



AustraliaNews

September 2009

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Climate change — issues for underwriters

Australia is undergoing significant regulatory reform in response to global concerns regarding climate change. Corporate officers are required not only to focus on compliance with new legislation but on the commercial, financial, and risk management challenges facing their business. Climate change litigation emerging from the United States provides a preview of what we may expect in Australia, with the adequacy of corporate disclosure a key issue.

With an increase in disclosure obligations, comes an increase in liability risk to directors and officers. This expansion of liability is likely to prompt D&O insurers to fine tune further their underwriting criteria and will also inevitably result in directors and officers revisiting the scope of their D&O insurance cover.

For further information on climate change, please click [here](#) to read the full article.

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London visit

CBP partner **David Miller** will be in London between 29-30 September 2009.

David has been invited to speak at the International Asbestos Litigation (expert guidance to manage the global impact of claims) forum being convened in central London.

*To read more about this event, or to register your details to attend, please click [here](#) to go to the **Lexis-Nexis information page**.*

David's practice includes product liability matters with a particular emphasis on asbestos-related claims. Prior to joining CBP David was legal counsel for a major Australian industrial company. In that role he managed the defence of asbestos-related claims in various Australian jurisdictions and in the United States.

Disclosure of terms of an insurance policy

Is a claimant who has commenced legal proceedings entitled to obtain the terms of an insurance policy when a mediation is ordered? This issue was recently considered by the Federal Court in *Kirby v Centro Properties Limited* (2009) FCA 695.

Background

In May 2008 “representative proceedings” brought on behalf of the holders of securities were commenced in the Federal Court claiming damages against Centro Properties Group and Centro Retail Trust (collectively Centro). The claimant alleged that Centro engaged in misleading and deceptive conduct and as a listed disclosing entity, breached its continuous disclosure obligations between August 2007 and February 2008. It is alleged that Centro deliberately misstated its debt position to the market.

The claimant alleged that, as a result, security holders suffered substantial losses. The refinancing and financial future of Centro was uncertain when the Court made an order in December 2008 referring the proceedings to mediation.

The issue for determination

The claimant was, unsurprisingly, anxious to understand the insurance position of Centro as it took the view that the insurance assets (if any) were relevant to the claimant’s assessment of any settlement offer that might be made during the mediation.

The claimant sought an order for the production of Centro’s insurance policies, submitting three bases on which the order should be made:

1. a mediation conducted without knowledge of the insurance cover (if any) would not produce an outcome which could properly be the subject of an application for approval under the *Federal Court of Australia Act 1976* (Cth) (the Act)
2. a mediation conducted without knowledge of Centro’s insurance cover would be inconsistent with the principles underlying case management
3. the insurance policies relate to a matter in question in the proceedings and are in the possession, custody and power of Centro.

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Disclosure of terms of an insurance policy (continued)

The Court interpreted the underlying premise of the claimant's submissions to be that the claimant's lawyers would simply not be in a position to evaluate and advise on any proposal which might be made at the mediation in the absence of knowledge of any available insurance.

Section 33V of the Act requires court approval of the settlement of a representative proceeding. The claimant's lawyer deposed to his belief that without knowing the level of insurance cover, it would not be possible for:

- a) him or his colleagues to advise the claimant or make any recommendation to the Court, or
- b) the Court to make a determination,

as to whether any offer of settlement was fair, reasonable and adequate in the interests of group members as a whole.

In his reasons for judgment Ryan J observed that Courts are generally reluctant to accord any relevance to the possession of insurance cover in determining the existence or measure of liability against which the policy indemnifies a defendant (see *Lister v Romford Ice and Cold Storage Co Ltd* (1956) UKHL6; *Hunt v Severs* (1994) UKHL4.

His Honour noted:

"The traditional reluctance of Courts to compel the disclosure of details of a party's insurance cover doubtless owes much to a concern with shielding juries from the temptation to effect redistributive justice. However, the underlying justification for the traditional view remains. That is, that the existence of policies of insurance held by a party or the details of such policies will not normally be relevant to the proof of any cause of action pleaded against that party".

His Honour then went on to consider whether there was any power available to compel the production of such documents in aid of mediation of legal proceedings.

His Honour gave consideration to order 15 rule 11 of the Federal Court Rules which provides for the production or discovery of certain documents. That rule contemplates the production of documents "relating to any matter in question in the proceedings".

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Disclosure of terms of an insurance policy (continued)

His Honour held that the terms of an insurance policy that benefits a defendant did not constitute a document relating to a “matter in question” in the present proceedings.

His Honour did not accept that a lack of knowledge by the claimant and his advisers of the existence and extent of insurance cover held by Centro would preclude the claimant’s advisers from forming an opinion on the reasonableness of any proposed outcome of negotiations in a mediation.

Accordingly, his Honour held it was not within the power or discretion of the Court to compel disclosure to the claimant of the presumptive insurance policies and declined to do so.

Observations

The reasoning of the Court is cogent and conforms with accepted authority. There can be little doubt that material which is only relevant to the capacity of a defendant to meet a judgment would not ordinarily bear on a matter in question in any proceedings. In that sense, “ability to pay” does not relate to a matter in question.

It appears that his Honour Justice Ryan was mindful that permitting disclosure of insurance policies creates a risk that litigation may be commenced and maintained on the basis of a defendant’s insurance assets rather than the merits of a claim.

He was not therefore willing to compel the production of the insurance policy, even in a situation where the claimant may have compromised its claim to a greater extent at mediation than it would have otherwise if it had known the existence of and extent to which an insurance policy was available to indemnify the defendant.

The decision does however, bring into sharp focus the difficulties which legal representatives might face when endeavouring to assess the merit of a settlement offer in mediation. It may be that in some instances an offer will be rejected for no other reason than the lawyer’s concern that a greater insurance fund might be available.

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Financial Ombudsman Service (FOS) Terms of Reference

CBP partner Mark Radford, widely recognised as a leading expert in the field of financial services regulation, has examined in detail the proposed changes to the Financial Ombudsman Service (FOS) Terms of Reference.

FOS is one of the three external dispute resolution (EDR) schemes approved by the Australian Securities and Investments Commission (ASIC) under Chapter 7 of the Corporations Act 2001 (Cth) and provides EDR services for up to 80% of Australian banking, insurance and investment disputes.

For further information on Mark's detailed summary of the proposed changes to the terms of reference, please click [here](#) to read the full article.

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Team news

CBP is pleased to announce:

Greg Skehan Partner

Greg Skehan has over 30 years' experience in insurance law with particular emphasis on directors' and officers' liability, professional indemnity and construction risk. He is also extremely experienced in all forms of commercial negotiation, litigation and alternative dispute resolution.

For the past year, Greg has been based in Dubai assisting with the merger of Lutfi & Co and CBP to form LutfiCBP. That merger having successfully taken place, Greg is returning to CBP in Sydney in mid-October 2009. Greg will work with both the Insurance and Commercial Dispute Resolution groups of CBP bringing with him his invaluable assistance as a senior practitioner of the firm.

About CBP

CBP was founded over 100 years ago and is today a firm with 26 partners and over 200 staff.

CBP has a national and international presence providing a range of legal services:

- insurance
- construction and engineering
- commercial dispute resolution
- commercial and corporate
- property and development

The insurance group has over 30 professional staff members, including eight partners.

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