

BURROWES and Company

Barristers and Solicitors

Insurance Bulletin

July 2006

INSIDE THIS ISSUE:

<i>Human Rights Commission Review</i>	1
<i>Financial Intermediaries Review Update</i>	1
<i>Amending a Policy Wording—A Cautionary Tale</i>	2
<i>Exclusion Clauses</i>	2
<i>Clear Intention in Policy Wordings</i>	3
<i>Securities Legislation Bill</i>	3

HUMAN RIGHTS COMMISSION REVIEW OF INSURANCE GUIDELINES

The Human Rights Commission's Insurance Guidelines, which were issued in 1997, are in the process of being updated.

The Guidelines were originally published to assist insurers in complying with the antidiscrimination provisions of the Human Rights Act 1993.

The aim of the update is to bring the Guidelines into line with the 2001 amendments to the Act. The review comes in the wake of a number of significant legal cases in Canada and Australia.

The Guidelines will reflect the Commission's views on how the Act should be interpreted and applied in practice, and assist insurers and consumers to better understand their rights and responsibilities under the Act.

Key issues identified by the Human Rights Commission include:

- lawful and unlawful discrimination;

- obtaining medical advice;
- exclusions and pre-existing conditions leading to a refusal to insure; and
- insuring for mental disability.

A draft discussion paper has been put together by the Human Rights Commission, and public submissions are being called for at the moment. Based on the responses received from this, a consultation document will be circulated and a draft revision of the Guidelines put together.

For more information about the review, including a copy of the discussion paper, contact infoline@hrc.co.nz or call 0800 496 877.



Michael Burrowes
Principal

Burrowes and Company

Level 5
82 Willis Street
P O Box 24515
Wellington

Phone: 04 473 7733
Fax: 04 471 1121
mrb@burrowes.co.nz
www.burrowes.co.nz

FINANCIAL INTERMEDIARIES REVIEW UPDATE

A discussion paper on the co-regulatory model proposed for financial intermediaries has been released by the Ministry of Economic Development.

In December 2005, Cabinet agreed in principle to the adoption of a co-regulatory model on the basis that:

- industry has the experience to suggest to government the skills and practices a good adviser should have, and what a consumer should expect;
- government oversight reduces the risk of inconsistencies across industry practice in the co-regulatory model, so that no one sector is disadvantaged; and
- consumers rely on intermediaries to provide them with the information they need to make good financial decisions.

This discussion document is the next step in the Ministry's consultation with the industry and the Securities Commission. Feedback is being sought on:

- who is a "financial intermediary", what are the

different levels of "financial intermediary", what is "financial advice" and what is a "financial product"?

- the conduct and disclosure standards for financial intermediaries; and
- the co-regulatory model, including the powers of the Securities Commission, the powers of the Minister, the powers and rules of the "approved professional bodies"

Copies of the discussion paper can be downloaded from www.med.govt.nz. Submissions close on 1 September 2006 and final policy decisions will be presented in late 2006.

BRIEFLY...

Business Law Reform Bill

The Government has recently introduced a Business Law Reform Bill to the House, which will amend a number of statutes, including the Insurance Companies' Deposits Act 1953.

The purpose of the amendments is to protect New Zealand's international reputation by prohibiting entities registered in New Zealand from using the word insurance, or a similar word, in their name, or holding out that they are New Zealand insurers, where they are offering insurance overseas but not in New Zealand.

This will prevent entities from representing either overseas or domestically that they are supervised under New Zealand's insurance regulatory regime when in fact they are not.

The Ministry of Economic Development will be able to provide an exemption to entities who have a legitimate reason for using a particular word in their names.

The Bill raises the penalty for non-compliance under the Act from \$100 to \$1,000.

The Act also amends parts of the Companies Act 1993, the Dumping and Countervailing Duties Act 1988, the Financial Reporting Act 1993 and the Friendly Societies and Credit Unions Act 1982.

AMENDING A POLICY WORDING - A CAUTIONARY TALE

Green v AMP Life was concerned with a policy wording which was in the process of being altered when it was taken out by the insured.

Mr Green took out a TPD insurance policy with AMP Life in 2000 on the basis of a brochure, which outlined the terms and conditions of the policy, including a limitation to a period of two years for the payment of benefits flowing from a mental disorder. Mr Green was subsequently provided with the details of the cover, which did not mention a two year limit. AMP had decided in 1999 to impose such a limit, and had advertised their policies in accordance with this, but did not make the amendment to the policy wording until 2004.

Mr Green made a successful claim for TPD in 2001, and brought action against AMP in 2003 once they ceased payment of benefits, in reliance on the two year limitation that appeared in the brochure.

This issue in this case was whether there was a two year limitation under the insurance policy.

Mr Green asserted that the terms of the policy should be taken as read in the policy wording, and that as such, the variation, which did not come into effect until 2004, had no effect.

AMP argued, and the Court agreed, that the objective intention of the parties when the insurance policy was taken out should be taken into consideration. The Court held that the agreement had been reached when Green signed and sent off the brochure in 2000, with the intention that this two year limitation would apply. Furthermore, the insurer had consistently acted in accordance with this interpretation.

This case is another in an increasingly large number that is taking into consideration the objective intention of the parties when the policy is taken out. It acts as a cautionary tale to ensure any amendments to policy wordings are made in a timely fashion, and that those who are affected by any changes are promptly informed.

EXCLUSION CLAUSES

Prime Infrastructure Management v Vero

Prime Infrastructure Management was insured under an industrial special risks policy issued by Vero, which excluded liability in respect of physical loss, destruction or damage occasioned by or happening through:

"...(e) faulty materials or workmanship"

But also provided:

"...Exclusion 4...(e) shall not apply to subsequent loss, destruction of or damage to the Property Insured occasioned by a peril (not otherwise excluded) resulting from any event or peril referred to in this exclusion."

An item of machinery insured under the policy collapsed as the result of a fatigue crack in a defective weld as the result of faulty workmanship that had occurred 20 years earlier when the machinery was originally assembled.

The case centred on the interpretation of this latter clause, and whether the words "not otherwise excluded" should be read to apply only to those perils identified in Exclusion 4, or more broadly to include any perils. The second issue was whether the damage was a direct consequence of the faulty workmanship, or if it was

subsequent damage, occasioned by a second peril.

Given the nature of Industrial Special Risks policies, the Court held that the words "not otherwise excluded" should not be limited to those identified in Exclusion 4. ISR policies are intended to provide cover to insured property, however caused, and so a narrow interpretation would not do justice to this.

On the second issue, the Court held that the damage caused by the collapsed machinery was not inevitable as a result of the faulty workmanship, and was therefore subsequent damage, recoverable under the policy.

This case cautions insurers to take care when phrasing exclusion clauses.

CLEAR INTENTION IN POLICY WORDINGS

The recent English High Court decision of *Brit Syndicates Limited v Italaudit S.p.A. (Formerly Grant Thornton S.p.A.)* brings to attention the importance of ensuring a policy wording clearly reflects the intention of the parties.

Grant Thornton International manages the worldwide network of Grant Thornton accountancy firms, including, until its expulsion in 2004, Grant Thornton Italy. GT Italy was insured, along with 93 other GT entities under a policy wording with Brit. By virtue of an extension to the policy, GT International was included in the policy in respect of "claims...arising from claims made against a member firm of Grant Thornton International insured by the terms and conditions of this policy".

In March 2004, action was brought against GT International in respect of an audit undertaken by GT Italy. GT International gave notice to Brit of this action.

In August 2005 Brit purported to avoid ab initio its insurance policy with GT Italy.

The issue arising in this case was whether GT International would still be covered under the policy wording in respect of the March 2004 claim.

The insurer argued that GT International would need to establish that GT Italy had a right to claim indemnity under the policy in order for GT International to be

covered. Because the policy had been avoided ab initio, this right did not exist.

The Court dismissed this claim, upholding the principle established in the New South Wales case of *FAI General Insurance v Ocean Marine Mutual [1998]* insofar as "a contract avoided ab initio is not, in newspeak, an uncontract." The criteria upon which GT International was entitled to cover were merely descriptive, and as such, it was irrelevant whether GT Italy had breached the terms of the policy in determining GT International's entitlement to cover.

GT was therefore able to claim under the policy wording.

Insurers should take note of this decision and take steps to ensure their policy wordings truly reflect their intention if they are to avoid costly scenarios like this one.

BRIEFLY...

Upcoming Insurance Industry Conferences

A number of insurance industry conferences will be occurring in New Zealand and Australia over the next few months.

- *Insurance Brokers Association of New Zealand Annual Conference*
24-27 August, Adelaide, Australia.
- *Australian Life Underwriters and Claims Association 2006 Conference*
9-13 September, Cairns, Australia.
- *Insurance and Savings Ombudsman Conference*
25-26 September, Auckland.
- *New Zealand Insurance Law Association Conference*
12-13 October, Auckland.
- *Australian Insurance Law Association National Conference*
1-3 November, Sydney, Australia.

SECURITIES LEGISLATION BILL

A discussion document regarding the proposed Securities Legislation Bill Regulations has been released by the Ministry of Economic Development.

The Bill is designed to ensure confidence in, and promote the efficiency of, New Zealand's capital markets by increasing the effectiveness of securities laws. It simplifies the current substantial security holders' disclosure regime, strengthens the law relating to insider trading and improves the quality of advisor and broker disclosure and business practices across the advisory industry, among other things.

The Bill is currently before the Committee of the Whole House.

The Regulations under discussion address the following:

- Investment advisers' and brokers' disclosure;
- Substantial security holders' disclosure;
- Insider trading exemptions; and

- Market manipulation exemptions.

The proposed regulations will form the backbone of how the Bill is to be implemented and enforced in New Zealand.

They come in the wake of Australian legislation regulating the disclosure of interests in the investment industry there.

Parliament is expected to pass the Bill into law before the end of the year, with the regulations due to follow shortly after.

The discussion document is available online at www.med.govt.nz. Submissions have now closed on this matter.

www.burrowes.co.nz

All information in this bulletin is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients consult a senior representative of the firm before acting upon this information.