#2015theyearahead

Sean O'Connor, Partner
Heidi Nash-Smith, Partner

10 February 2015

WELCOME

PRESENTATION OUTLINE

wotton kearney

1 **#2014wereweright?**
Looking back at the legal issues that dominated the insurance industry in 2014

2 **#2015theyearahead**
Lighting up the crystal ball for 2015

1 #2014wereweright?

2014 Predictions

Duty of care after ***Brookfield***

Section 6 of **LRMP Act** after ***Bridgecorp***

Impact of changes to the **ICA**

Proportionate liability

Class actions – fraud on the market and litigation funding

Proportionate Liability

wotton kearney

2014's predictions

Selig v Wealthsure

wotton kearney

Common Facts

- Claim for breach of section 1041H of the *Corporations Act* (and other breaches)
- Claim based on breach of section 1041H is specifically apportionable
- Other pleaded causes of action not specifically apportionable
- Same loss and damage arose from the apportionable and non-apportionable claims
- Is a 'single apportionable claim' confined to a claim made exclusively by reference to s1041H?

Proportionate Liability

wotton kearney

Section 1041L:

*(1) This Division applies to a claim (**an apportionable claim**) if the claim is a claim for damages made under section 1041I for:*

(a) *economic loss; or*

(b) damage to property;

***caused by conduct that was done in contravention of section 1041H**.*

*(2) For the purpose of this Division, there is **a single apportionable claim** in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).*

……

*(4) For the purpose of this Division, **apportionable claims are limited to those claims specified in subsection (1)**.*

Proportionate Liability

WEALTHSURE PTY LTD V SELIG

- Besanko and Mansfield JJ found all of the claims were apportionable
- Proportionate liability provisions applied even though some of successful causes of action not apportionable
- Section 1041L(2) – *"the same loss or damage"* broad enough to capture the non-apportionable claims
- White J (dissenting) – narrower interpretation. Section 1041L(2) refers only to causes of action which are apportionable claims

ABN AMRO BANK NV V BATHURST REGIONAL COUNCIL

- Jacobson, Gilmore and Gordon JJ agreed with White J in *Wealthsure*
- Only a claim for contravention of section 1041H is apportionable
- Policy reasons for confining the proportionate liability provisions
- Conduct in contravention of ss 1041E, 1041F and 1041G constitutes an offence and have attendant mental elements of moral culpability

Proportionate Liability

- High Court Appeal – ***Selig v Wealthsure***
  - Set down for hearing on 12 March 2015

- Possible implications

Class Actions

wotton kearney

Litigation Funding

Common Funder Applications

Fraud on the Market

Bank Fees Litigation

Class Actions – Litigation Funding

wotton kearney

- Productivity Commission Report – April 2014 recommendations:
  - Funders be required to hold an AFSL
  - Funders be subject to capital adequacy obligations
  - Funders be required to meet ethical and professional standards
  - **That the ban on contingency fees be lifted!!**

Class Actions – Fraud on the Market

- Reminder – what is the theory?
- Will the US Supreme Court decision in ***Halliburton Co v Erica P John Fund Inc*** have any relevance here?
- Is the theory sneaking into our pleadings – ***Caason Investments Pty Ltd v Cao*** [2014] FCA 140?

Class Actions – Common Funder Applications

- ***Blairgowrie Trading Ltd v Allco Finance Group***

- Application by International Litigation Funding Partners Pte Ltd for a common fund approach to financing class actions

- Funder appointed as funder for all members of the class, whether or not individual group members have signed a funding agreement

Class Actions – Bank Fees

wotton kearney

Andrews v ANZ [2012] HCA 30

- If the purpose of a fee is to ensure compliance of a contractual term and does not flow from the provision of further services, that fee is a penalty.
- Such a fee is only enforceable if the fee represents a genuine estimate of the loss that flows from a breach of a contractual term

Paciocco v ANZ [2014] FCA 52

- Late payment fees charged to Mr Paciocco's credit cards were penalties.
- Other types of fees charged by ANZ were not penalties as they flowed from the provision of further services.
- The value of the late payment fees were extravagent and unconscionable.

Duty of Care

Brookfield v Multiplex

Hunter and New England Local Health District v McKenna

Duty of Care

wotton kearney

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36

- Does the general law impose a duty to avoid causing the Owners Corporation economic loss resulting from latent defects?
- No – the D&C Contract contained detailed provisions requiring Brookfield to remedy defects. The OC was not vulnerable and imposing an additional duty of care would disturbe the contractual bargain.

Hunter & New England Local Health District v McKenna [2014] HCA 44

- Does the Health Authority owe a duty of care to relatives of a man killed by a mentally ill patient who had been discharged from a hospital into that man's care?
- No, the **Mental Health Act** prescribed the obligations that the doctor and Health Authority must consider in discharging Mr Pettigrove and there was no common law duty to Mr Rose's relatives. Performing the statutory obligations would not be consistent with the common law duty of care alleged.

Final look back at 2014

Section 6 of **LRMP Act** after ***Bridgecorp***

Impact of changes to the ICA

2014 – a dangerous year for the defence of dangerous recreational activity

wotton kearney

A dangerous year for the dangerous recreational activity defence

- ***Ackland v Stuart*** [2014] ATSC – 21 February 2014
- ***State of Queensland v Kelly*** [2014] QCA 27 – 25 February 2014
- ***Campbell v Hay*** [2014] NSWCA 129 – 16 April 2014

A dangerous year for the defence of dangerous recreational activity

- ***Ackland v Stuart*** [2014] ATSC – 21 February 2014

  - Not obvious to a reasonable person in the position of the plaintiff that there was a risk of serious neck injury in attempting to perform a back somersault on the jumping pillow. Risk of harm was considered minor only.

A dangerous year for the defence of dangerous recreational activity

- ***State of Queensland v Kelly*** [2014] QCA 27 – 25 February 2014

  - Signs warned against:
    - running down the steep dunes; and
    - jumping in lake; but
  - Did not warn of the risk associated with running down the dunes ***and*** diving into the lake and as such, the risk associated with the combined task was not considered *"obvious"*

A dangerous year for the defence of dangerous recreational activity

- ***Campbell v Hay*** [2014] NSWCA 129 – 16 April 2014

  - 1 in 500 light aircraft flights in 2007 ended in a serious accident = not a trivial risk
  - Common sense indicates that if there is complete engine failure, a forced landing = a risk of serious injury or death

2 #2015theyearahead

#2015theyearahead

wotton kearney

Proportionate liability after ***Selig v Wealthsure***

Class actions – common funder applications

More complex disputes at FOS

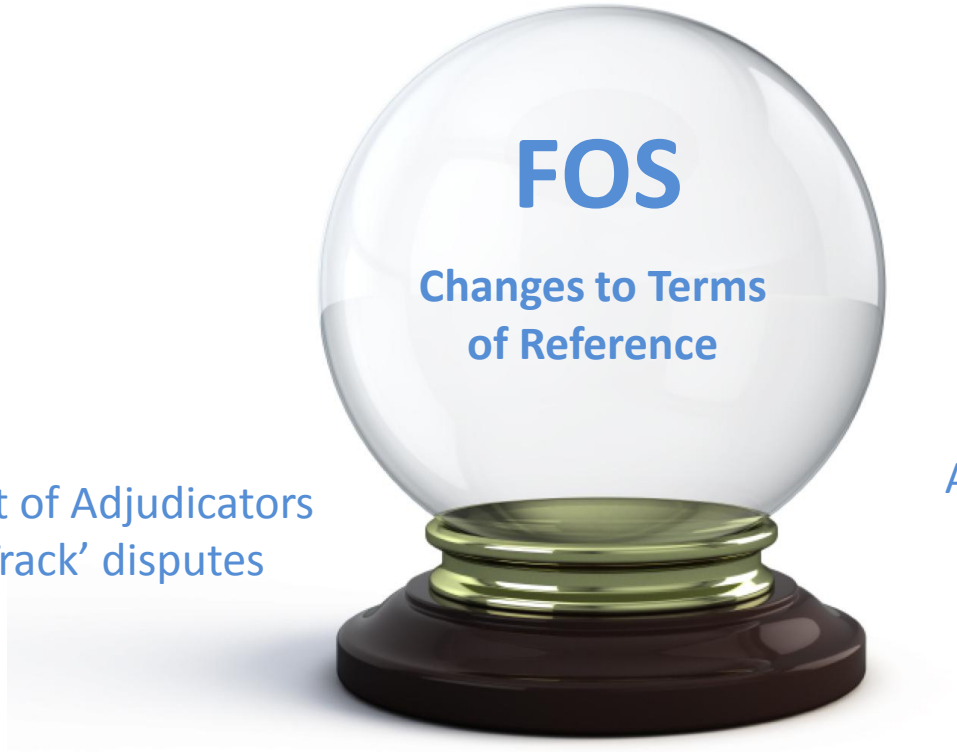
More class action litigation about fees and penalties

#2015theyearahead

wotton kearney

Increase to compensation caps

Joining other FSPs



Appointment of Adjudicators for ‘Fast Track’ disputes

Accountants joining FOS

FOS Jurisdiction

wotton kearney

	1 January 2012	1 January 2015
Banking & Finance	$280,000	$309,000
General Insurance	$280,000, but $3,000 for TP motor vehicle claim	$309,000, but $5,000 for TP motor vehicle claim
Insurance broking	$150,000	$166,000
Investments, Life Insurance & Superannuation	**Lump Sum insurance - $280,000** **Income stream insurance - $7,500 per month** **Investment - $280,000**	**Lump Sum insurance - $309,000** **Income stream insurance - $8,300 per month** **Investment - $309,000**
Mutuals	$280,000	$309,000

FOS: Joining other parties to a dispute

- Third party financial services providers who are members of FOS can be joined to existing disputes

- Joinder can be initiated by:
  - the complainant
  - the relevant AFSL holder the subject of the original complaint
  - FOS

- Scope for more complex disputes involving financial product manufacturers and research houses

wotton kearney

Questions?