Liability of insurer for actions of its agents
 - CL: insurer bound by acts of agents as long as they are within scope of agent’s actual (express/implied) or apparent (ostensible) authority OR subsequently ratified by insurer

- Insurer may have cause of action in damages against agent (indemnity) depending on agency requirement
- *Colonial Mutual Life v Producers and Citizens*: insurer expressly forbid agent using language that would bring any person/institution into disrepute but defamatory statements about other life insurance companies used – insurer liable for slander of agent b’cos conduct undertaken in course of/for purpose of executing agency
- ❖ Liability of insurance brokers (k/tort): must prove (Refer)
- ❖ Fiduciary obligations of insurance agents and brokers (Refer)

Statute

- ❖ Section 11
 - Insurance broker: person who carries on bz of arranging k of insurance as agent for intending insureds
 - Insurance intermediary: person who (a) for reward) and (b) as agent for 1/more insurers or as agent for insureds arranges k of insurance (includes insurance broker)
 - Binder: authority given by insurer to insurance intermediary to enter into, as agent for insurer, k of insurance on behalf of insurer as insurer

Section 71: Agency

- (1) Provisions (except s 58(2)) w.r.t. giving of notice/document/information to insured before k of insurance is entered into x apply where k arranged by broker (not being insurance broker acting under binder) as agent of insured
- (2) where (a) person who is x insurance intermediary acted as agent of insured in arranging k of insurance and (b) insurer gave person notice/document of information, insurer shall be deemed to have given notice
- (3) insurance intermediary (other than insurance broker who is x acting under binder) shall w.r.t. giving of notice, be deemed to be agent of insurer and not of insured

3. DUTY OF UTMOST GOOD FAITH

COMMON LAW

Pre-contractual:

- ❖ Parties required to disclose to each other information known to them which is material to the risk transferred and not misrepresent information material to risk
- ❖ Remedy = avoidance of k from beginning (*Carter v Boehm*), no damages
- ❖ *Carter v Boehm*: insurer refused to pay claim b’cos insured failed to disclose vulnerability of fort to attack by Euro forces – insured owed DUGF to underwriter in which he is **req. to disclose all facts material to risk** (reciprocal duty) – special facts **lie most commonly in knowledge of insured only – keeping back of such info=fraud** and hence policy void **even though no fraudulent intention** (but note here insurer liable b’cos ought to have known that risk existed as political situation was public knowledge)

Post- contractual

- ❖ DUGF in performance of k
 - Requires insurer/insured/others to act openly, honestly and fairly with due regard for their own and for legitimate interest of others (*CGU*)
 - Insured be full & frank with insurer about claim/notification of circs
 - Insured respond promptly to insurer’s request for co-operation/info/documentation
 - Insurer be full and frank about handling of claim, reasons for rejecting claim/pay less