



**CQIB Training – February/March 2011  
Legal Rights 101**

**Gillian Bristow and Terry Batch**



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**COOPER GRACE WARD**  
LAWYERS

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# 2010 Highlights

- BRW Client Choice Awards Winner – 2009 and 2010
- EOWA Employer of Choice for Women – 2009 and 2010
- Cooper Grace Ward's 30<sup>th</sup> Anniversary
- CGW People + Planet



# Our topics for today ('D' Day)

- Describing the insured
- Disclosure
- Drafting and interpreting policies
- Dealing with investigators
- Duty of brokers to third parties
- Disputes (and “off the record”)
- Discussion



# Topic 1: Describing the insured – still many court cases

- Sole traders – Jim Smith
- Partnerships – Jim and Jane Smith
- Trusts Jim Smith Pty Ltd as trustee for Smith Family Trust
- Companies – Jim Smith Pty Ltd/Jim Smith Ltd
- Corporate Groups – Smith Group
- Incorporated Associations – Smith Charity Inc



# Describing the insured

- Business Names – Jim Smith t/as Smith Electronics
- Subsidiaries - definition
- Statutory bodies



# Describing the insured

- The need to be careful – include all names  
***Australasian Medical Insurance Ltd & Anor v  
CGU Insurance Ltd***
  - Queensland Medical Services Pty Ltd
  - Samdoor Pty Ltd
  - Renbond Pty LtdT/AS Queensland Medical Laboratory  
Partnership.”



# Quiz

## Which of these cannot exist?

- Brown Pty Ltd t/as Black Pty Ltd
- Henman Brown Ltd
- Queens Park Pty Ltd as trustee for the Black Family Trust
- Queens Park Trust trading as Purple Rockets Pty Ltd



## Topic 2: Disclosure

- Duty of good faith
- *There is more than an obligation to treat the insurer honestly and freely to tell him what the applicant thinks it is relevant*
- *Disclosure should not be limited to just what you know but what a reasonable person would know*



# Disclosure cont.

## Section 21 of ICA

- *Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:*
  - *(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or*
  - *(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.*



# What must the insured disclose?

- Exposed to more than ordinary danger from the perils insured against
- Taking out cover for a “special reason” - intended arson
- Increased risk to insurer – e.g. hazardous goods / storage
- Any moral hazard - respectability, solvency, character, reputation
- What you know the insurer thinks is relevant



# Disclosure cont.

- Consider “the moral risk”..
  - Conviction?
  - Criminal Conduct?
  - Details

Should always ask the insured about convictions/criminal conduct



# Matters which do not need to be disclosed (s 21)

- Common knowledge
- Insurer knows or in the ordinary course of business as an insurer ought to know
- Diminish the risk
- Duty of disclosure has been waived by the insurer



# Topic 3: Drafting and interpreting policies

- You need to understand the principles
- How courts interpret policies
- Case study on interpreting a policy



# Definition of simplicity

- *A policy ought to be.. framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which on the other, the company can be cheated, shall be found on the face of it: nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are often entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be framed in a manner to perplex the judgment of the first judges in the land, and to lead to such differences of opinion among them.*



# Interpreting policies- the principles

- Words with accepted meanings
- Contra proferentum (against the writer)
- Plain meaning
- Commercial purpose
- Consulting other documents





# Why the policy responds

- Fire is clearly an accident
- The clause relates to the conduct in allowing licensed shooters onto the property for the duration of their stay
- Cover is not restricted to whilst they are in the act of hunting



# Topic 4: The Investigator

- A private investigator does not have any special powers
- An insured is bound to co-operate – is part of the duty of good faith
- The broker is the agent of the insured – need to obtain instructions



# Dealing with the investigator cont

- If broker conduct is under question, obtain legal advice and notify PI insurer
- Never co-operate with an investigator appointed by a third party



# Topic 5: Duty of Brokers to Third Parties

Third parties may obtain the benefit of insurance:

1. By entering into the contract as agent/ trustee of the third party
2. The insured may assign its benefit under the insurance to the third party
3. The insured may enter into a contract with the insurer and the policy may extend the benefit to a third party
4. Premium funders may also have rights under premium funding agreements (e.g. power of attorney)



# Duty of Brokers to Third Parties cont'd

1. Section 48 ICA allows TP to recover loss from the insurer even though the TP is not a party to the contract
2. The insurer has the same defence to an action under this section as he would have in an action by the insured
3. Section 54 ICA is available to the third party if a breach relied upon the insurer is proved not to have caused the loss
4. Section 56(1) ICA: a fraudulent claim by an insured will not affect an innocent claim by a third party



# Duty of Brokers to Third Parties cont'd

- *BMW Finance v Miller & Associates* – High Court 2010.
  1. BMW lent \$2.7 million to Consolidated Timber Holdings by way of insurance premium funding
  2. The insurance policy which was funded was non cancellable. Broker didn't tell BMW
  3. CT defaulted under the premium funding facility
  4. BMW sued CT's insurance brokers
  5. Action was brought under the *Trade Practices Act* – corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive



# Brokers' Checklist

1. Obtain permission from insured to discuss policy with TP
2. What is the nature of the information required by the TP? Why is it required?
3. Is there an obligation to provide the information? Don't give any advice - just answer questions.
4. Will the third party rely on the information to make a commercial decision?



## Brokers' Checklist cont'd

5. Is the information sufficiently clear for the third party to embark on its decision or abandon it?
6. Has the third party sought clarification in respect of the information?
7. Have any queries been answered comprehensively?
8. Has the third party been referred to anyone armed with knowledge to sufficiently answer the queries?



# Who handles claims if client changes broker?

- No easy or straightforward answer
- No general legal obligation for a broker to assist an insured with an insurance claim
- Once you cease to act, you have no authority to act for the insured



# Topic 6: Off the record/without prejudice

- Communications are often headed “without prejudice”
- This means it is intended to be protected from the need to be produced to a court which is determining the dispute
- There is no magic in the words “without prejudice”



# “Off the record” is of doubtful use

- *The words "off the record" indicate no more than a desire for confidentiality, and do not give rise to a legal obligation of confidentiality. The words “off the record”, in a context like the present one, should be taken only as indicating (a) that a prediction by the speaker might prove incorrect and should not be relied upon, and/or (b) a desire for confidentiality.*
- *Jadwan Pty Ltd v. Porter (No.2) [2004] TASSC 126*



# The danger of admissions....

- *As soon as Mr Worsley made his "off the record and without prejudice" disclosure, the information that he imparted ceased to be confidential. As Long Innes J pointed out in Haynes v Hirst (1927) 27 SR (NSW) 480 at 489, "A man, having eaten his cake, does not still have it, even though he professed to eat it without prejudice."*



# Context is important

- Words “off the record” or “private conversation” can be used in the sense that the following discussion should not be disclosed:

*Orpen v. Tarantello & Ors* [2009] VSC 143  
per Beach J



# Topic 7: Disputes (and resolving them) - IDR

- IDR processes are set up by the *General Insurance Code of Practice*
- Disputes with insurance brokers are handled similarly under the *Insurance Brokers Code of Practice*
- This code only covers some brokers – members of NIBA and those who opt to adopt the Code



# Disputes (and resolving them) - EDR

- FOS – Financial Ombudsman’s Service
- Must lodge dispute within specified times and these vary
- Applicant not bound by recommendation or determination but insurer or broker is



# Questions.....

- Other seminar topics of interest to you and/or your clients?



# Regular seminars we run - examples

- Children's issues in the context of family breakdown
- Discrimination in employment - are you up to date?
- Estate Planning Tips and Traps
- Managing Ill and Injured Employees
- Managing Tax Audits
- Termination of an employee - your legal obligations
- How effective are restraints on employees?





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Thank you



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