

# Insurance Case Note

4 December 2009

## *Zurich Australian Insurance Limited –v– Metals and Minerals Insurance Pte Limited [2009] HCA 50*

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The scope and operation of the “Other Insurance” provisions in section 45 of the Insurance Contracts Act 1984 (“the Act”) has been considered by the High Court of Australia in the recent decision of *Zurich Australian Insurance Limited –v– Metals & Minerals Insurance Pte Limited* [2009] HCA 50.

For a detailed account of the complex history of this litigation, refer to the Hunt & Hunt Insurance Case Note of 13 February 2009 relating to the Western Australian Court of Appeal proceedings which preceded this appeal.

### The Western Australian Court of Appeal proceedings

The basis of this appeal to the High Court related to a portion of the Court of Appeal proceedings referred to as the “*Zurich contribution action*”. This was a claim by Zurich for contribution from MMI pursuant to the equitable principles of dual insurance, for moneys paid to an iron ore manufacturer, Hammersley. Hammersley was entitled to cover under each of 2 policies issued by Zurich and MMI respectively.

In defending the claim, MMI relied upon an “*underlying insurance*” clause, which was drafted so it purported to apply in each of two circumstances:

- A. Where the insured was an actual party to another contract of insurance; and alternatively
- B. Where the insured was a third party beneficiary to another contract of insurance (that is, entitled to cover without being an actual party to that other contract).

Section 45 of the Act, which seeks to void such underlying insurance clauses, reads:



*“Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, the provision is void.” (our emphasis added)*

Although it was held in the Court of Appeal that the underlying insurance clause relied upon by MMI was indeed of the type which was declared void by section 45 of the Act, a distinction was made by the Court of Appeal in this case because Hammersley, although entitled to cover under the contract of insurance issued by Zurich, was not a party to that contract.

Because section 45(1) was held to only be triggered to void the underlying insurance clause by the first of the circumstances in which the underlying insurance clause operated (“A” above), the Court of Appeal found that the underlying insurance clause could continue to operate in the second circumstance (“B” above). Namely, in the case of an insured such as Hammersley who was entitled to cover under a second policy of insurance, but who was not necessarily an actual party to that contract.

As such, the Zurich contribution action was set aside in the Court of Appeal.

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## The High Court of Australia proceedings

Zurich brought the appeal to the High Court of Australia on 2 main bases:

1. That the Court of Appeal erred in failing to find that the term "provision" in section 45(1) of the Act means the whole of the relevant provision of the contract of insurance, and not just the offending element of it; or,
2. In the alternative, that, read with section 48 of the Act (which gives beneficiaries of policies the same rights as actual insureds), section 45(1) should be construed to include a person entitled to cover under a second contract of insurance, but who may not be a party to that contract. (Namely, the type of cover afforded to Hammersley under the Zurich policy.)

These submissions by Zurich were not accepted, and the following points of insurance law were confirmed in dismissing the appeal:

1. When referring to a contract of insurance, the words "entered into" refer only to the actual parties to that contract, and the inclusion of persons not parties to the relevant contract would be inconsistent with the ordinary, or any plausible extended, meaning of "entered into" in relation to contracts.<sup>1</sup>

Therefore, section 45 of the Act operates to void "other insurance" provisions affecting double insurance only where the insured is a party to both the relevant contracts of insurance, and MMI did not have to contribute in circumstances where their insured (Hammersley) was also covered by other insurance effected merely on the insured's behalf.

**Comment:** Insurers should take note that the numerous provisions in the Act which refer to parties who have "entered into" a contract of insurance, will now be read to refer only to the parties to that contract, and not to beneficial third parties.

2. The term "provision" is to be defined as providing "for some particular matter"<sup>2</sup>, notwithstanding any "accidents of drafting"<sup>3</sup> which cause provisions for more than one particular matter to be included in a single numbered clause.

In the underlying insurance clause in question, this means that the whole provision which relates to insurance affected "by or on behalf of the insured" can be read disjunctively to apply to insurance effected "by the insured", and again to insurance effected "on behalf of the insured". In circumstances where section 45(1) of the Act only catches the former of those alternative provisions, the latter continues to operate.

Therefore the underlying insurance clause in the policy issued by MMI prevented

Zurich from claiming contribution pursuant to the equitable principle of dual insurance, in circumstances where the insured was not an actual party to the contract of insurance issued by them.

**Comment:** Although this was referred to by the Court as an "accident of drafting", we consider that clauses

which make provision for more than one eventuality are quite common. This is an authority that would support that method of drafting as quite effective (although possibly not ideal). It was simply on the construction of the legislation that the section did not apply to both eventualities in this case.

Further, it would seem perverse that section 48 of the Act, which extends the same rights to beneficial third parties as provided to actual insureds, does not extend corresponding rights to contribution to the insurers of beneficial third parties. This leads thereby to inequity in that the insurer of the beneficial third party, though having to indemnify that insured, is precluded from the protection of section 45 which is afforded to the actual insurer.

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<sup>1</sup> at [26]

<sup>2</sup> at [31]

<sup>3</sup> *Ibid.*

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