



DEPARTMENT OF BUSINESS LAW

STUDY GUIDE

BUSL862 INSURANCE LAW

Semester 2 2010

Credit points: 4

Unit Convenor: Mr John Bourke, LL.M (Monash)

Students in this unit should read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult one of the teaching staff in the unit.

1. ABOUT THIS UNIT

Examines the concept of insurance, the regulatory framework, formation of contracts of insurance, insurable interest, duty of utmost good faith, effect of misrepresentation, indemnity principle, double insurance, the doctrine of subrogation, claims, standard classes of insurance (such as general, property, life, marine and aviation, and public liability), risk management, self-regulation, and dispute resolution.

2. TEACHING STAFF

Unit Convenor /Lecturer in Charge: Mr John Bourke,
Office W3A 421
Phone: 9850 8454 or 0422 539 361
E-mail: John.Bourke@law.mq.edu.au.

Adjunct Lecturer:

Dr Malcolm Quirey, Special Counsel
Piper Alderman, Lawyers, Sydney

Postgraduate Administrator: Lara Hardy
E-mail: lara.hardy@mq.edu.au

3. CLASSES AND STUDY TIMES

The unit will be offered in alternate modes:

Internal Students

- Weekly Mondays 6-9pm in Room C5C 236

External Students

- Intensive weekend class on the following days:

Saturday, 14 **and** Sunday, 29 August from 10.00 am - 5.00 pm, in Room C5A 232

Please check the timetable for class times and rooms on the University website at:

<http://www.timetables.mq.edu.au>

4. REQUIRED AND RECOMMENDED TEXTS AND/OR MATERIALS

Students are encouraged to refer to the following texts and other references:

Text Book:

Pynt, Greg, *Australian Insurance Law --A first reference* Lexis Nexis Butterworths 2008
This text gives an excellent overview of the subject.

“A” Other recommended references:

(Later editions of some of these books may be available)

- ALRC Report No. 20 *Insurance Contracts*
- *Australian & New Zealand Insurance Reporter: CCH Online Commentary* (available through library website)
- Birds, J. *Modern Insurance Law*, (6th ed, 2004).
- Derrington, D, Ashton, R, *The Law of Liability Insurance*, (2nd ed, 2005)
- Kelly, D. and Ball, M. L. *Insurance Legislation Manual*, (3rd ed, 1995).
- Mann, P. and Lewis C. *Annotated Insurance Contracts Act*, (4th ed, 2003).
- Sutton, K. *Insurance Law in Australia*, (3rd ed, 1999).

Aust and NZ Insurance Law (e-journal, CCH) (held in library)

Canadian Journal of Insurance Law (e-journal, LexisNexis) (held in library)

Insurance Law Journal (e-journal, LexisNexis) (held in library)

Other recommended materials

The following have been obtained using the university library online databases and so the electronic citation is provided.

- Bloomfield, J ‘Medical defence organisation membership – Not a substitute for malpractice insurance’ (1998)10 ILJ LEXIS 21
- Boyd, G ‘The duty of disclosure in life insurance: is the balance struck by Part IV of the Insurance Contracts Act appropriate?’ (2001)13 ILJ LEXIS 15
- Campbell, N ‘Allocation problems in D&O policies: *Vero v Baycorp*’ (2006) 17 ILJ LEXIS 6
- Charrett, D ‘Professional indemnity insurance – Do third parties have an interest?’ (2003) 14 ILJ LEXIS 1
- Chipperfield, S ‘Carrying on an insurance business in Australia – What does that really mean?’ (2006) 17 ILJ LEXIS
- Drummond, S ‘Misleading or deceptive conduct in insurance’ (2002)14 ILJ LEXIS 15.
- Ellis, R ‘What are notifiable circumstances?’(2001) 12 ILJ LEXIS 7
- Godfrey, K ‘The duty of utmost good faith – the great unknown of modern insurance law’, (2002)14 ILJ LEXIS 20
- Hardy, H ‘Third party beneficiaries to insurance contracts’ (1997) 8 ILJ LEXIS 15
- Hawke, F ‘The innocents abroad’, (2006) 17 2006 ILJ LEXIS 2
- Otlowski, M ‘Australian empirical study into genetic discrimination’(2002) 12 Eubios Journal of Asian and International Bioethics 164

- Rodd, C ‘Fraudulent claims and the rights of the innocent co-insured’ (1997) 9 ILJ LEXIS 9.
- Slingsby, N ‘The events of 11 September 2001: Implications for war risk exclusions in aviation insurance’, (2002) 14 ILJ LEXIS 19
- Sutherland, K ‘An uneasy compromise: An analysis of the effect of a settlement reached by an insured with a third party claimant vis-a-vis his or her insurer’ (1998) 9 ILJ LEXIS 11.
- Tarrant, J ‘Narrow exclusion clause fails to protect insurer’ (2006) 17 ILJ LEXIS 5
- Ying, C ‘Whose premium is it anyway?’ (2001) 13 ILJ LEXIS 14
- Zakrzewski, R ‘The nature of a claim on an Indemnity’ (2006) 22 JCL LEXIS 4

Useful Websites

- **Australian Prudential Regulation Authority:** <http://www.apra.gov.au>
- **Australian and NZ Insurance Law:** (available at www.lib.mq.edu.au , CCH Online)
- **Australian Competition and Consumer Commission:** www.accc.gov.au
- **Australian Government Department of the Treasury:** <http://icareview.treasury.gov.au/content/members.asp?NavID=4>
- **Australian Securities and Investment Commission:** <http://www.asic.gov.au/asic/asic.nsf>
- **Canadian Journal of Insurance Law:** (available at www.lib.mq.edu.au, LexisNexis)
- **Insurance Law Journal:** (available at www.lib.mq.edu.au, LexisNexis)
- **Private Health Insurance Administration Council:** <http://www.phiac.gov.au/>

“B” The online law databases available through the university homepage are very useful. These include:

Case Base facilitates searches for Australian legal materials, and provides links to these. (If a case is not available through one of the commercial reports try the parallel BC..... link.)

Hein Online is for searching journal articles.

LexisNexis AU is for searching local primary (cases, legislation) and secondary (articles) materials.

LexisNexis affords a facility for searching for primary and secondary materials from a number of jurisdictions. Although it focuses on US materials it is also a good source for materials from other jurisdictions.

Westlaw international also provides a trans jurisdictional search facility for primary and secondary materials.

Some tips for using these databases – click the Natural Language option; key in fewer rather than more words, so as to provide a wider net for searches (for example, take one distinctive word in the title of a case, if the full title does not get a hit); use AND or & in order to narrow a search (for example, waiver & arbitration will ensure that documents retrieved contain both words).

Worldtradelaw.net –World Trade Organisation dispute resolution materials.

“C” Library Support for Postgraduate Students in Law

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website <http://www.lib.mq.edu.au>. For a complete list of services and resources and for enrolling in Library orientation programs for Law consult the Librarians at the Macquarie Library (below).

Library services include information on borrowing periods, services to distance students, links to IT Help (the Library’s IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. These include the Liaison Librarians (LL). The LLs are the first point of contact for Postgraduate students. There is an LL appointed to each Faculty of the University.

Services offered by your LL include:

- Providing further information on the library services
- Providing individual and group library resource sessions for postgraduate students
- Advising on new database trials being held in the Library
- Advising on appropriate contacts for specific services, such as requesting items not held at the Library from the Document Supply Service
- Preparation of resource guides in print and on the web
- Reference advice (face-to-face, phone and email)

Further information about these services is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage

5. UNIT WEB PAGE

Study guides and information on this unit can be found at:

http://www.buslaw.mq.edu.au/postgraduate_programs/PG_units/Busl862

6. LEARNING OBJECTIVES

The objectives of this unit are to develop an understanding of the fundamental legal principles of insurance law and its institutions and their regulation, and of the policies guiding the application and development of insurance law.

7. GENERIC SKILLS

The skills sought to be developed by the unit include critical analysis skills, and problem-solving skills, focused on the law and its institutions.

8. TEACHING AND LEARNING STRATEGY

The classes will take the form of a seminar in both the weekly and intensive sessions. Students are encouraged to read ahead of class. Marks for participation will be awarded .

9. ASSESSMENT

The assessment is based upon three (3) tasks:

A INTERNAL STUDENTS

- (1) Class Participation 5% of overall assessment
- (2) An in class Examination to be held prior to the mid-Semester recess, the precise date and other information to be announced in class. 45% of overall assessment
- (3) An Essay of 3,500 to 4,500 words on ONE of the following topics: 50% of overall assessment
 1. “The Insurance Contracts Act 1984 is almost unique in the common law world in its scope and importance”. Discuss and evaluate the Act’s significance assessing in particular the changes made to the common law. In your answer refer to relevant decided Cases
 2. “Medical Negligence currently poses an explosive situation for Insurers in relation to indemnity of professional persons”. Comment on this statement and refer in your answer to relevant statutes and the common law.
 3. Consider the following scenario:
You are the partner in a large firm of legal practitioners responsible for looking after the interests of a major client, Alpha All Risks Insurance. In using your best endeavours in acting for your client you find that conflicts of interest can arise in dealing with the insured and the insured’s disputes with a third party. Identify these areas of conflict and state how they should be resolved. In your essay refer to decided Cases.

The Essay is due on or before Friday 5.00pm 12 November 2010

Essays received after this date may attract penalties and may not be marked.

(B) EXTERNAL STUDENTS

1. Class Participation in the Intensive weekend 5% of overall assessment

AND

2. TWO Essays each of 3,500 to 4,500 words, selected from Topics 1 - 3 above.

These two Essays comprise 95% of the final assessment.

The Essays are due on or before 5.00pm Friday 12 November 2010.

Essays received after this date may attract penalties and may not be marked.

INFORMATION ON SUBMISSION OF ESSAYS FOR ALL STUDENTS:

NB For referencing in your Essay use the *Australian Guide to Legal Citation* available on the Internet. This must be used for Footnoting and referencing generally.

Use Footnotes,

Do not use Endnotes,

Provide a full Bibliography,

Include a word count.

Essays received after the due date may attract penalties and may not be marked.

Place a hard copy with the completed COVER SHEET attached in the Postgraduate Box outside Room 341 in W3A

OR

Mail a hard copy or copies with the completed COVER SHEET attached to Mr John Bourke, Department of Business Law, Building W3A, MACQUARIE UNIVERSITY, NSW 2109

10. RELATIONSHIP BETWEEN ASSESSMENT AND LEARNING OBJECTIVES

Completion of the above assessment tasks will foster the acquisition of knowledge specific to the subject matter of the unit, and the development of the more general skills of law-focused data searching, analysis, synthesis and written expression.

11. PLAGIARISM

The University defines plagiarism in its rules: “Plagiarism involves using the work of another person and presenting it as one’s own.” Plagiarism is a serious breach of the University's rules and carries significant penalties. You must read the University's policies and procedures on plagiarism. These can be found in the *Handbook of Postgraduate Studies* or on the web at: <http://www.student.mq.edu.au/plagiarism/>.

The policies and procedures explain what plagiarism is, how to avoid it, the procedures that will be taken in cases of suspected plagiarism, and the penalties if you are found guilty. Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

12. UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means that on occasion a student’s raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the

distribution bands set down by the University. The policy does not require that any numbers of students are to be failed in any unit.

13. SCHEDULE OF TOPICS

The link to these Materials will be uploaded to Blackboard.

Topics 1 & 2: Introductory Materials:

Concept of insurance; structure of industry; regulatory framework; policy considerations informing regulation.

- Gillies, P 'Insurance Law' *Business Law*, (12 ed, 2004).
- Sutton, K 'Nature of the Contract of Insurance', *Insurance Law in Australia*, (3 ed, 1999).
- Lewins K & Lo, S 'Striving for Equilibrium: A Critical Analysis of Section 54 of the Australian Insurance Contracts Act' [2003] MurUEJL 20, extract.
- 'Regulation of Insurance: Legislation Regulating Insurance', *Halsbury's Laws of Australia*, available at www.lexisnexis.com.au.
- 'Statutory Regulation- Australia', CCH Online Insurance Commentary.
- 'Insurance Contracts Act- Summary', CCH Online Insurance Commentary.

Topic 3: Concluding a Contract of insurance:

Contracts of Insurance

- Sutton, K 'Formation of Contract', *Insurance Law in Australia*, (3 ed 1999).

Insurable interest

- 'Insurable Interest', CCH Online Insurance Commentary.

Utmost Duty of Good Faith

- Derrington, D & Ashton, R 'Utmost Good Faith and Disclosure' in *The Law of Liability Insurance*, (2 ed, 2005).
- Scott, Tim, 'Implications of Hannover v Sayseng: Third Parties and the Duty of the Utmost Good Faith' (2006) 17 ILJ 48.

Topic 4: Duty of Disclosure and Misrepresentation:

Duty of Disclosure

- Derrington, D & Ashton, R 'Utmost Good Faith and Disclosure' in *The Law of Liability Insurance*, (2 ed, 2005.)
- Tay, C 'The duty of disclosure and materiality in insurance contracts – a true descendant of the duty of utmost good faith?' 2002 ILJ LEXIS 7.

Misrepresentation

- 'Misrepresentation', CCH Online Insurance Commentary.

Topic 5: Indemnity, Double Insurance and Contribution:

Indemnity Insurance

- ACCC, 'Public Liability and Professional Indemnity Insurance: Fifth Monitoring Report', (extracts) January 2005.
- Spigelman J 'Negligence and insurance premiums: recent changes in Australian law' (2003) 11(3) Torts Law Journal 291.
- See also Gillies, P 'Insurance Law' extract from *Business Law*, (12 ed, 2004).

Double insurance and the doctrine of contribution

- Pynt, G 'Elf downunder', 2002 ILJ LEXIS 4.
- 'Double Insurance', extract from Halsbury's Laws of Australia.
- Warrington, J.M '9/11 WTC Insurance litigation – Phase two and three,' 2005 ILJ LEXIS 11
- 'Contribution and Subrogation', CCH Online Insurance Commentary

Topic 6: Subrogation and Privity:

Subrogation

- 'Contribution and Subrogation', CCH Online Insurance Commentary

Insurance and Privity

- "Rights of Third Parties", Insurance, Chapter II, General Principles, Halsbury's Laws of Australia.
- McCarthy, C 'Third Party Access to Insurance Policies and Joinder of Insurers', (1999) ILJ LEXIS 12
- See also Sutton, K 'Formation of Contract', *Insurance Law in Australia*, (3 ed, 1999).

Topic 7: Construction of terms in insurance contracts:

- 'Standard Cover', CCH Online Insurance Commentary
- 'Construction of Policies', CCH Online Insurance Commentary
- 'Warranties and Conditions', CCH Online Insurance Commentary
- 'Increase of Risk', CCH Online Insurance Commentary
- 'Limited effect of Exclusion Clauses', CCH Online Insurance Commentary
- 'Different Classes of Insurance', CCH Online Insurance Commentary
- Trigg, P 'What is an 'accident' under a contract of insurance?' (2006) 17 ILJ LEXIS 4

Topic 8: Claims:

- 'Claims ', CCH Online Insurance Commentary
 - Claims procedures,
 - Notice of Loss
 - Onus of Proof
 - Proof of Loss
 - Causation
 - Fraudulent Claims
- Ellis, R 'What are notifiable circumstances?' (2001) 12 ILJ LEXIS 7

Topic 9: Illegality, Conflict Resolution and Interim Insurance:

Illegality

- ‘Illegality- Public Policy’, CCH Online Insurance Commentary ‘.

Conflict resolution in insurance cases

- ‘Claims-Notice- Dispute Resolution’, CCH Online Insurance Commentary
- Hill, D, & Waters, P ‘Alternative Dispute Resolution in Australia for Insurance Related Disputes’, 1994 ILJ LEXIS 4

Interim insurance

- Derrington, D & Ashton, R ‘Interim Cover’ in *The Law of Liability Insurance*, (2 ed, 2005).

Topic 10: Expiration, renewal and cancellation of contracts:

- ‘Renewal, Cancellation and Termination,’ CCH Online Insurance Commentary

Topic 11: Discrimination and Reinsurance:

Discrimination law and insurance contracts

- Spiteri, G ‘Genetic testing and its implications for Australian insurance law’ (2000) 7 James Cook University Law Review 96
- Tarr, JA ‘Regulatory approaches to genetic testing in insurance’, (2002) 24 (2) Sydney Law Review 189.

Reinsurance

- ‘Reinsurance’, CCH Online Insurance Commentary
- Hawke, F ‘The innocents abroad’, (2006) 17 (1) Insurance Law Journal 18

DEPARTMENT OF BUSINESS LAW

ESSAY COVER SHEET

(Please attach cover sheet to every assignment)

Surname:		Student Number:	
Given Name:			
Lecturer's Name	Mr John Bourke		
Date Due:		Unit Number:	
Essay Title:			
<p>“I certify that I am aware of the University’s policy on plagiarism and that this assignment meets those requirements and has not been previously submitted for assessment in any other course of study”</p> <p>Signed</p>			
Marker’s Comment			