Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 21 – insurance and superannuation

A. Essentials of an insurance contract

1. An insurance contract is subject to the ordinary laws of contract. It does, however, have four special characteristics that set it apart:

   - insurable interest;
   - duty of disclosure;
   - the principle of subrogation; and
   - indemnity.

2. It is also these four principles that distinguish an insurance contract from a wager.

3. Contracts of insurance are of two kinds:

   - **contingency insurance** – where payment is made upon the occurrence of an event. Life policies and personal accident policies are contingency policies; and
   - **indemnity insurance** – where any loss suffered is made good. General insurance policies are normally indemnity policies.

Before 1984, the bulk of general insurance law came from the common law. Since 1984, the *Insurance Contracts Act 1984* has provided the basis for insurance law throughout Australia, although some State laws remain in force where they are consistent with the *Insurance Contracts Act 1984* (the Act). Note also that with the passage of the *Financial Services Reform Act 2001* (Cth), there are some areas of inconsistency in the *Insurance Contracts Act 1984*. To address this, the *Insurance Contracts Act 1984* was amended in 2012.

There are two major bodies regulating insurance practices in Australia: the **Australian Securities and Investments Commission (ASIC)** which regulates investment products, financial advisers and consumer protection; and the **Australian Prudential Regulation Authority (APRA)** which oversees industry standards.

If an insured has a dispute with an insurer over an insurance product, he/she may seek resolution from a number of bodies if the matter has not been resolved by complaint to APRA or ASIC. The Financial Ombudsman Service is a major provider of dispute resolution in the financial services industry.

From 1 July 2014, the new *General Insurance Code of Practice* came into effect which is intended to provide guidelines for general insurers of industry standards of conduct.

Recent world events (especially the bombing in New York on 11 September 2001) have precipitated the passage of the *Terrorism Insurance Act 2003* (Cth) which has sought to re-establish a reinsurance pool of $300 million which will be funded by an additional premium on insurance of 2%, 4% or 12% depending upon the location of the commercial building being insured. Without this contingency, many commercial construction projects could not proceed because developers would not be able to get finance on uninsured projects.

The Australian Reinsurance Pool Corporation will manage the scheme.

B. Insurable interest

The general proposition is that the owner of an insurance policy must have an insurable interest; ie a real and genuine interest in the thing insured.

1. In contracts of general insurance, the owner of the policy must have an insurable interest at the time that the loss occurred: see *Macaura v Northern Assurance Co Ltd*.

2. The Act has altered this position and requires only that the claimant suffer a pecuniary or financial loss. This probably means that *Macaura's case* would be decided differently today.

3. There is no longer any requirement for the owner of a life policy to have an insurable interest.

4. Recent changes were made under the new *Insurance Contracts Amendment Act 2013* (Cth), for eg, the life insurer will have the right to change the date of expiry of a life policy if an incorrect birth date was wrongly provided, and policies can be cancelled is a claim made proves to be fraudulent.

C. The duty of disclosure

1. The common law position was that of utmost good faith. Failure of the insured to disclose all matters relevant to the risk made the policy void.

2. The Act has modified the common law duty. The insured must not make an untrue statement, or omit a fact which he or she knows to be relevant to the risk, that is, that would be relevant to the insurer's decision whether to insure and at what rates. Section 26 states that a misrepresentation is not fraudulent if the insurer reasonably believed in its truth.

3. The insured does not have to disclose matters that:

    - lessen the risk;

    - are of common knowledge;

- the insurer knew, or should reasonably have known; or
- the insurer has waived.

4. The law imputes the knowledge of an agent to the principal: see *Lindsay v CIC Insurance*.
5. The duty of disclosure extends to each joint insured person: see *Advance Insurance v Mathews*.
6. The Act provides that an insurer can void a policy of general insurance for fraudulent misrepresentation or non-disclosure if it would have affected the insurer's decision to insure, or its rates.
7. The Act states that an insurer can void a life policy if there is fraud (other than a misstatement of age) and the insurer would not have insured at all, but must do so within three years. If the insurer would have insured but at higher rates, or if the misstatement is as to the age of the insured, the policy is valid but the insurer can adjust the claim to reflect the higher premiums.
8. The court has a discretion if it thinks it fair to declare valid (with an adjustment of premiums) an otherwise void policy.

D. Indemnity

1. The principle of indemnity is that the insured cannot recover more than the loss.
2. Where there is over-insurance, the principle of indemnity limits the insured to claiming for the actual loss.
3. Where there is double insurance, the insured is entitled to claim against all or any of the insurers but only for a total sum equal to the actual loss. Each insurer must pay in proportion to the amount of risk covered.
4. If the insured has under-insured, and the policy contains an averaging (more properly called *average*) clause, the insured is his or her own insurer for the proportion of risk under-insured. The Act cushions the consequences of this but only for residential property or residential contents:
    - if the insurance covers 80% or more of the risk, averaging does not apply;
    - otherwise, the insurer must pay according to the formula AS/P where:
        - **A** is the number of dollars equal to the amount of the loss or damage;
        - **S** is the amount of the sum insured under the contract in respect of the property;
        - **P** is 80% of the number of dollars equal to the value of the property.

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E. Subrogation

1. This means that the insurer acquires, upon payment of the claim in full, all the insured's rights over the thing insured, including rights of ownership and right to sue.

2. Most policies, because of this, provide that the insured must not do anything that would limit the insurer's rights to recover from a third party, or to release a third party from legal liability.

F. Types of policies

A summary of various types of insurance policies can be found in Table 21.1.

G. Insurance agents and brokers

1. An insurance agent represents the insurer and has authority to bind the insurer. An insurance broker carries on an independent business of arranging insurance and is not the agent for the insurer unless it has a **binder**, ie a preferred relationship with the insurer: see *Manufacturer Mutual v Boardman*.

2. Note that the passage of the *Financial Services Reform Act 2001* (Cth) has substantially restructured the insurance industry. Most of the provisions commenced operation on 11 March 2002, although there was a two-year phase-in period. Its main thrust is to uniformly licence finance providers, of which insurance brokers and agents are part. It has also raised regulation requirements for various financial markets.

3. One important feature of the new regime is the issue of *disclosure to consumers*. For example, the *Corporations Act 2001* (Cth) requires that retail insurance clients shall be entitled to receive:

   - a Financial Services Guide;
   - a Statement of Advice; and
   - a Product Disclosure Statement where personal advice is given to the retail client.

H. Superannuation

Superannuation is savings for retirement. These are usually in the form of superannuation funds which are built up by a combination of compulsory and voluntary contributions from employers and individuals over their working lives and are preserved (locked away) for a period before they can be accessed.