A Professional Indemnity Perspective from Down Under

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MinterEllison
LAWYERS

Introduction

The foundation of justice is good faith

Marcus Tullius Cicero

Pay all of our policy holders irrespective of the terms of their policies

Cuthbert Heath

The duty of good faith

In England, the United States and Australia, the principle of good faith in insurance law has its genesis in the judgement of Lord Mansfield in *Carter v Boehm*. [1] Lord Mansfield was a judicial heavyweight of his era, best known for his judgement in 1772 in Somerset's Case, which played a key role in ending slavery. He was also renowned for his scrupulous impartiality. He famously found the leader of the mob which rampaged through London in the 1780 Gordon Riots innocent of wrongdoing, despite the fact that the mob had burned down Lord Mansfield's own house.

In *Carter v Boehm,* Lord Mansfield called for the application of the principle of good faith in all commercial contracts, not only insurance contracts:

> *'But as by the law of merchants all dealings must be fair and honest - fraud infects and vitiates every commercial contract'.*

[1] [1766] 97 ER 1162.

Lord Mansfield's vision that good faith should be implied in all commercial contracts was eschewed in favour of 'freedom of contract' but preserved in relation to insurance contracts in common law in the United Kingdom, the United States and Australia. This spirit of good faith was in fact described by Thomas Jefferson as "honeyed Mansfieldism", prevailing as it did in the London insurance industry's attitude to devastating claim losses. One of the best examples of the application of the principle in favour of US policy holders was the San Francisco earthquake.

In 1906 an earthquake destroyed a significant part of the city and the resulting fire caused US$300 million in damage. Numerous insurance companies either reneged on their obligations under their insurance policies or went bankrupt under the weight of claims. Cuthbert Heath, a Lloyd's underwriter, famously cemented Lloyd's reputation in the US by cabling his agents '*pay all of our policy holders irrespective of the terms of their policies*'.

Heath's spirit was present again in 1912 when the Lutine Bell rang in the Lloyd's Room and Mr Farrant, formerly a porter at Clapham Junction Railway Station, climbed onto the rostrum and announced '*Gentlemen, the Titanic now lies at the bottom of the Atlantic*'. The hull claim alone was worth more than one million pounds but within two weeks all claims on policies covering the Titanic were paid by Lloyd's Underwriters. Legend has it that the Titanic was re-insured on a handshake after the terrible news was announced by Mr Farrant.

It was also Cuthbert Heath who famously said:

> *'…there is one thing which is still with us and shines as brightly as ever. It is the honourable feeling that privileged as we are among*

traders in that our contracts are 'uberimae fidei', our good faith must also be the supreme law of our existence'.

Where, however, two and a half centuries after its genesis in Lord Mansfield's judgment, does the principle of good faith stand today? Does is 'shine as brightly as ever' in 2007?

To answer those questions, I propose to contrast the position at law in the United Kingdom with the Australian and United States positions, where the principle has, in my contention, less of the shield for policy holders as envisaged by Cuthbert Heath but rather a sword to be wielded against recalcitrant insurers.

In Australia, the duty of utmost good faith very much survives at common law but it has also been enshrined in statute. Section 13 of the *Insurance Contracts Act 1984* (Cth) states that there is implied in all insurance contracts to which it applies (including professional indemnity policies) a term that the parties will act towards each other in the utmost good faith.

While the statute does not put the insurer and the insured in a fiduciary relationship, it has been held that it establishes something akin to one.[2] Importantly, the duty is *implied* into insurance contracts, which means that a breach of the duty will give rise to a claim in damages. The duty covers all aspects of the insurance relationship, including, importantly, claims.[3] Perhaps not surprisingly, the enactment of the *Insurance Contracts Act* has

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[2] *Maksimovic v Royal & Sun Alliance Life Assurance Australia Ltd* [2003] WASC 46.
[3] *RAF England v Zurich Australian Insurance Ltd* (SADC, Kitchen J, unreported, 30 July 1991).

been observed to have rendered insurers more generous than they were before its implementation.[4]

The following case demonstrates the way in which the principle of good faith is now playing out in Australia.

Last year, the Supreme Court of New South Wales had cause to examine the operation of the principle in one of the most complex professional indemnity cases to arise in Australia: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian RunOff Ltd* [2006] NSWSC 223.

Baulderstone Hornibrook Engineering Pty Ltd ("**BHE**") contracted with Sydney Airport Corporation Limited ("**SACL**") to undertake the design and construction of a new runway extending into Botany Bay. Within a year of the completion of construction in 1994, the reinforced earth seawall and millstream wall suffered massive sand loss, accompanied by voids, sink holes and settlement. The walls were supposed to have a maintenance-free life of 50-100 years, however the exposure of steel reinforcement behind the concrete walls meant that corrosion would be accelerated and the structural integrity of the walls possibly undermined.

SACL brought proceedings against BHE in 2002 for the losses it allegedly suffered. This claim was settled, and BHE agreed to rectify the walls, at a likely cost of more than AUS$60 million. BHE had a multi-layered insurance scheme for the runway design and construction.

The now notorious Australian insurance company, HIH, was the primary insurer. GIO /Gordian RunOff Ltd was the first layer excess insurer for the

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[4] Robert Merkin, "Reforming Insurance Law: Is there a Case for Reverse Transportation? " *A report for the English and Scottish Law Commissions on the Australian experience of insurance law reform* [2006] 106.

first $10 million in excess of $20 million and CGU, QBE, and Lloyds' (seven Underwriters) were the second layer excess insurers for $20 million in excess of $30 million. HIH granted indemnity to BHE for the claim, subject to the policy terms, conditions and exclusions, and on the basis of the facts then known to HIH. However, GIO/Gordian and CGU denied liability.

The 315-page judgment of Einstein J (perhaps an apt judicial choice given the complexity of the case) addressed what his Honour described as "a veritable myriad of issues". On the question of whether or not BHE's construction was the underlying cause of the sand loss, his Honour accepted the evidence of the insurer's internationally-renowned expert, and held that it was. The problem was attributed specifically to defective construction, rather than a design defect. This finding had significant ramifications as to whether the relevant policies applied to the claim, which was in his Honour's judgment, ultimately excluded from the policy.

While BHE lost the case, it argued that Gordian and CGU had breached their duty of utmost good faith by failing to promptly and adequately investigate the claim. The insurers also wielded the duty as a sword however, alleging that BHE had breached its duty to them.

Importantly, BHE's submissions as to the operation of the principle were accepted as correct by his Honour, namely:

- that an insurer's failure to make a prompt admission of liability and prompt payment of a sound claim for indemnity may be a failure to act with utmost good faith; and

- though an insurer is entitled to wait for details necessary for it to decide whether to grant indemnity, if it fails to make its decision within a reasonable time because of negligence or an unwarranted and unjustified suspicion as to the bona fides of the claim, this may amount to a failure to act with utmost good faith.

His Honour found that a breach of the duty may occur if the insurer deliberately "strings out" an investigation, if it fails to investigate, if it does not take necessary steps to obtain information relevant to the claim, or if it fails to make a timely decision to accept or reject a claim.

BHE argued that Gordian and CGU failed to investigate promptly the claim made by SACL against BHE so as to be in a position to make a decision in respect of an indemnity to BHE, and that they failed to consider the materials provided to them by BHE in respect of the claim in a timely manner. These arguments were not sustained, however His Honour found that neither of the insurers had breached its duty of utmost good faith in the circumstances.

His Honour also rejected the insurers' submissions that BHE had breached its duty of good faith to the insurers. His Honour held that BHE had no difficulty with the fact that they had "continued throughout to endeavor to have the insurers accept the fundamental proposition that the cause of the sand loss was "*defective design"* as opposed to "*defective construction*".[5] However the corollary of this was that the insurers were justified in treating the claim with particular care, based on the information they had received from BHE. His Honour held that the insurers "had every entitlement in the *extraordinarily* difficult environment in which they were placed, to await

[5] At [1118].

further details and tests and developments… before deciding whether or not to grant indemnity",[6] and therefore that they were "entitled to form the view that they had reasonably arguable defences".[7]

The manner in which the principle of good faith has been incorporated into the *Insurance Contracts Act* by the legislature provides for generous interpretation by the courts. Section 12 of the Act ensures that the duty is not limited or restricted in any way by any other law, and section 14 provides that no party to an insurance contract is to rely on any provision in the contract if it would constitute a failure to act with utmost good faith. The fact that section 13 implies good faith into insurance contracts eliminates the difficulties experienced with the common law duty, as to whether or not damages can be awarded for its breach. Accordingly, under Australian insurance law, a breach of the duty may result in damages for breach of contract,[8] and may, though there has been some judicial concern expressed about the true position at law,[9] constitute a separate and distinct cause of action.

However we have not, in Australia, seen the sword of good faith sharpened to the point that it has been by the judiciary in the United States. In the US, damages for breach of the duty of utmost good faith have been awarded in what can only rightly be described as astronomical amounts - in some headline cases, well beyond the hundred million dollar mark.

The fact that the duty has the potential to give rise to damages awards in Australia has caused many Australian commentators (no doubt well

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[6] At [1122].
[7] At [1123].
[8] *Duncan v The Prudential Assurance Company* (WADC, Sadleir DCJ, unreported, 26 September 1996).
[9] See for example, Matheson J in the South Australian Supreme Court, in *Settlement Wine Co Pty Ltd v National & General Insurance Co Ltd* (SASC, Matheson J, unreported, 31 August 1990).

apprised of the US position) to begin referring to the duty as the "sleeper of insurance obligations,"[10] the "great unknown" of Australian insurance law,[11] and a mechanism which "has not really been tested",[12] "underutilised" and "significantly under exploited."[13]

There are however, voices of judicial reason which suggest that the Australian position will never be as extreme as the US position. In the US the law recognises a tort of first-party bad faith. In a recent Queensland Supreme Court decision, Justice McMurdo took the view that there was no such tortious duty of good faith in Australia.[14] Further, Australian commentators have recognised that the large US damages claims "have often arisen to address real or perceived dishonest and unfair practices of insurers"[15] in a jurisdiction where exemplary damages awards far exceed by many factors, such awards made in Australia.

In a presentation at an Australian Insurance Law Intensive last year, Justice McMurdo expressed the view that exemplary damages, in general, were unlikely to be favourably viewed in Australia and noted that in its report which led to the *Insurance Contracts Act*, the Australian Law Reform Commission expressly rejected the availability of exemplary damages for breach of the duty of good faith. His Honour went on to observe, however, that such a question could often be affected by the facts of the case at hand and faced with a serious enough breach of an insurer's duty of good faith,

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[10] Michael Mills, "The duty of good faith – the "sleeper" of insurance obligations?" 2006 http://www.freehills.com.au/publications/publications_5080.asp
[11] Kelly Godfrey, "The duty of utmost good faith – the great unknown of modern insurance law" (2002) 14 *Insurance Law Journal* 56.
[12] Merkin, above n 4, 51.
[13] J Bremen, "Good faith in Insurance Contracts – Obligations on Insurers" (1999) 19 *Australian Bar Review* 89.
[14] *Lomsargis v National Mutual Life Association of Australasia Ltd* (2005) QSC 199.
[15] Mills, above n 10, [2.73].

the judge may well be persuaded that there is a need for an extraordinary remedy. In that context, there is not yet an authority which precludes exemplary damages from breach of contract as there is for breach of tort, and if "the facts of the case at hand" are extraordinary enough, perhaps more Mansfieldian members of the judiciary may seize the opportunity to award exemplary damages for breach of contract.

A recent Federal Court case is indicative of how the principle of good faith is likely be applied in Australia in the future.

The Full Federal Court of Australia's decision in *AMP Financial Planning v CGU Insurance Ltd*,[16] has been described on the one hand as the "coming of age" of the duty of utmost good faith[17] but caused another commentator to remark that the case demonstrates that "the goal of creating defined standards of conduct under section 13 is far from achieved"[18]. The case demonstrates the difficulty being experienced in Australian courts in attempting to set out clear borders of the duty of good faith.

The facts involved two financial advisors working for AMP, who gave inappropriate financial advice which led to a number of claims against the company. An investigation by ASIC meant that AMP was under considerable pressure to respond to the claims, and subsequently, a number of claims were settled by AMP – at a total of $3,242,668.00. However, the insurer of the two advisors, CGU, denied liability to indemnify AMP for that amount under the relevant professional indemnity policy.

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[16] (2005) 55 ACSR 305.
[17] Peter Hopkins, "*AMPFP v CGU* – Utmost Good Faith under section 13, the principle in *Rocco Pezzano* and the 'prudent uninsured'. What does it all mean and where to from here?" (2007) 18 *Insurance Law Journal* 25, 25.
[18] Peter Hopkins, "*AMPFP v CGU* – Utmost Good Faith under section 13, the principle in *Rocco Pezzano* and the 'prudent uninsured'. What does it all mean and where to from here?" (2007) 18 *Insurance Law Journal* 25, 40.

The Federal Court proposed a fairly expansive definition of the duty of utmost good faith. The court held that the duty went beyond mere good faith or honesty alone, and found that any failure to make a prompt admission of liability in the face of a sound claim for indemnity may be a breach of the duty. The expansive definition adopted by the Federal Court is authority for the proposition that where an insurer denies policy liability on the basis that proof of a settlement is not sufficient to establish liability, that may give rise to a successful allegation by the insured that the insurer has breached the duty of utmost good faith.

The English and Australian positions differ, in that a breach of the duty of utmost good faith is not a breach of contract in England. English common law does not imply the principle into insurance contracts and there is no English counterpart to the *Insurance Contracts Act*. The only remedy available is rescission, rather than an action in damages. As a consequence, an insured, who, met with the unfair conduct of its insurer and still wishes to claim under the policy, holds a very blunt sword indeed.

Importantly, the UK and Australian positions also differ in that established UK authority precludes the possibility of exemplary damages awards, unlike in Australia.[19]

So, taking up the crystal ball for a moment, what is likely to be the future position in the UK? The facts show that the only remedy for a breach of the utmost duty of good faith under UK law has drawn criticism at highest level. For example, in *Kauser v Eagle Star*,[20] Staughton LJ commented that avoidance was a "drastic remedy", and suggested that "there should be

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[19] *Rookes v Barnard* [1964] AC 1129.
[20] [2000] Lloyd's Rep IR 154 at 157.

some restraint in the operation of the doctrine". A number of recent case reports contain similar judicial commentary and it appears that the courts' view will strain against upholding policy avoidance if the result would produce unfairness.

In the recent UK Court of Appeal case, *Drake Insurance v Provident Insurance*,[21] Rix LJ, in obiter, held that an insurer's right to avoidance should be limited where that remedy would operate unfairly. In *Drake*, the insured had disclosed a previous accident before entering into the insurance contract, but had not described it as a "no-fault" accident. Rix LJ suggested that, had the insurer known it was a "no-fault" accident, it would be acting in *bad faith* to avoid the policy.

His Honour commented that new impetus for reform exists as a result of the increasing amount of insurance contracts of a consumer nature, rather than those which are strictly commercial. He said that such a consumer presence meant "it may be necessary to give wider effect to the doctrine of good faith and recognise that its impact may demand that, ultimately, regard must be had to a concept of proportionality implicit in fair dealing".

The Law Commission for England and Wales published a report by Robert Merkin in September last year, called *Reforming Insurance Law: Is there a Case for Reverse Transportation?* The report compares the statutory system in Australia with the common law in the UK, and asks whether it would be wise to implement something similar to the Australian regime. It seems quite possible then, that the UK will in the future adopt legislation similar to section 13 of the *Insurance Contracts Act*, leaving the door open

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[21] [2003] EWCA Civ 1834.

for the introduction of damages to be awarded for breach. However, as Merkin commented, this is "a step presently beyond the English courts".[22]

In the wake of *Drake's* case, UK commentators began discussing how the law would develop, and whether there would be scope for more practical utilisation of the duty. Norma Hird suggested that legislators needed to engage in a process of identifying an appropriate source for such a duty, as the efforts of the Court of Appeal to refashion the duty into something meaningful may be detrimental. An implied term approach, she suggested, would cement an insurer's post-contractual duty of utmost good faith.[23] Even before *Drake's* case, Longmore had argued that the failure to provide a remedy other than rescission was "a step towards formalism rather than a bold advance into pragmatism."[24]

An implied acknowledgement of the desirability for a remedy of damages was made in 2003 by the House of Lords in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank.*[25] It was held that a breach of the duty may give rise to a separate award of damages for negligent misrepresentation under the *Misrepresentation Act 1967*, or under the tort of deceit, for the making of a fraudulent statement. However, this liability is for pre-contractual misstatements, and only captures positive statements, rather than intentional non-disclosure. While any attempt to map the future path of the duty of good faith in England can only be conjecture, the time may be approaching when the legislature will consider statutory recognition of an implied contractual term.

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[22] Merkin, above n 4, 53.
[23] Norma J. Hird, "Utmost Good Faith – Forward to the Past" (2005) March *Journal of Business Law* 257, 264.
[24] Andrew Longmore, "Good Faith and Breach of Warranty: Are we Moving Forwards or Backwards?" [2004] *Lloyd's Maritime and Commercial Law Quarterly* 158.
[25] [2003] UKHL 6.

As Merkin suggests, there may be a certain value, if the UK does implement a statutorily implied duty, in including in the legislation a list (or at the least, some guidance) as to what is intended to be encompassed by the duty. This may also assist to allay any concerns the insurance industry may have about the introduction of such legislation.

Proposed amendments to the *Insurance Contracts Act* were released in a draft reform package on 12 February 2007. The Australian Government's review of the Act commenced in 2003 to ensure it continues to serve its consumer protection function. Some amendments are proposed to the duty of utmost good faith to extend its application, and make the imposition of penalties easier.

Currently, parties to insurance contracts may enforce the duty of utmost good faith by commencing private legal action. The architects of the reform package consider this to be too great an expense to incur, especially for insured, and point to cases where systemic breaches of utmost good faith committed over time are not able to be addressed by effective solutions. Amendments to the duty contained in the reform package include an amendment to section 13 which would make breach of the duty a breach of the Act. The effect of this amendment is that the Australian Securities and Investments Commission would be able to commence or continue a representative action on behalf of an insured against an insurer, as a breach of the *Insurance Contracts Act* will have been committed. Various remedies may then be imposed, such as a banning order, suspension or cancellation of the insurer's financial services licence, the imposition of conditions on the licence, or the acceptance of an enforceable undertaking not to act in a particular manner. Banning orders, for example, could be made by ASIC where there has been a pattern of persistent

contraventions of the *Insurance Contracts Act*, or general and ongoing lack of understanding of the need for compliance.

Reinvigorating the "claims made and notified" policy

Claims made and notified policies were of course developed by insurers to confine policy liability to claims made against the insured, and notified by the insured to the insurer during the currency of the policy. If the insured has given notice of the relevant circumstances, a claim made in a later year will also, prima facie, be covered.

Section 54 of the *Insurance Contracts Act* was introduced in Australia to mitigate the perceived unfairness to insureds who notified claims outside the policy period and were therefore denied cover. Section 54 provides:

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act, but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

The explanatory memorandum to the *Insurance Contracts Act* suggests that the main hope for section 54 was that it would ensure that a more equitable result would be achieved between the insurer and the insured. However, judicial interpretation of the section since its introduction has resulted in the original intention of claims made and notified policies being eroded

such that, absent prejudice, an insurer's policy liability was open ended. The original intention of providing insurers with certainty as to the length of their exposure was therefore lost.

The High Court decision in *FAI Insurance v Australian Hospital Care Pty Ltd*[26] is a leading authority in the development of the claims made and notified policy in Australia. The court held that due to the effect of section 54, the omission of an insured to give notice within the policy period did not mean the insurer could refuse to pay the claim. The insured owned a hospital, and received a letter from a patient indicating that the patient was considering suing for having developed post-operative septicaemia. During the policy period, the insured did not give the insurer notice of these facts, but when the patient pursued a claim against the insured after the policy had expired, the insurer was prevented from refusing to pay the claim, because the insured's omission to notify the insurer was the only ground on which the insurer could refuse payment.

The creation of this legislative "long tail" has been particularly problematic for professional indemnity insurers wishing to finalise their accounts as soon as possible after the policy expiries.

There appears to be some relief on the horizon however, in the form of the Commonwealth Government's proposed changes to the *Insurance Contracts Act.* The amendments recognise the need for insurers to be able to underwrite true "short tail" business, and come in the context of interpretive cases such as *Antico v C E Heath Casualty & General Insurance Limited*,[27] where attempts to read down section 54 were

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[26] (2001)11 ANZ Ins. Cases 61-497.
[27] (1997) 188 CLR 652.

disapproved, and a liberal construction adopted, forgiving even deliberate failures to notify claims on the part of the insured.

The Review Panel's report evidenced a particular concern for the effect of section 54 on professional indemnity insurance. It said:

> *'Strong evidence was provided to suggest that the judicial interpretation of section 54 was one, although by no means the only, factor having a material impact on the professional indemnity insurance market in Australia. Some insurers had withdrawn from the professional indemnity insurance market in Australia (particularly London insurers) or had altered their policies, in an effort to reduce the impact of the decisions. Others made it clear that they would withdraw if those alterations were found by subsequent judicial decisions to be ineffective.'*

The imperative for change has resulted in a proposal for a much-awaited legislative amendment applying only to claims made and notified policies.

It is proposed that a new section 54A be inserted, which will ameliorate the effect of judicial interpretation of the section. The new section would provide that despite section 54, an insurer may refuse to pay a claim against the insured or any third party beneficiary under the contract if two conditions are met. First, that the insured or third party beneficiary became aware, during the period in which insurance cover was provided by the contract, of facts that might give rise to such a claim. Second, that written notice was not given to the insurer of those facts either during the period in which insurance cover was provided by the contract, or within 28 days after the cover expires.

This is an express stipulation that a failure to give notice of facts which may give rise to a claim is *not* within the ambit of acts contemplated by section 54, and is therefore once again a ground on which insurers can refuse to cover claims. So where a claim eventuates from facts that the insured knew about during the policy period but which they did not notify to the insurer during that policy period, or extended reporting period, an insurer will be able to refuse to cover the claim.

These amendments would apply to all contracts of liability insurance entered into 28 days after Royal Assent, and will go some way toward reinvigorating the more traditional concept of claims made and notified policies in Australia. The Insurance Council of Australia has indicated its belief that further to late notification of facts, the amendments should apply to late notification of claims, to ensure a definite increase in the availability and affordability of professional indemnity insurance in Australia.

In the UK of course, the absence of any equivalent to section 54 means that if claims made and notified policies were to be more widely used in the future, no similar "long tail" expansion of the concept would likely occur as in the Australian experience.

Capping exposures through proportionate liability

Following the demise of HIH, the Australian insurance industry began lobbying for tort reform. The largest corporate collapse in Australian history was merely one of the factors contributing to a severe hardening in premiums, and was exacerbated by the fact that insurers were recognising underwriting losses from the nineties, by changing judicial attitudes to the extension of negligence principles, and by escalating litigiousness. Claims costs ballooned, as the amounts awarded by courts were also increasing. In

the ten years leading up to 2002, inflation averaged 2.5% in Australia, while court awards for personal injury claims grew by 10% per annum.

One of the earlier aspects of the reform process was a push for the introduction of proportionate liability systems. New provisions were sought which would prevent claimants looking to professionals who had 'deep-pocketed' insurers behind them, even in situations where the liability of these professionals was minimal in comparison with other so-called wrong-doers.

At common law, the law of negligence operated so that the principle of joint and several liability determined what damages were paid for loss and damage caused. This, of course, exposed professionals to liabilities greater than what was proportionate to their involvement, and was viewed to be a major factor in the significant increases in professional indemnity premiums in Australia. The industry became concerned that internationally, Australia was being perceived as a relatively small, but disproportionately high-risk market. Another negative effect of the common law was that professionals tended to settle matters out of court, even where they may have had viable defences against the negligence alleged, or where they did not cause, or only minimally contributed to, the damage claimed.

The reforms came as part of a package designed to curtail the costs of professional indemnity insurance, which included the amendments to section 54 of the *Insurance Contracts Act* discussed earlier, and the enactment of professional standards legislation. Professional standards laws have now been introduced in every state, and, in conjunction with proportionate liability provisions, allow professionals to limit their liability

in exchange for risk management, compulsory insurance, and other consumer protection initiatives.

Each Australian state has enacted its own changes to civil liability laws to incorporate various proportionate liability schemes, and South Australia was the last state to do so in October 2005. In Queensland, the Civil Liability Act 2003 largely reformed the law of negligence, and introduced a range of new provisions to address escalating litigiousness and insurance premiums. Part 2 of the Act, which commenced in March 2004, implements a proportionate liability regime for damages claims for economic loss or damage to property arising from a breach of a duty of care, and for similar claims under the misleading and deceptive conduct provisions of the Fair Trading Act 1989 (Qld). The regime does not apply to personal injury claims, or to consumer claims.

The second reading speech for Queensland's legislation explained that the amendments were "intended to slow the rate of increase of insurance premiums, and make public liability and indemnity insurance more readily available." The Minister also commented that "proportionate liability reflects the principle of personal responsibility for one’s own actions; that is, people should be responsible for harm that they cause according to their degree of fault, but not for comparative harm which is the responsibility of another."

Under section 28(2), any claim to which the regime applies must be treated as a single, apportionable claim. The liability of any defendant who is a concurrent wrongdoer is limited to an amount reflecting that proportion of the loss or damage claimed, which the court considers just and equitable having regard to the extent of the defendant's responsibility for the loss or

damage.[28] The Act allows courts to take into account the comparative responsibility of a concurrent wrongdoer who is not a party to a proceeding.[29]

Claimants are compelled to make their claim against all persons they have reasonable grounds to believe may be liable for the loss, and any concurrent wrongdoer must give the claimant any information they have which may assist the claimant to identify other concurrent wrongdoers. If these obligations are not complied with, courts have the discretion to award costs against the non-complying party, and may also make the concurrent wrongdoer severally liable.

Under the Queensland Act, and the corresponding Acts in the majority of the other states, it is not permissible to contract out of these provisions. The remaining states' provisions can be contracted out of however. There is also a view that the Queensland legislation is more conservative than other states because it preserves joint and several liability in a range of situations such as fraud, vicarious liability, agency, and intentional damage.

In addition, section 87CB(2) of the Trade Practices Act 1974 (Cth) has been amended to similar effect, and provides that there is a single apportionable claim where the claim relates to the same loss, even if the claim is based on one or more causes of action.

These radical reforms mean that from an insurer's perspective, the pursuit of the well-insured "single deep pocket" is no longer the "main game" in many actions. This makes it easier for defendant insurers to determine the

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[28] *Civil Liability Act 2003* (Qld) s31(1)(a).
[29] *Civil Liability Act 2003* (Qld) s31(3).

likely extent of their liability, as a judgment against one wrongdoer no longer releases any others from liability.

Additionally, the states have introduced schemes that cap liability for certain professionals and compliment proportionate liability legislation. For example, in New South Wales, the liability of an auditor is now capped at ten times the audit fee for a substantial audit (AUS$20m).

By the end of 2005, the Australian Competition and Consumer Commission had revealed in a report on the insurance industry's response to the reforms, a 17% drop in premiums for professional indemnity and public liability insurance, and anecdotal evidence has shown that there may indeed have been an improvement in the allocation of international capital to Australian professional indemnity risk. In addition to international insurers being more willing to underwrite Australian risk, professional indemnity insurance is also now more readily available - which may be a result of the benefits conferred by proportionate liability schemes.

There have been some arguments that the legislation was drafted too swiftly in order to remedially appease insurers, and that it is not well-thought out. Judicial guidance will be necessary to clarify any anomalies or ambiguities. However, the main issue which has been debated in relation to the proportionate liability schemes is the fact that in some state jurisdictions, parties may contract out of the rules. The fact that the situation differs across the board means that forum shopping is an option, and that parties to a contract will be able to strategically select the governing law of the agreement. Some argue that it is not until the states achieve uniform legislation that the true benefits of proportionate liability

will be felt, however it is arguable that it has already brought substantial change to the insurance industry, and will continue to do so.

The broad-reaching scheme which has been introduced in Australia can be contrasted with the UK's Companies Act 2006. Amendments to the Act have introduced optional proportionate liability, but only in relation to auditors' liability. The Act repeals a bar on auditors limiting their liability, and in addition intends to introduce a measure by which companies and their auditors can create a liability limitation agreement, which will require shareholder approval. Courts will be able to set aside the agreement, should it not propose a limit which is reasonable in the circumstances.

This change comes after much lobbying from accounting firms concerned that the old status of the law dissuaded firms from taking on audits of larger companies. Courts too had been recognising that allowance for proportionate liability was necessary in certain circumstances. Last May, an important House of Lords decision was handed down in the case of Barker v Corus.[30] It was held that there is a narrow exception to the usual rule of joint and several liability in mesothelioma cases arising from exposure to asbestos dust at different times by different entities. In these cases, each defendant will be liable only to the extent that it caused the harm. Despite the fact that it seems this decision will be applied narrowly, it highlights the need for proportionate liability for a range of reasons, including the fact that defendant insurers will now be better able to assess potential liability from the outset. The question remains whether a broadbased system of proportionate liability will be employed in England. If the Australian experience is anything to go by, it is a positive step, and

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[30] [2006] UKHL 20.

one which contributes to overall balance and functionality in the insurance domain.

However, in relation to the Companies Act amendments, there has recently been concern and renewed confusion over the next steps auditors are supposed to take – what proportions should be agreed on, and how should new clauses be drafted? Interpretation of proportionate liability protection promises to be rather difficult, and those who have pre-empted this have sought the guidance of the Financial Reporting Council by asking it to provide benchmark wording that can be used by auditors to re-draft their contracts.

Conclusion

At the very least, shifting judicial, consumer and legislative attitudes in relation to the three areas of law discussed has meant that the industry in Australia has been incredibly dynamic, requiring insurers to keep abreast of the law to avoid the pitfalls and take advantage of the opportunities. It can safely be said that the insurance environment in Australia has increasingly become consumer driven and for politicians and insurers, more consumer-conscious.

The is no doubt that on the part of those three stakeholders, a stable system is what is sought, in which certainty and predictability are paramount. Achieving this however, in light of differing judicial attitudes and a shifting legislative landscape, has been far from a smooth ride.

There is no doubt however that the Australian experience in relation to good faith, the claims made and notified policy and proportionate liability is very much a part of the thinking of England's commentators, politicians

and jurists. It is not difficult to predict that, in what is also an increasingly consumer driven society, the UK insurance landscape will in the future reflect many of the changes which have swept through the Australian industry in the past ten years.