

Insurance law update

September 2014



CASE NOTE

Trucks and Tribulations: *Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33*

On 10 September 2014 the High Court, consisting of Hayne Crennan, Kiefel, Bell and Gageler JJ unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of Western Australia and held that section 54(1) of the *Insurance Contracts Act* (1984) (Cth) (**ICA**) affords a level of protection for insureds, safeguarding them against circumstances whereby cover is declined for a breach of a policy term where such a breach is not connected to the actual loss.

SECTION 54

Prior to the ICA, contracts of insurance were governed by a mixture of federal and state statutes, imperial statutes and common law principles. Following referral to the ALRC¹ in 1976 for a review of the adequacy and appropriateness of the governance of insurance contracts the ICA was born eight years later.

The ICA is described in its long title as an Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds, and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly.

The relevant provisions of the ICA to consider in relation to this decision are as follows:

Section 54(1):

"(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 act² 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. "

Section 54(2):

"(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim."

MAXWELL

The respondent, Highway Hauliers Pty Ltd (**HH**) was an interstate freight business which owned a fleet of vehicles. HH hauled cargo between Western Australia and Eastern states. In

¹ Australian Law Reform Commission

² An act also includes an omission; see section 54(6) of the ICA.

2004, HH entered into a contract of insurance (**the policy**) with various Lloyd's Underwriters (**insurers**). The policy period ran from 29 April 2004 to 30 April 2005 and provided cover for specified loss, damage or liability occurring to or in respect of HH vehicles, subject to the terms and conditions of the policy.

An endorsement formed part of the policy. This endorsement stated that no indemnity would be provided unless, amongst other things the driver of the vehicle had a PAQS profile score of at least 36 (or an approved equivalent). PAQS testing was defined as psychological/safety testing conducted by People and Quality Solutions Pty Ltd.

Two of HH's vehicles were damaged in separate incidents occurring within the period of insurance. At the time of the incidents the vehicles were being driven by HH drivers who had not undertaken the PAQS testing required by the endorsement (**untested drivers**).

HH claimed under the policy for the damage to the vehicles, third party liability and legal costs (claims). Insurers refused to pay the claims because the drivers were untested drivers.

HH commenced proceedings in the Supreme Court of Western Australia against insurers seeking indemnity under the policy for the damage to the vehicles, third party liability and damages for consequential loss³.

FIRST INSTANCE, SUPREME COURT OF WESTERN AUSTRALIA⁴

It was established at first instance that HH during the period of insurance had omitted to ensure its drivers had undertaken PAQS testing. However, even though each vehicle was being operated by an untested driver it was established pursuant to section 54(2) of the ICA that this could not have been reasonably regarded as being capable of causing each loss.

Justice Corboy held:

- (a) insurers were therefore obliged to indemnify Highway Hauliers for the claims by reason of section 54(1) of the ICA; and
- (b) by refusing to pay the claims, insurers had breached the terms of the policy and were also liable for HH's consequential loss.

COURT OF APPEAL⁵

Insurers appealed the decision. The decision of Justice Corboy was upheld by McLure P, Murphy and Pullin JJA.

HIGH COURT DECISION

By special leave, insurers appealed to the High Court.

The High Court affirmed the decision of the Court of Appeal and held that HH had made claims in relation to incidents which had occurred within the period of insurance. It was therefore sufficient to engage section 54(1) to the effect that insurers could only refuse to pay claims by reason only of acts which occurred after an insurance contract was entered into.

IMPACT ON INSURERS

Insurers should be aware that:

- (a) section 54(1) of the ICA will only apply to acts or omissions that occur after the policy is entered into;
- (b) section 54(1) of the ICA will not apply to conduct which took place before inception of a policy;
- (c) section 54(1) of the ICA allows an insurer to reduce its liability for the loss to the extent that its interests were prejudiced; and
- (d) section 54(2) of the ICA allows an insurer to refuse to pay the claim only if the act or omission could be reasonably regarded as being capable of causing or contributing to the loss.

If the untested drivers in this case had caused the losses then section 54 would have applied.

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¹ Loss of profits.

² *Highway Hauliers Pty Ltd v Maxwell* (2012) 17 ANZ Insurance Cases 61-925.

³ *Maxwell v Highway Hauliers Pty Ltd* [2013] WASCA 115