

ANNOTATED INSURANCE CONTRACTS ACT BY PETER MANN [Sydney: Law Book Co, 3rd Edition, 2001. 459 pp (including index). Paperback: A\$82.50.]

IN the 1980s, the Australian Law Commission found that the existing law governing insurance contracts was disadvantageous to the insured in a number of ways and recommended reforms to ensure greater protection to the insured. These recommendations were substantially implemented in the Insurance Contracts Act 1984 (Cth) which received the royal assent on 25

June 1984. This book is an annotation of this significant milestone in Australian insurance law.

The title is a slight misnomer as the work also includes annotations of the Insurance (Agents and Brokers) Act 1984, the Insurance Contracts Regulations and the Insurance (Agents and Brokers) Regulations. Besides, it conveniently contains the Insurance (Agents and Brokers) Decision-making Principles No. 1 of 1994, the General Insurance Code of Practice and the General Insurance Brokers' Code of Practice in one accessible, updated (containing legislative amendments up to 31 December 2000) volume.

There is comprehensive coverage of the main areas in insurance contracts such as the duty of utmost good faith, non-disclosures and misrepresentations, contractual remedies, claims and subrogation. With a succinct and "no frills" style of writing, the author adopts a highly practical approach towards elucidating the scope and meaning of the provisions. Of particular value and deserving of specific mention is the use of extensive cross-referencing and highlighting of interrelationships between various sections.

Despite its concise style of summarizing the relevant case law, this work does not come across as being too brief and simplified. Instead, it is lauded for striking a balance between a user-friendly digest and insightful discussion of the inherent difficulties in the interpretation of the Act leading to judicial differences.

There is reasonably specific discussion of how important provisions have been applied in different factual scenarios. An example is the treatment of s 13 (the requirement that each party to an insurance contract must act in utmost good faith) and s 14 (where parties cannot rely on provisions in the policy except in utmost good faith). Traditionally, utmost good faith is considered mainly in connection with the duty of disclosure. Outside this realm, it is a fluid concept that has once been criticized as an "alien, vague and useless expression without any particular meaning other than bona fides": *Mutual and Federal Insurance Co Ltd v Oudshoorn Municipality* [1985] 1 SA 419 (South Africa). As it is not defined in the Insurance Contracts Act, its meaning is probably best determined according to the various cases in which it has been applied. To this end, this book provides a good examination of the relevant judicial application of the duty, both at the pre-contractual and post-contractual stages.

Another example of how this book illustrates law in operation is the treatment of s 31. This section empowers courts to disregard the insurer's right of avoidance if it is not prejudiced or minimally prejudiced by the non-disclosure or misrepresentation. It has occasionally been commented that the element of judicial discretion in this provision creates uncertainty in practice. This book helps practitioners identify the rough boundaries of s 31 by compiling concise digests of many cases where judges are / are not prepared to exercise this power and the factual circumstances taken into account.

Furthermore, there is detailed analysis of the case law in controversial areas. Targeting an audience that includes both academics and practitioners, the book critically traces the case law development, even for topics where doubts have probably been dispelled by recent decisions. Moreover, its insightful examination of the issues merits praise. Where appropriate, there is incorporation of direct quotes and reference to extracts and synopses from the Australian Law Reform Commission Reports and Explanatory Memoranda.

An excellent example is the much-litigated s 54. This provision affects contracts of insurance which permit an insurer to refuse to pay a claim because the insured or a third party has done some act (or omitted to do some act) after the contract was entered into. If the act or omission could not reasonably be regarded as being capable of causing or contributing to a loss for which insurance cover is provided, the insurer may not refuse to pay the claim. The insurer may, however, reduce its liability by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act or omission. The question as to what constitutes an "omission" under s 54 has "agitated courts and commentators for several years": *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38, per Kirby J. A controversial issue is whether, in a claims made and notified policies where the insured has the right (not obligation) to notify circumstances likely to give rise to a claim, failure to do so attracts operation of s 54. This book traces the complex history of cases such as *East End Real Estate Pty Ltd v C E Heath Casualty and General Insurance Ltd* [1992] 25 NSWLR 400, *FAI General Insurance Co Ltd v Perry* [1993] 30 NSWLR 89, *Antico v Heath Fielding Australia Pty Ltd* [1997] 188 CLR 652, *Greentree v FAI General Insurance Co Ltd* [1999] 10 ANZ Ins Cas 61-423, and *HIH Casualty & General Insurance Aust Pty Ltd v DellaVedova* [1999] 10 ANZ Ins Cas 61-431. Over the years, the consideration of the question has moved from technically distinguishing an omission from a mere inaction to distinguishing an omission from a non-event. Recently, the High Court of Australia resolved this issue conclusively in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd*, holding that s 54 would apply where an insured omitted to give notice of circumstances during the policy period even where the claim is made after the policy period has expired. An "omission" may be a failure by the insured to exercise a right, choice or liberty that the insured enjoys under the policy. The majority rejected a literal reading of the Insurance Contracts Act, placing emphasis instead on the remedial purpose and its application to substance rather than form. Unfortunately, this landmark decision, which has important implications for the insurance industry at both the claims level and underwriting level, was reported too late for mention in the book. Otherwise, we would have had the benefit of the digest of the latest development alongside the author's views.

Nonetheless, a shortfall of this book is its minimal discussion of provisions that has not been judicially considered (especially those of the

Insurance (Agents and Brokers) Act 1984). Generally, there would only be notes of the legislative background and the synopsis (which is almost a mere paraphrase). This may possibly lull readers into thinking that such provisions are generally non-contentious. This point may be illustrated with the new s 21A. It requires an insurer to ask specific questions in respect of “eligible” contracts of insurance (prescribed by regulations, including domestic and personal lines insurance), in default of which the insurer is deemed to have waived the duty of disclosure. The motivation behind s 21A is to shift the emphasis from the insured’s onerous duty of disclosure to the role of the insurer to seek information.

A puzzling aspect of s 21A is the fact that it deals with non-disclosure but says nothing about misrepresentation. As the two closely related doctrines of non-disclosure and misrepresentation are often inadequately distinguished in practice, real confusion may arise about the effect of an insurer’s waiver under s 21A upon any misrepresentation by an insured. This reflects the weakness of the book in failing to identify potential live-wires for litigation. However, this may not be a fair criticism. One must recognize that as an annotation, not an insurance treatise, this book has already overreached the reader’s expectations.

Next, another weakness in this book is that its indices of cases and statutes are set out in a less than satisfactory manner. Only the section numbers, not the page numbers, of the cases and statutes cited in the book are listed in the indices. This creates some inconvenience in locating the relevant material when the section is of considerable length.

A final observation is that this book may be of little use to the local practitioner, given the vast difference between Australian and local insurance laws. Local courts generally adopt the common law position governing insurance contracts, where the insured is burdened with an onerous duty of disclosure, suffers the disproportionate penalty of avoidance of payment by the insurer for minor technical hitches in a contract or its fulfillment, etc. In stark contrast, Australian legislation has been described by the UK National Consumer Council as the “most comprehensive reform of insurance contract law in the common law world, aimed at improving the position for consumers”: Report by the National Consumer Council (Insurance Law Reform), 1997. The Council goes on to draw on the Insurance Contracts Act as a model for proposed reforms in the UK. Indeed, this book is a valuable resource for comparative analysis and reform research in the insurance arena.

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