

# General Liability

Emerging Talent Series (Part 1)



Shaping the future of insurance law

## Policy Interpretation

25 February 2021

SUMMARY PACK

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## RESOURCES

Video recording of the session:

<https://vimeo.com/516990085/64231c4d22>

Presentation slides:

<https://www.wottonkearney.com.au/download/10161/>

W+K Policy & Indemnity Checklist:

<https://www.wottonkearney.com.au/download/10184/>

Other W+K articles and insights:

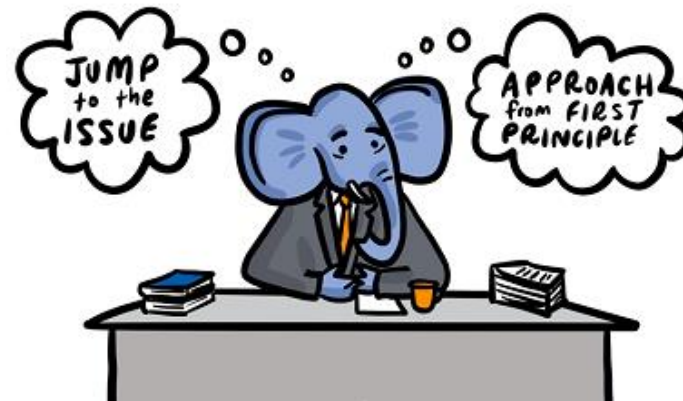
<https://www.wottonkearney.com.au/knowledge-hub/>

## FEEDBACK & QUESTIONS WELCOME!

We welcome any feedback you have on the presentation materials, format, or what could be done to improve the next session in our Emerging Talent Series. If you have any feedback or further questions, please don't hesitate to **email one of our presenters**.

# POLICY INTERPRETATION

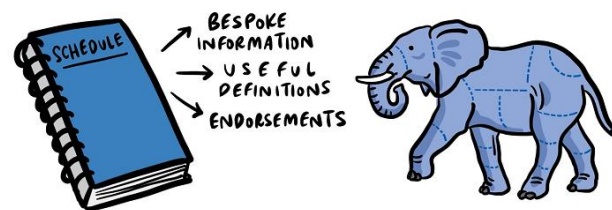
*BREAKING DOWN the ELEMENTS to MAKE  
a COMPLEX TASK SIMPLER to UNDERSTAND*



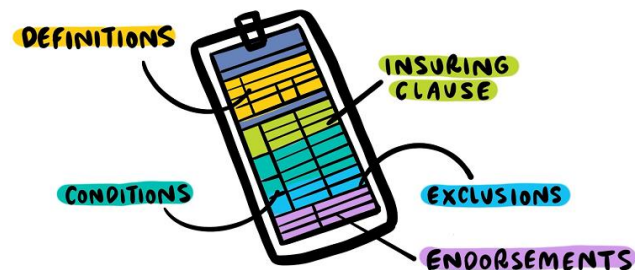
## KEY TAKEAWAYS

- ✓ Take a methodical approach to determining whether a claim is covered.
- ✓ Break the task down into small pieces – start with the insuring clause and then work through the rest of the policy from there.
- ✓ Watch out for defined words and other significant connecting words that will impact the scope of cover.
- ✓ Don't forget the exclusions, conditions and endorsements!

## CENTRAL DOCUMENTS SCHEDULE and WORDING



## W+K POLICY & INDEMNITY CHECKLIST



## How will a Court approach a case where a clause might look broad, but the underwriting intent is for a narrow cover?

The insurer might be in trouble in that case. While a Court will seek to give effect to the intention of the parties, it approaches that task on an “objective basis”. Objective interpretation means ascertaining the meaning of a clause or words by reference to what a reasonable person would have understood the language of the policy to convey. Because insurance contracts are generally standard form, that generally involves asking: what would a reasonable person in the position of the Insured understand the words to convey or the clause to mean? If you are trying to change the language used in the policy, you’re generally in the territory of equitable rectification. Some good cases to look at on objective interpretation are *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] and *Halford v Price* (1960) 105 CLR 23 at 30.

## You mentioned the contextual approach to construction affecting endorsements. If you put an endorsement in a separate document, does that avoid the problem?

In short, no. The contextual approach to construction is a fancy way of saying that the policy (including the schedule and any endorsements) needs to be read “as a whole”. Where a form of words is used in one part of the document, a Court will construe those words as having the same meaning in other parts of the document. So, adding a really narrowly worded endorsement might lead to a Court saying that another provision in the policy, that you thought was narrow, is broader. Some good cases to look at are *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [16], *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 at [134], and *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370 from [85].

## **When an Insured goes under, can the insurer elect to only pay for settlement of anything after the excess amount, or do they usually have to pay the full amount and then be an unsecured creditor for that excess amount?**

The short point is that this is one of those scenarios where everything will turn on the wording. Usually, what we see is the excess used as a defence to the claim. The issue arose in *Calliden Insurance Limited v Chisholm* [2009] NSWCA 398. It was a case about leave to proceed against an Insurer. The Insurer's policy said "*Excess is the amount the Insured first bears in relation to each claim caused by an Occurrence*". The Insurer said that leave to proceed against it ought to be refused, as it was a condition precedent to cover that the \$25,000 excess be paid by the Insured before there was indemnity. The Court disagreed. It found that if the Insurer's interpretation was correct it would have the effect of relieving an Insurer from liability under a policy whenever an Insured was unable to pay the excess. The Court found that the clear intent of the policy was not that the Insurer should be paid the \$25,000 before there is any claim under the policy, but rather that it should not have to pay the first \$25,000 in respect of any claim. So, while the Insurer lost the battle in *Calliden*, the Court's determination was that the excess could be deployed as a defence to the claim. An issue that *Calliden* didn't consider, and which sometimes makes things tricky, is scenarios where defence costs erode the deductible. The Insurer is bound to pay costs in defence of the claim, and sometimes a Claimant might say "*those amounts erode the deductible and if you want them back, you need to recoup that in the liquidation*". Whether that is correct or not usually turns on the wording.

## Q&A – section 54 of the ICA in practice

Upon the discovery of any personal injury or property damage or circumstance giving rise or which may give rise to a claim (whether or not the insured believes the claim amount might fall below the applicable deductible) under this policy, **the insured shall:**

### Relevant Clause

- (a) give notice in writing to the Insurer as soon as practicable after the insured becomes aware of such loss or circumstance and within 30 days thereafter provide, at the insured's own expense, a written statement detailing all relevant information;
- (b) advise of the cause and the amount of loss and any other proof or information with respect to the claim that may be reasonably required;
- (c) furnish to us details of any other insurance covering or which may cover the same loss;
- (d) take reasonable steps to prevent further loss; and
- (e) **at all reasonable times permit the Insurer or our agents to inquire into, investigate and examine the circumstances of any loss.**

### Scenario

An insured notifies ABC Insurance of a claim against it. It says to the insurer that it is not liable and provides an incident report setting out its version of events. The incident report begs more questions than the answers it gives. The insurer is far from convinced the insured is not liable. The insurer asks for documents and the insured simply does not respond. After numerous requests and follow ups, the Insured still fails to respond to any requests. How would section 54 of the ICA operate?

# Q&A – Section 54 of the ICA

Has the Insured committed an act or omission that gives the insurer the right to refuse to pay a claim, either in whole or in part?

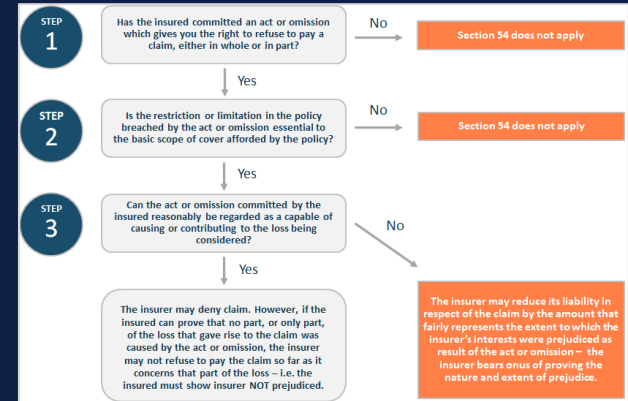
- a) **Yes**
- b) No

Is the restriction or limitation in the policy breached the act or omission essential to the basic scope of cover afforded by the policy?

- a) N/A – Step 1 was no
- b) Yes
- c) **No**

Can the act or omission committed by the insured reasonably be regarded as capable of causing or contributing to the loss being considered?

- a) N/A – Step 1 or Step 2 was no
- b) Yes
- c) **No**





## UPCOMING SESSIONS:

- Session 2: **Procedural Differences** (18 March) [View outline and RSVP here](#)
- Session 3: **GL Key Issues & Jurisdictional Nuances** (29 April) [Save the date to calendar](#)
- Session 4: **Quantum Regimes by State** (20 May) [Save the date to calendar](#)

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