

Insurance Law Journal (ILJ)
Volume 31 Part 1
(articles included in this part are linked to the LexisNexis platform)

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Articles

[The limitations of contractual indemnities](#)

— *Felicity Maher*

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The nature of the contractual obligation to indemnify is much contested. Rival analyses include that the obligation is to prevent loss to the indemnified party, and that the obligation is to compensate loss suffered by that party. Controversially, in the context of indemnity insurance, the prevent loss analysis is dominant in England. This analysis was recently applied by a five-member New South Wales Court of Appeal in *Globe Church Inc v Allianz Australia Ltd*. The analysis of the indemnity obligation has significant consequences, including in relation to the nature of a claim on an indemnity, the recoverability of consequential losses and limitation. This article argues that the New South Wales Court of Appeal has taken Australian law down the wrong path. The nature of an indemnity obligation must be a question of construction of the contract. The usual principles of contractual construction should apply. And for both insurance and non-insurance indemnities, a commercial construction approach should be adopted. Moreover, when an issue concerning a contractual indemnity arises, the starting point for analysis should always be the obligation to indemnify and its construction. This approach will provide a proper perspective for the resolution of issues including limitation.

[When is a debt not a debt? When it is a claim for damages](#)

— *Fred Hawke*

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The subject of this article is when should an insured consider making a claim against an insurer in debt? It is the author's contention that an insured seldom, if ever, will want to sue upon the policy to recover its claim as a debt. Such a cause of action would appear to be mispleaded in the current state of Australian insurance law and the benefits of bringing it dubious at best. A claim in debt would only be appropriate if an amount which could properly be characterised as a debt was outstanding under the policy and an action in the form of a claim for it as monies due and payable, as opposed to some other legal remedy such as an action for breach of contract damages or for specific performance of an indemnity, represented the optimal and recognised legal route to recovery. That is not the case according to current Australian insurance authorities.

[Insurance contracts and unfair contract terms: A two-tier system](#)

— *Peter Sise*

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Currently, the laws concerning unfair contract terms apply to insurance contracts, provided those contracts are not governed by the Insurance Contracts Act 1984 (Cth). Insurance contracts which are covered by the Act are beyond the reach of the unfair contract terms laws. This creates a two-tier system where some insurance contracts are covered by the unfair contract terms laws but not others.

Much of this will change on 5 April 2021 when the unfair contract terms laws will be extended to contracts covered by the Insurance Contracts Act. However, the unfair contract terms laws that will apply to insurance contracts covered by the Act will be different to those that apply to other insurance contracts. This creates a new two-tier system. This article will explore the current two-tier system and the one that will begin on 5 April 2021, including some of the uncertainties of the new system.

Implications of the Royal Commission: The Royal Commission and the insurance framework

— *WIB Enright*

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This article argues for a broader and deeper view of the work and reports of the Financial Services Royal Commission than a narrow focus on the Final Report's recommendations: the work and reports have traced an outline for change in the insurance framework itself, beyond the insurance recommendations in the reports. After sketching the background, I argue for a wider angled reading of the Final Report. The Financial Services Royal Commission's work was strongly influenced by the Treasury submissions and these were then shaped into the financial services regulatory framework through the Commissioner's consideration of norms, precepts and principles which become the foundations of the Commissioner's general rules. We are now also left with the task of finding a place in our business practices and, given the forensic intensity of the Financial Services Royal Commission, the law, for 'community standards'. I then consider a number of omissions and flaws in the Final Report. Firstly, on the 'important limitations' in the regulatory framework: consumer credit insurance regulation; approved product lists; and unregistered life insurance businesses. Secondly, on sales and products: standard cover terms. Thirdly, on disclosures and representations, the Financial Services Royal Commission's recommendations on s 29 of the Insurance Contracts Act 1984 (Cth) are flawed and the Insurance Contracts Act already deals with a duty to make a reasonably careful representation. Fourthly, the Unfair Contract Terms regime should be aligned to the statutory utmost good faith duty and adapted for insurance. Fifthly, the code proposals must find a place for ethical standards, standards should be contractually enforceable by a customer and serious or systemic code breaches should be enforceable by Australian Securities and Investments Commission. I then consider the concerns that the Financial Services Royal Commission did not touch on any issues of access and diversity for the insurance sector: family violence, mental illness and disability discrimination. It is a part of my argument that the Financial Services Royal Commission work gives some illuminating guidance on those matters. I also deal in the same spirit with some rogue products and chronic legal issues. I offer some proposals, consistent with the wider reading of the Commissioner's work, for consideration.