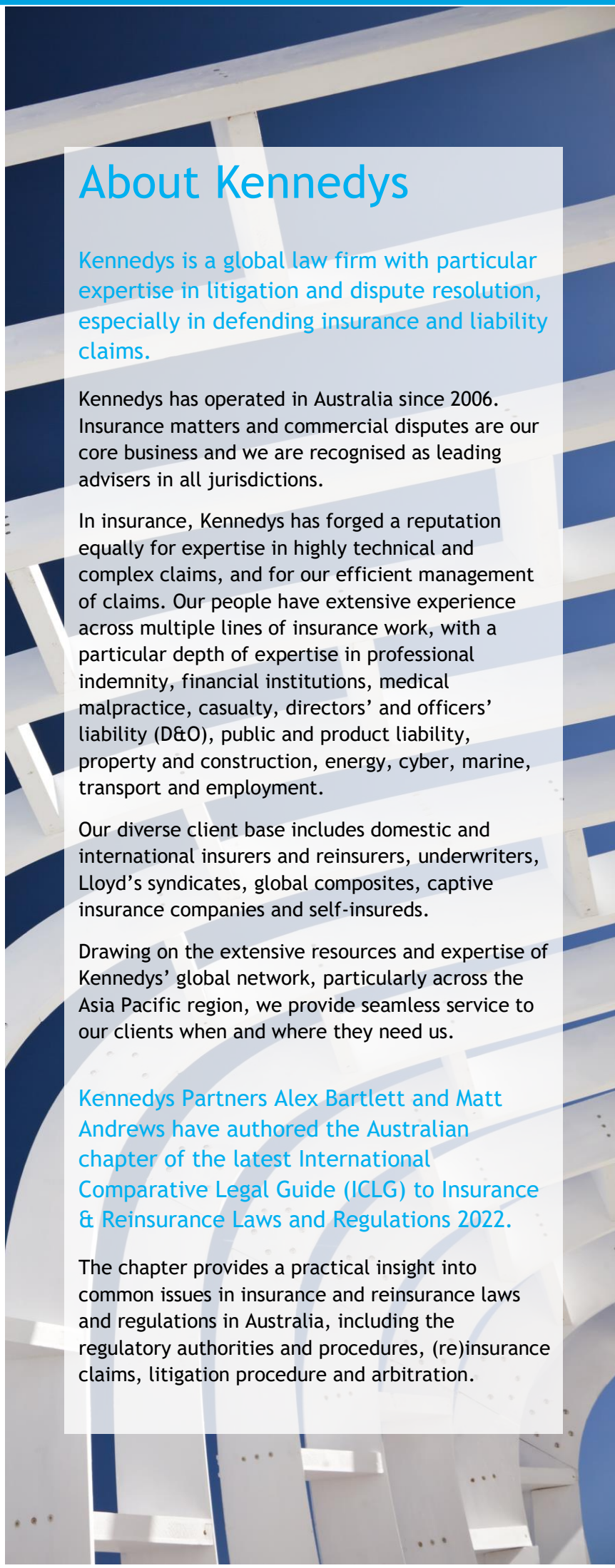
Guide to Australian Insurance & Reinsurance Laws and Regulations

2022

Kennedys

Contents



About Kennedys

Kennedys is a global law firm with particular expertise in litigation and dispute resolution, especially in defending insurance and liability claims.

Kennedys has operated in Australia since 2006. Insurance matters and commercial disputes are our core business and we are recognised as leading advisers in all jurisdictions.

In insurance, Kennedys has forged a reputation equally for expertise in highly technical and complex claims, and for our efficient management of claims. Our people have extensive experience across multiple lines of insurance work, with a particular depth of expertise in professional indemnity, financial institutions, medical malpractice, casualty, directors' and officers' liability (D&O), public and product liability, property and construction, energy, cyber, marine, transport and employment.

Our diverse client base includes domestic and international insurers and reinsurers, underwriters, Lloyd's syndicates, global composites, captive insurance companies and self-insureds.

Drawing on the extensive resources and expertise of Kennedys' global network, particularly across the Asia Pacific region, we provide seamless service to our clients when and where they need us.

Kennedys Partners Alex Bartlett and Matt Andrews have authored the Australian chapter of the latest International Comparative Legal Guide (ICLG) to Insurance & Reinsurance Laws and Regulations 2022.

The chapter provides a practical insight into common issues in insurance and reinsurance laws and regulations in Australia, including the regulatory authorities and procedures, (re)insurance claims, litigation procedure and arbitration.

1 Regulatory overview

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Two government bodies regulate insurance companies in Australia:

- Australian Securities and Investments Commission (**ASIC**).
- Australian Prudential Regulation Authority (**APRA**).

ASIC is responsible for the general administration of the *Insurance Contracts Act* 1984 (Cth) (**ICA**), which governs the dealings between insureds and insurers with respect to contracts and proposed contracts of insurance (except for some types of insurance, such as marine and reinsurance contracts). ASIC has the power to:

- Obtain insurance documents relating to insurance cover provided, or proposed to be provided, by insurers.
- Review insurers' organisational structure administrative arrangements.
- Intervene in any proceeding relating to a matter arising under the ICA or Part 3 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act* 2003.

APRA is responsible for the general administration of the *Insurance Act* 1973 (Cth) (**Insurance Act**) and is the prudential regulator of general insurance business, including reinsurance. The purpose of the Insurance Act is to govern the conduct of insurance business in Australia. APRA has the power to:

- Authorise general insurers to carry on general insurance business.
- Revoke such authorisation.
- Remove a director or senior manager of a general insurer.
- Set prudential standards for general insurers.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

In Australia, setting up a new insurance or reinsurance company requires authorisation from APRA. Only bodies corporate or Lloyd's underwriters can carry on insurance business in Australia.

APRA's guidelines outline the requirements for applicants, including:

- Having the capacity and commitment to conduct insurance business on a continuing basis with integrity, prudence and professional skill. Complying with APRA's prudential requirements.
- Satisfying APRA that its risk management and control framework is adequate.
- Satisfying APRA that its information and accounting systems are adequate.

The applicant must also obtain an Australian Financial Services Licence (**AFSL**) from ASIC in order to offer insurance products in Australia.

> Read more: APRA's Guidelines on Authorisation of General Insurers

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

In general, foreign insurers can conduct insurance business in Australia if they have authorisation from APRA or are a Lloyd's underwriter. In some

limited circumstances specified under Part 2 of the *Insurance Regulations* 2002 authorisation from APRA is not required.

Foreign insurers may seek APRA authorisation by establishing a locally incorporated subsidiary or by obtaining an authority to operate in Australia through a branch (foreign insurer).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The ICA renders void:

- Interim contracts of insurance provisions where the liability of the insurer is dependent upon the submission to, or the acceptance by, the insurer of a proposal for a contract of insurance intended to replace the interim contract of insurance (s38).
- Arbitration provisions (s43 – unless the agreement to arbitrate was made after the dispute arose).
- 'Other insurance' provisions that have 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 (s45).
- 'Contracting out' provisions that purport to exclude, restrict or modify, to the prejudice of a person other than the insurer, the operation of the ICA (s52).
- Variation of contracts of insurance provisions that authorise or permit the insurer to vary, to the prejudice of a person other than the insurer, the contract (s53).
- Unfair contract terms in all general insurance contracts which were entered into, renewed or varied from 5 April 2021 (s15 and s12BF *Australian Securities and Investments Commission Act 2001* (Cth)). Under s12BG, a term of a contract will be unfair if:
    - It would cause a significant imbalance in the parties' rights and obligations arising under the contract.
    - It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
    - It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The ICA also imposes on insurers and insureds a duty of utmost good faith and disclosure, which are explored further at question 2.5 below.

Otherwise, there are some complex common law principles of insurance that also confine the parties' freedom of contract, such as the public policy principle of not permitting insureds to benefit from their own criminal misdeeds or contract out of the consequences of their own fraudulent non-disclosure.

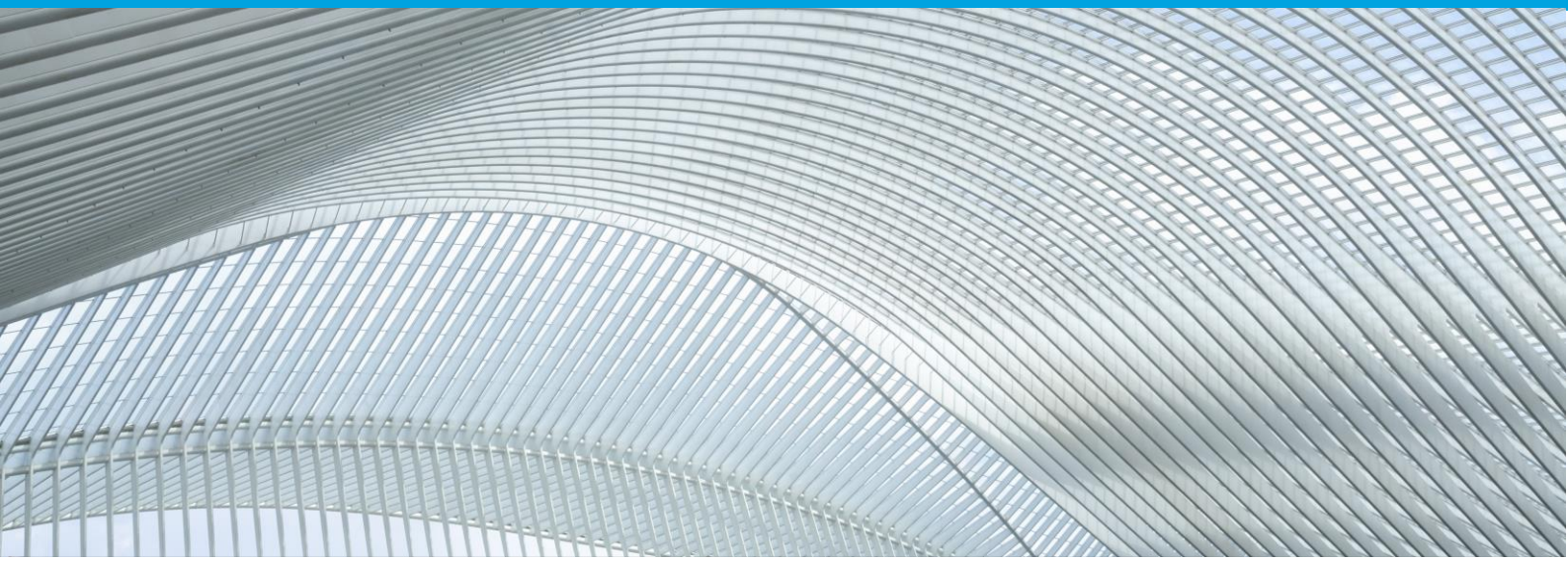
> Read more: *All Class Insurance Brokers Pty Ltd (In Liq) v Chubb Insurance Australia Ltd (No 2)* (2021) 154 ACSR 78; [2021] FCA 782

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify directors and officers under local company law although s199A of the *Corporations Act 2001* (Cth) (**Corporations Act**) prohibits a company from indemnifying:

- A liability owed to the company or a related body corporate (s199A(2)(a).
- A liability for pecuniary penalty order under section 1317G or a compensation order under section 1317H (s199A(2)(b)).
- A liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith (s199A(2)(c)).
- Legal costs of defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred in certain circumstances, such as defending or resisting criminal proceedings in which the person is found guilty (see s199A(2) and s199A(3).

A company must not pay a premium for a contract insuring a person who is an officer or auditor of the company against a liability (other than one for legal costs) arising out of conduct involving a wilful breach of duty in relation to the company or misuse of their position or information (s199B).



Furthermore, s229 of the *Competition and Consumer Act 2010* (Cth) (**Australian Consumer Law - ACL**) makes it an offence for a company to indemnify a liability to pay a pecuniary penalty under s224 of the ACL and legal costs incurred in defending or resisting proceedings in which a person is found to have such a liability. Any attempt to do so is void (s230 ACL).

1.6 Are there any forms of compulsory insurance?

There are many forms of compulsory insurance in Australia, with the most common including workers' compensation, compulsory third party motor vehicle, marine/shipping and professional indemnity for certain professions.

2 (Re)insurance claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Australian law is generally perceived to be more favourable to insureds than insurers because of the consumer protection provisions within the ICA. Some examples, in addition to those mentioned at question 1.4 above, include:

- **s28**: limits rights of avoidance for non-disclosure or misrepresentation to instances of fraudulent non-disclosure or misrepresentation.
- **s40(3)**: provides that if an insured gives notice in writing of facts that might give rise to a claim under certain types of liability policies, the insurer is not relieved of liability in respect of a subsequent claim by reason only that it was made after the expiration of the period of insurance cover.
- **s54:** prevents insurers from relying on contractual breaches by the policyholder to refuse payment of claims in whole or in part, unless the contractual breach prejudices the insurer's interests.
- **s58:** if the insurer fails to notify the insured in writing of the expiry or non-renewal of insurance cover, cover will be extended automatically as provided by the original contract.
- **s6:** an insurer must not cancel a contract of insurance and any purported cancellation is of no effect, except as provided by the ICA.

Notwithstanding, the courts will also construe policies of insurance as commercial contracts and the Australian courts have not hesitated to construe them in this way.

> Read more: *P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd* [2021] NSWCA 136).

2.2 Can a third party bring a direct action against an insurer?

Typically, the privity of contract doctrine would prohibit a third party with no relationship to the contract of insurance from bringing a direct action against an insurer. An exception is s48 ICA, which confers the same rights and obligations to third party beneficiaries as insureds under contracts of general insurance. Otherwise, there are statutory regimes which allow third parties to pursue claims for damages directly against an insurer, including:

- **s51 ICA**: a third party can bring an action directly against an insurer where the insured or third party beneficiary is liable in damages to the third party, the contract provides insurance cover in respect of the liability and

the insured or third party beneficiary has died or, after reasonable inquiry, cannot be found.

- **s601AG Corporations Act**: a third party may recover from the insurer of a deregistered company an amount that was payable to the company under the insurance contract if the company had a liability to the person and the insurance contract covered that liability immediately before deregistration.
- **The *Civil Liability (Third Party Claims Against Insurers) Act* 2017 (NSW)**: provides a process by which third parties may seek leave to join insurers to proceedings. In order to obtain leave, the third party must establish various matters, including that the insured person has a liability to the claimant and the policy covers that liability. The amount insurers will be liable for is limited to what would be payable under the policy for the insured person's liability to the claimant.

2.3 Can an insured bring a direct action against a reinsurer?

In most cases, an insured cannot bring a direct action against a reinsurer because the reinsurer is not privy to the original policy – unless there is a specific 'cut through' clause in the policy.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The ICA provides the following remedies to insurers in cases of misrepresentation or non-disclosure by an insured:

- The insurer may avoid the contract if the relevant failure was fraudulent (s28(2)). This remedy is subject to the courts' discretion to disregard the avoidance where the insurer has not been prejudiced, or the prejudice is minimal or insignificant and it would be harsh and unfair not to disregard the avoidance (s31).
- If the insurer is not entitled to avoid the contract, such as where the misrepresentation or non-disclosure was 'innocent' or negligent, or being entitled to avoid the contract has not done so, the liability of the insurer is reduced to the extent where it would be in the same position as if the misrepresentation/negligence had not occurred (s28(3)).

These remedies are not available if the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the failure had not occurred (s28(1)). Insofar as the non-disclosure or misrepresentation is 'innocent' or negligent, an insurer cannot enforce these statutory rights unless the insurer informed the insured in writing of their obligations of disclosure (s22).

Policies of insurance can, and often do, vary insurer's statutory rights of non-disclosure and misrepresentation, but the common law has an abhorrence of insureds contracting out of the consequences of their fraudulent non-disclosure.

> **Read more**: *Onley v Catlin Syndicate Ltd as Underwriting Member of Lloyd's Syndicate* (2018) 360 ALR 92; [2018] FCAFC 119

Finally, as the ICA does not apply to reinsurance contracts and the common law applies, where there has been misrepresentation or non-disclosure (regardless of whether it is 'innocent' or fraudulent), the reinsurer has the right to avoid the policy from its inception.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Section 21(1) ICA provides that an insured has a duty to disclose to the insurer every matter that is known to them, or that a reasonable person in the circumstances could be expected to know, that may be relevant to the insurer's decision to accept the risk and on what terms. This applies to all non-consumer insurance contracts.

The duty of disclosure does not require the disclosure of matters:

- That diminish the risk.
- That are of common knowledge.
- That the insurer knows, or in the ordinary course of the insurer's business as an insurer ought to know.
- As to which compliance with the duty of disclosure is waived by the insurer.

Section 13 ICA and the common law also require the insured and insurer to act towards each other with the utmost good faith, including in disclosures and representations made prior to inception or renewal of the policy. As outlined at question 2.4 above, an insured will not be permitted to avoid any fraudulent non-disclosure or fraudulent misrepresentation.

In determining whether any breach of duties has occurred, an Australian court will consider matters such as the questions asked by the insurer in the proposal and publicly available information.

For consumer insurance contracts, section 20B ICA provides that an insured has a duty to take reasonable care to not make misrepresentations to the insurer before entering into the contract. This new duty was introduced by the *Financial Sector Reform (Hayne Royal Commission Response) Act* 2020 in October 2021.

> **Read more:** Australian Insurance Regulatory Reforms

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Insurers have rights of subrogation as a matter of law upon certain conditions being met, but they are not automatic. There is often a clause in the policy in the insurance contract specifying when the insurer will be entitled to subrogation where they have indemnified the insured the policy. The ICA also regulates insurers' right of subrogation by:

- Limiting their ability to recoup from certain third parties (ss65 and 66).
- Setting out the process for distribution of money recovered depending on whether the insured or the insurer brought the recovery action (s67). These rights and processes are subject to the relevant contract of insurance or any agreement made between the insurer and the insured after the loss occurred (s67(9)).

> **Read more:** How subrogation and recoupment should be considered by insurers when resolving indemnity

3 Litigation overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The most appropriate courts for commercial insurance disputes will be the relevant state or territory Supreme Court or the Federal Court of Australia, as they have specialised commercial and insurance lists.

The value of the dispute will often inform which court is appropriate at a state/territory level. For example, in New South Wales the following monetary limits apply:

- **Local Court:** up to $100,000.
- **District:** up to $750,000.
- **Supreme Court:** more than $750,000.

Each jurisdiction has processes for applying for jury trials in civil matters. In practice, such trials are rare and highly unlikely to occur in insurance matters.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Court fees are payable in order to commence a commercial insurance dispute and will depend on who is commencing the proceedings and in which court proceedings are commenced. The filing fee for a corporation to commence a commercial insurance dispute in the Federal Court is $4,235, and ranges from $2,502 to $4,336.40 in the Supreme Courts.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The length of a commercial case will depend upon several factors, including the complexity of the issues, the number of parties, how quickly the case can be heard and the availability of the parties and their Counsel. The commercial divisions typically aim for proceedings to be resolved within 12 months where the issues are confined (such as a dispute about construction of a contract). However, there are obviously a number of variables that can impact this timeframe.

Parties to proceedings in Australia have statutory duties to assist the court to achieve the just, quick and inexpensive resolution of the real issues in the proceedings.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

Australian courts have successfully implemented a number of changes to their operations in response to COVID-19, including:

- Conducting hearings and applications by video or telephone.
- Requiring electronic filing of documents.
- Allowing procedural decisions to be made 'on the papers'.

Many practitioners find these changes have made practice more efficient, and at least some of the processes will remain in place. There has also generally been a reduced tolerance to adjourn hearings due to COVID-19 restrictions in order to uphold the overriding philosophy of litigation in Australia, namely to resolve matters in the most just, quick and inexpensive manner, even in cases involving issues of credit.

Read more: *Long Forest Estate Pty Ltd v Singh & Anor* [2020] VSC 604

4 Litigation – procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Generally, the Australian courts have the power to order the disclosure of documents in respect of parties to the action and non-parties (such as via notices of non-party disclosure).

In Queensland, South Australia and the Northern Territory disclosure or discovery is an automatic right between the parties whereas in other jurisdictions a party must give notice (Victoria, Tasmania and Western Australia) or obtain an order from the court to obtain general discovery (Federal Court of Australia, Australian Capital Territory and New South Wales).

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party can withhold from disclosure documents created with the dominant purpose of advice given by lawyers or prepared in contemplation of litigation on the basis of legal professional privilege.

A party may also withhold from disclosure documents produced in the course of settlement negotiations where the communication is directed towards a genuine attempt to reach a compromise or resolve the dispute.

The exceptions are, in general terms, where privilege has been waived either expressly, or by conduct that is inconsistent with the confidential nature of the communication, or where the communication is in furtherance of a fraud.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Australian courts have the power to require witnesses to give evidence at trial by issuing a subpoena, and witnesses may be held in contempt of court if they fail to attend. Subpoenas can be served:

- In a state or territory outside the territorial jurisdiction of the court (*Service and Execution of Process Act* 1992 (Cth)).
- In New Zealand by obtaining leave (*Trans-Tasman Proceedings Act* 2010 *(Cth*)).
- Outside Australia by obtaining leave, although the courts will be hesitant to do so unless the utility of the subpoena is clear, and the matter cannot be advanced by other means.

A party can also apply to have evidence taken before trial in certain circumstances, which often occurs in silicosis and mesothelioma cases where the plaintiff may be very ill.

4.4 Is evidence from witnesses allowed even if they are not present?

Evidence from a witness who is not present is ordinarily inadmissible, as it is considered hearsay. Noting subtle differences by state or territory, there are exceptions to the hearsay rule, and such evidence can be admitted where the witness is dead, unfit or cannot, with reasonable diligence, be found or identified. It is important to note however that the court may not give as much weight to the evidence of a witness that is not present.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Parties are ordinarily permitted to call their own expert witnesses, who must give their examination-in-chief by a report, unless the court orders otherwise.

Australian courts have broad discretionary powers with respect to expert evidence. Courts can direct expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court. Often the court's preference is for expert witnesses to provide their evidence concurrently, a practice known as 'hot-tubbing'.

4.6 What sort of interim remedies are available from the courts?

In addition to the remedies noted above for disclosure, the courts have the power to grant the following:

- Injunctions, restraining a party or (more rarely) requiring a party to do something. The aim is to preserve the status quo until the court can resolve the matter.
- Declaratory relief – in insurance matters this may include the insured or insurer seeking a determination of their rights or obligations under the policy.
- Security for costs.
- Stay of proceedings.

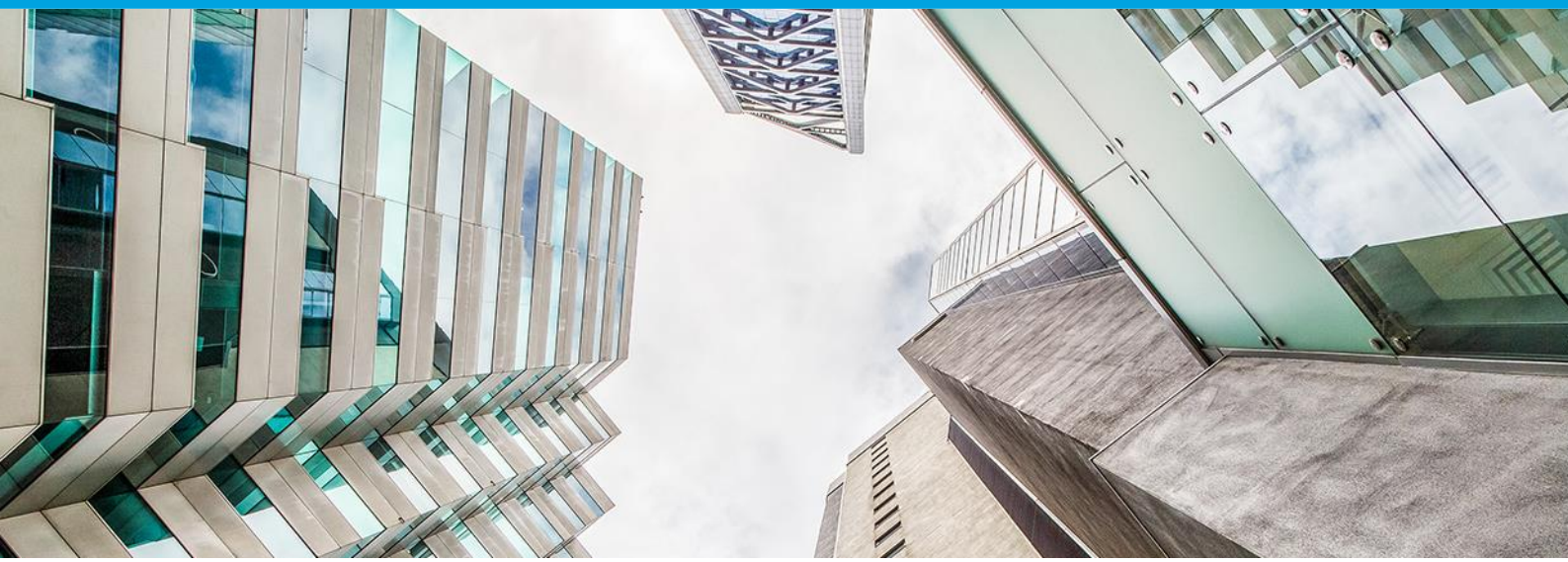
Other well-known interlocutory processes which are less common in insurance matters include:

- **Mareva (freezing) orders:** which prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment of the court will be unsatisfied.
- **Anton Piller (search) orders:** allows a party seeking information to search and preserve evidence.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Appeals are provided for by statute in the relevant jurisdiction. The grounds of appeal will depend on the substantive legal issues in the relevant jurisdiction, and the form will depend on the statute and relevant court rules. Generally, while appellate rules differ across jurisdictions:

- Parties will require the leave of the appellate court for appeals from interlocutory decisions.
- Leave is not required for appeals from final decisions, but sometimes there is complexity in determining whether a decision is interlocutory or final.
- In state and territory jurisdictions an appeal will progress from a first instance court to its supreme court, and then its court of appeal (or straight to the court of appeal if the primary decision was by a supreme court), and then subsequently to the High Court of Australia.
- In the federal jurisdiction, appeals are from the Federal Circuit Court to the Federal Court, and then to the Federal Court Full Court of Australia (or straight from the Federal Court to the Federal Court Full Court of Australia depending on the first instance



decision), and then to the High Court of Australia.

- There are limited rights of appeal from tribunals in each jurisdiction, again governed by statute.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Australian courts have the power to award pre and post-judgment interest on application by a party:

- **Pre-judgment interest:** is calculated at the rate the court thinks fit on all or part of the money, and for the all or any part of the period from when the action arose until judgment takes effect.
- **Post-judgement interest:** the rate is set at 6% above the cash rate last published by the Reserve Bank of Australia, or at another rate as the court may order.

Section 57 ICA provides for interest on late payment of claims from the date upon which it became unreasonable for the insurer not to pay. Under section 57, interest is set by a formula in the relevant regulations and is generally higher than the contemporary commercial rates of interest.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The general rule is that, except in exceptional circumstances, the successful party will be awarded their costs and those costs will follow the event (ie, litigation). Costs are ordinarily awarded on a standard 'party/party' basis and the successful party will generally recover between 60% to 75% of its actual costs.

There are costs advantages in making an offer prior to trial, as the offering party may be able to secure indemnity costs where there is an imprudent refusal of an offer to compromise. Indemnity costs are expressed as a recovery of 'actual costs', but parties generally recover between 80% to 90% of actual costs on an indemnity basis.

There are other grounds for awarding indemnity costs, such as for unmeritorious claims, but these are made only in exceptional circumstances.

Traditionally, costs are 'taxed' or 'assessed' by each parties' costs assessors, which can be a lengthy process. Many jurisdictions now prefer parties to apply for a 'gross sum' order whereby the party leads evidence in support of an award for a specific amount of costs.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Courts have powers to compel parties to mediate disputes. In practice, parties are often amenable to mediation, mainly to avoid the costs and time associated with a trial. Courts tend to be reluctant to order mediation if the parties are against it, and sometimes it is not appropriate.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

If the court has ordered the mediation (or another form of alternative dispute resolution), the parties have a duty to participate in good faith. If a party fails to do so, an adverse costs order may be made against them, they may be in contempt of court and there could be a stay of proceedings.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

In Australia, domestic arbitration is governed by uniform state and territory Commercial Arbitration Acts (**CAAs**) and international arbitration is covered by the *International Arbitration Act* 1974 (Cth) **(IAA**), both of which follow the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**).

The Acts provide limited scope for intervention and the court must not intervene except where provided for in the Acts, which is limited to offering assistance and supervision only (as discussed at question 5.4 below).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

As outlined above, s43 ICA provides that arbitration provisions in an insurance contract are void unless the agreement to arbitrate is made after the dispute arises. Therefore, no form of words can be put into a contract of insurance to ensure an arbitration clause will be enforceable.

In reinsurance contracts, where the ICA does not apply, the standard clause recommended by the Institute of Arbitrators and Mediators is:

> *"Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations."*
>
> ***Institute of Arbitrators and Mediators***

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A court will refuse to enforce an express arbitration clause that:

- Relates to the carriage of goods by sea, unless the arbitral location is Australia (s11 *Carriage of Goods by Sea Act 1991* (Cth)).
- Is included in an insurance contract because it would be void, as noted at question 5.2 above.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts have the same powers to make interim orders in arbitration proceedings as they have for court proceedings (17J CAAs). As outlined at question 4.6 above, interim relief commonly includes injunctions, declaratory relief, security for costs and stay of proceedings in commercial insurance matters.

Courts may also provide the following interim relief in support of arbitration (as specified in the CAAs):

- Assist in taking evidence.
- Issue a subpoena on application by a party.
- Allow or prohibit disclosure of confidential information in certain circumstances.
- Determine preliminary questions of law on application by a party.
- Make decisions on the appointment/ termination of an arbitrator.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Arbitral tribunals are bound to state the reasons for an award, unless the parties have agreed that no reasons are to be given. Reasons must be in writing and signed by the arbitrator/s.

There are no rules about how detailed the reasons must be, and this will often depend on the circumstances of the case, but they do not need to be to a judicial standard.

Read more: *Westport Insurance corporation v Gordian Runoff Ltd* [2011] 244 CLR 239

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

In international arbitrations there is no right of appeal on questions of law under the IAA. A party must apply to the relevant court for the award to be set aside and there are limited grounds for making an application (section 34 CAAs).

In domestic arbitrations, within 30 days of receipt of the award, a party may request the arbitral tribunal to correct any perceived errors in the award or give an interpretation of a specific point or part of the award (section 33 CAAs).

Under section 34A CAAs, parties can also appeal to the court on a question of law, if the parties agree an appeal may be made or the court grants leave. The parties have three months to apply from the date of the award or the request made under section 33 was disposed of. The court can only grant leave to appeal where it is satisfied certain conditions have been met, such that the determination of the question will substantially affect the rights of one or more of the parties.

The court may confirm, vary or remit the award to the tribunal for reconsideration on appeal. They may also set aside the award where appropriate.

Research and drafting support for this report provided by Amelia Craw.

Useful links

- View this chapter on Kennedys' website
- Access the full guide on ICLG's website
- Find out more about Kennedys' services in Australia

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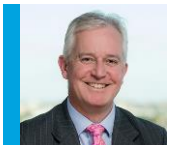

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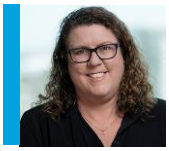

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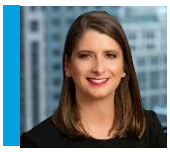

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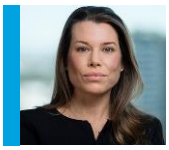

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