IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M24/2011

BETWEEN:

HIH CLAIMS SUPPORT LIMITED
(ACN 096 857 635)

Appellant

AND

INSURANCE AUSTRALIA LIMITED
(ACN 000 016 722)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the internet

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal raises the following issues:

   2.1 Are respective liabilities

   (a) of the respondent as insurer to indemnify an insured (**Steele**) under a contract of liability insurance; and

   (b) of the appellant to indemnify Steele under a contract of indemnity made following the liquidation of another liability insurer (**HIH**) insuring Steele for the same risk, and in consideration of an assignment to the appellant of Steele's rights against the respondent and HIH;

   coordinate liabilities entitling equitable contribution?

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Filed on behalf of the Respondent by:
NORRIS COATES
10-99 WILLIAM STREET
MELBOURNE VIC 3000

DX 101 MELBOURNE
TEL: (03) 9620 726[illegible]
FAX: (03) 9620 2733
REF: SW:AW

2.2 Is the liability of an insurer to indemnify under a contract of liability insurance secondary to the liability of the appellant to indemnify under a contract made subsequent to the event giving rise to the insured liability and in consideration of an assignment of rights of the indemnified person?

2.3 What is the appropriate date for determining whether a right to contribution exists in the circumstances of this case?

Part III: *Judiciary Act 1903*, s.78B

3. The respondent certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notice is required.

Part IV: Contested factual issues

4. The appellant refers at paragraph 14 of its submissions ("AS[14]") to the *Appropriation (HIH Assistance) Act 2001* (Cth) by which the Commonwealth appropriated the funds to establish the fund to be distributed under the HIH Claims Support Scheme ("**the Scheme**"). Section 4 referred to the purpose of "providing assistance to HIH eligible persons", and s.3 of that Act defined an "HIH eligible person" as a person who:

(a) is a policyholder, insured or beneficiary under a policy of insurance issued by a HIH company; and

(b) has suffered financial loss as a result of the insolvency of the HIH companies.

5. The appellant refers thereafter in the AS to claims made by, or money paid to, "HIH eligible persons".[1] Not all HIH policyholders falling within the statutory definition of "HIH eligible persons", however, were ultimately entitled to make claims for assistance under the Scheme, which was established to administer the appropriated funds. Eligibility criteria were set out in the Application for Assistance ("**Application**"), which limited eligibility to apply for assistance from the Scheme to certain categories of insured, and imposed a means test on individual insureds.[2]

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1 See paragraphs 16, 17 and 36.

2 The Notes for Applicants (which were described by the Offer as setting out "the requirements of the Scheme"), in combination with the Application, set out the conditions of eligibility to apply to the Scheme,

6. The appellant refers at AS[24] to the payment made by the appellant on Steele's behalf. The respondent would add to this factual background that prior to the payment by the Scheme of the judgment debt, the Scheme paid certain defence costs of Steele relating to the defence of the NSW proceeding.[3]

7. It was the first such payment of defence costs that constituted HCSL's acceptance of the offer made by Steele, in the document titled "Offer to assign your rights as a policyholder" ("**Offer**"), to assign his rights to HCSL. The Offer document had stipulated that:

> The only method which HCS Limited may use to accept your offer is payment of a benefit under the Scheme. Where the benefit consists of a series of payments relating to one claim, the first payment of the series constitutes acceptance by HCS Limited of this offer.[4]

8. The first payment made by QBE Management Services Pty Ltd ("**QBE**") as agent for HCSL, (which payment was made to the plaintiff in the NSW proceeding, on Steele's behalf)[5] therefore gave rise to the contract as between Steele and HCSL. It is this contract of indemnity ("**the HCSL Contract**") that gives rise to the relevant "obligation" of HCSL for the purposes of the present case. The payment of the actual judgment debt by HCSL was thus made after the HCSL Contract (including the assignment of rights) had been effected.

9. It is, with respect, not quite accurate to state, as the appellant does at AS[21], that "[t]he appellant was appointing existing insurers to handle claims under HIH policies as if HIH was administering them". The Commonwealth appointed HCSL to manage the Scheme. HCSL's obligations were set out in the Commonwealth

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and those HIH policyholders who were ineligible to apply to the Scheme: Page 2 of the Offer Document. AB . The eligibility criteria were set out in clauses 1, 4 and 6 of the Notes for Applicants: AB)

3 Statement of Agreed Facts, paragraphs 20, 26 and attached Schedule.

4 Offer, page 2. AB . Note that the terms of the Offer were stipulated in advance in the Commonwealth Management Agreement as between the Commonwealth and HCSL. See clause 5.3 (d) which imposed on HCSL the obligation to collect "Offers to Assign" from Applicants (AB), clause 1.1 which defines "Offer to Assign" as the "Written offer to assign made by Applicants to HCSL of rights under a Relevant Policy and rights against third parties in terms, of, or substantially similar to, the terms of the document contained at Schedule 2" (AB 0098) and Schedule 2 (at AB).

5 The Statement of Agreed Facts refers to defence costs payments made my HCSL on behalf of Steele "on the dates and in the amounts recorded in the attached Schedule". However, that Schedule includes some payments made prior to 1 July 2001, which is the date on which HCSL was appointed to administer the Scheme (see paragraph 17 of the Statement of Agreed Facts). However, notwithstanding that some of the defence costs referred to in the Schedule may not have been paid by HCSL on the stipulated dates, it is uncontroversial that defence costs were paid by HCSL prior to the payment of the judgment debt on 13 December 2002. Paragraphs 19 and 20 of the Statement of Agreed Facts refer to Steele's defence costs after 10 October 2001 having been paid by HCSL.

Management Agreement.[6] Pursuant to a Claims Management Agreement, HCSL, with the HIH companies, entered into an agreement with QBE to provide to HCSL claims management, payment management and recovery services in relation to claims on the Scheme. The obligation of QBE as manager was to establish the rights of applicants under the Scheme and the HCSL Contract, by reference to the terms and conditions of the HIH policies.[7]

10. For the same reason, it is also not accurate to say, as the appellant does at AS[48], that a "third party" (i e the appellant) "picked up the responsibilities .... by way of an assignment from the insured". Steele could not and did not assign HIH's obligations. The appellant "paid upon the existence of the HIH policy" only in the sense that an applicant must have been insured under a responding HIH policy.

11. Similarly, it is inaccurate to say, as is also said at AS[48], that the appellant was "administering the HIH Policy". It was administering payments under the Scheme. It did so in part by reference to the terms of HIH policies (because the appellant chose to make compliance with the HIH policy terms a requirement of its Scheme), and in part by reference to other criteria and requirements stipulated by the Commonwealth when the Scheme was established.

12. The arrangement given effect by the constituent documents did not make the terms and conditions of the HIH policies determinative of claims under the Scheme. Further, the rights of applicants under the relevant HIH policy were materially different from rights under the Scheme. These points are apparent from other relevant provisions of the Offer document, and the Notes for Applicants. The Offer to Assign Policyholder Rights ("**Offer**") stated:

> If HCS Limited has accepted your offer, but you do not comply with the requirements of the Scheme or your undertaking to provide all reasonable assistance and co-operation to HCS Limited and other parties, then HCS Limited may in its absolute discretion:
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> - withdraw the provision of further assistance to you under the Scheme in respect of your claim under the policy;
> - set a limit on the total amount which will be paid under the Scheme in connection with your claim under the policy.

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6 Exhibit P1-7; AB .

7 Claims Management Agreement, exhibit P2, Schedules 10 and 11 (AB .)

> [Certain examples of conduct which will "constitute a failure to comply with the terms of the Scheme or to provide all reasonable assistance and co-operation to HCS Limited are other parties" are then given].
>
> ...
>
> Thus, HCS Limited may exercise its discretion even if you have fully complied with the terms and conditions of the policy.

13. The Notes for Applicants also state that "The Scheme may be withdrawn or criteria for eligibility altered at any time without notice".[8]

14. In relation to AS[29], the respondent accepts that, although the trial was conducted on the basis of submissions by both parties that the appropriate date for determining whether an entitlement to contribution existed was the date of the insuring clause event, withdrawal of that concession at this stage of the proceeding would not cause any relevant unfairness.

Part V: Legislation

15. The respondent agrees that the legislation identified by the appellant, the *Appropriation (HIH Assistance) Act 2001* (Cth), is the only applicable legislation in this case.

Part VI: Respondent's argument

16. The appellant, at AS[33], asserts that the approach of the Court of Appeal "subverted the basic rationales for the existence of the doctrine of equitable contribution".[9] The submissions in support of that argument, and in support of the appeal, are maintained throughout at a level of generality which does not address the essential requirements of the doctrine. It is submitted that the appellant does not descend into any analysis of the specific liabilities that fall for consideration in this case, as would be necessary to establish that the liability of the appellant and that of the respondent are co-ordinate liabilities, or a common obligation in the sense required to found an entitlement to equitable contribution. It is submitted that the appellant's argument approaches the issue at a level of abstraction such as to obscure the true nature of the respective obligations[10], and that on a proper analysis, the

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8 Notes for Applicants, page 4, AB 00170.

9 Submissions, paragraph 33.

10 Cf *Friend v Brooker* (2009) 239 CLR 129 at [47] and [90].

respective obligations of the parties are materially different, and are not of the same nature and extent.

17. The fundamental objectives driving the equitable doctrine of contribution are not, in any event, undermined by the result arrived at by the Court of Appeal. Here, the respective obligations were qualitatively different. Further, the circumstances in which the obligations were entered into involved the Commonwealth having full control over the terms on which such indemnity would be granted, and full control over the legal mechanism through which it could achieve that result. In such circumstances, the principle that "equality is Equity",[11] and the demands of "natural justice" are served by the outcome.[12]

The requirement of co-ordinate liabilities or common obligation

18. The doctrine of equitable contribution is usually expressed as arising where persons are under "co-ordinate liabilities" or a "common obligation" to make good the one loss.[13] For liabilities to be "co-ordinate" in this sense, they must be "of the same nature and the same extent".[14] Another way of describing the principle is that co-ordinate liabilities will not arise where the respective burdens, obligations and rights owed and enjoyed are different qualitatively and quantitatively.[15]

19. It is accepted that a "common design" is unnecessary for an equity for contribution to arise[16] and that the existence of co-ordinate liabilities between obligors can be described as a "community of interest",[17] but it is not the case that a "community of interest" is a sufficient basis for the equity to arise, if it is not also established that this community of interest is manifest in co-ordinate liabilities as properly understood.

20. The equitable doctrine of contribution requires that regard be had to substance rather than merely to form. However the legal structure of the respective obligations

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11 *Craythorne v Swinburne* 14 Ves. Jun. 160 at 165; ER 482 at 484.

12 *Craythorne v Swinburne* 14 Ves. Jun. 160 at 162; ER 482 at 483. See also *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, at [22].

13 *Friend v Brooker* (2009) 239 CLR 129, 149 at [41]; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 292-293, [15]; *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342 at 350.

14 *Friend v Brooker* (2009) 239 CLR 129 at 148 per French CJ, Gummow, Hayne and Bell JJ; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 292-293 per Gaudron ACJ and Hayne J, at 303 per McHugh J and at 332 per Callinan J; *Street v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588, at 597 per Gummow J.

15 See Callinan J in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at [145].

16 *Friend v Brooker* (2009) 239 CLR 129, 149 at [42].

17 *Friend v Brooker* (2009) 239 CLR 129, 150 at [45].

remain relevant.[18] It is necessary to consider the respective liabilities to determine whether they are, in fact, co-ordinate, or of the same nature and extent.

21. The relevant liabilities in this case are those of IAL (formerly SGIC) as insurer under the SGIC policy, and of HCSL as indemnifier pursuant to the HCSL Contract, formed when HCSL accepted the offer made by Steele to assign his rights and made payment of a benefit on Steele's behalf.

22. The AS commence, not with an analysis of the specific legal obligation of the appellant (in contrast with the obligation of the respondent as insurer) but refers to "certain features of the relationship of the various identities in the proceedings."[19] The appellant points first to the fact that as between the SGIC policy and the HIH policy there was a shared co-ordinate liability. This is not disputed, but it is not the question for consideration. It is HCSL that is the relevant party, and the HCSL Contract, which falls for consideration.

23. Secondly the appellant notes that the payment made by HCSL under the Scheme discharged the liability of the respondent to indemnify Steele under the SGIC policy. The AS also refer to the "windfall"[20] or benefit arising for the respondent from being relieved of the obligation to pay under the policy.[21] It is inappropriate to refer to the respondent as having received any "windfall". It was, by the conduct of Steele and the appellant, relieved of a liability.

24. In any event, it is not the role of equity to prevent a "windfall". The relevant role is to prevent an unjust loss lying where it falls. Further, by reason of the equitable assignment of rights under the SGIC policy,[22] the appellant had the ability to have Steele fully indemnified by SGIC in respect of the New South Wales judgment before the appellant paid out that judgment and extinguished the policy liability of SGIC.

25. The fact of a benefit alone is insufficient to give rise to the obligation, if the necessary common obligation is absent. In *Friend v Brooker* the majority opinion observed

> The equity to seek contribution arises because the exercise of the rights of the obligee or creditor ought not to disadvantage some of those bearing a common

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18 *Friend v Brooker* (2009) 239 CLR 129, 150-151 at [47].

19 Appellant's submissions, paragraph 34.

20 Appellant's submissions, paragraph 46.

21 Appellant's submissions, paragraphs 33, 38.

22 The assignment was equitable rather than an assignment at law, because notice of the assignment was not given to SGIC.

burden; the equity does not arise merely because all the obligors derive a benefit from a payment by one or more of them. As explained in United States authority, contribution is an attempt by equity to distribute equally, among those having a common obligation, the burden of performing it, so that without that common obligation there can be no claim for contribution.[23]

26. The fact that the payment by the appellant discharged the liability of the respondent under the SGIC policy is relevant to the question of common obligation or co-ordinate liability. However, it is not determinative, as that fact only answers part of the relevant question. The liabilities must be co-ordinate in the sense that there is a common benefit and common burden[24] or that they are "of the same nature and the same extent". The mutuality underlying these concepts has also been noted.[25]

27. In the present case, there was no truly common burden in that, as the Court of Appeal observed, if Steele had been paid under the SGIC policy, he would not have made a claim upon the Scheme, and no contract would have come into existence. The respondent could not have brought a claim against the appellant for contribution from the Scheme, even though the funds for the Scheme had been appropriated to satisfy claims of HIH policy holders. This was because the way in which the Scheme was structured was such that no enforceable obligation arose until payment was actually made. The fact that the respondent would never have had a right of contribution from the appellant is a very compelling reason why the liabilities involved no common burden, and were not co-ordinate. The necessary mutuality was absent. That circumstance was, as noted by the Court of Appeal, a sufficient reason why the liabilities were not co-ordinate.[26]

28. The third circumstance referred to by the appellant is that the payment by the appellant under the Scheme was "not paid on a whim, or by reference to some vague, undefined standard", and that "the HIH Policy was the very factum upon

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[23] (2009) 239 CLR 129, 148 at [38]. See also the observations of McHugh J in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at [44]-[45]: The doctrine of contribution will not apply "merely because the claimant's payment has benefited or relieved the other financially", citing *Ruabon Steamship Co v London Assurance* [1900] AC 6 and *Cockburn v GIO Financial Ltd [No 2]* (2001) 51 NSWLR 624 at 633. See also the observations of McHugh J at [60], noting the difficulties associated with determining claims for contribution solely on the basis of one party making a payment which another party might have been equally liable to make, albeit for the breach of a completely different obligation.

[24] *Dering v Earl of Winchelsea* (1787) 1 Cox 318 [29 ER 1184]; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, Gaudron ACJ and Hayne J at [16]; McHugh J at [41]-[42].

[25] *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at [115] per Kirby J; [138] per Callinan J. The reference in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 342, at 346 to "inquiring whether payment by one insurer of the policy holder's claim for indemnity would provide the other insurer with a defence to a like claim against it" also has this concept of reciprocity or mutuality at its base.

[26] Court of Appeal Judgment, at [23].

which the payment was made".[27] It is true, of course, that the payment was not made by reference to vague, undefined standards. It was made pursuant to the terms of the Scheme, the legal and administrative framework of which was established by a number of constituent documents.[28] Eligibility of policy holders to receive payment was limited by reference to the terms of the Application, including the Notes to Applicants.[29] These terms did not simply refer to the terms of the HIH policy, but included additional criteria. Importantly, the Offer was conditional upon the assignment of rights under relevant contracts of insurance. HCSL required, as a precondition of the grant of any assistance, the assignment of these rights which, although not of an ascertainable value at the time, were understood to be of value and were likely to prove to be of value. Thus HCSL's obligation to indemnify (which was in any event limited to 90% of the amount which would have been due under the HIH policy) would ultimately be reduced in practical terms by the extent to which it made any recovery in the liquidation. Again, this was rightly regarded by the Court of Appeal, entirely consistently with authority, as a factor which rendered the liabilities not of the same nature and the same extent, and thus not coordinate.[30]

29. The significance of that potential right was also recognised by the appellant itself before the Court of Appeal in accepting that it would be necessary, in the event of recovery in the liquidation, to make an adjustment ex post facto to the amount awarded by way of contribution, and it is again recognised in the orders sought before this Court.[31]

30. The entitlement of a Scheme beneficiary was subject to another condition which, while not specifically considered by the Court of Appeal, added to the degree to which the nature of the HCSL Contract differed from the nature and quality of the SGIC policy. The Offer, in addition to requiring the applicant to assign its rights under the policy, also required the applicant to assign any rights the applicant had, "howsoever arising, which you may have or obtain against any person or organisation other than the HIH insurer, in connection with the matters which have given rise to your need to make a claim under the policy".[32] These assigned rights

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27 Appellant's submissions at [36].

28 These were: the HIH Claims Support Trust Deed dated 6 July 2001 (Exhibit P1-6, AB); the Commonwealth Management Agreement between the Commonwealth and HIH Claims Support Limited dated 6 July 2001 (exhibit P1-7, AB), and the Claims Management Agreement dated 4 September 2001 (Exhibit P2, AB).

29 See paragraph 5 above.

30 Court of Appeal judgment, at [20] and [24].

31 Notice of Appeal, order 2.

32 Appeal Book .

are wider in their express terms than mere subrogated rights, and constituted a further factor that had the potential to reduce HCSL's net liability.

31. These limits on the extent of HCSL's liability are specific features of the HCSL Contract that rendered it materially different from the IAL obligation under the SGIC policy. But the very nature of the two obligations was also different – through the SGIC policy, SGIC indemnified the insured for all possible insured risks which may eventuate, of course without knowledge of exactly what risks that would encompass. In contrast, HCSL was in a position to know, upon assuming risk, the nature of that risk. The insured events had already occurred, and the claim made under the policy. In entering into its contract with Steele it could accurately assess the size of the risk taken on. Further, it knew what other claims may have materialised. The nature of the risk assumed was quite different in each case.

32. For the above reasons, the liabilities or burdens were not materially of the same nature and extent.

Assignment from the insured as opposed to novation or assignment from HIH

33. The appellant compares the position of HCSL (as having contracted to indemnify Steele, in consideration of an assignment of Steele's rights), with the position which would have prevailed had the Commonwealth taken an assignment from the HIH companies, or had there been a novation of the insurers' rights and obligations to the appellant.[33] This comparison serves to emphasise the difference in the nature of the obligations of HCSL under the HCSL Contract, and those of HIH under the HIH policies, and more importantly, those of IAL under the SGIC policy.

34. The appellant states that there is "no qualitative difference between what has occurred here and if the Commonwealth, or some other person, had bought up the HIH policies through a novation or had the rights assigned to them directly by HIH."[34] However there could be no unilateral assignment.[35] Secondly there is both a qualitative and a material legal difference between the structure adopted and a novation. Different rights and liabilities attach to each legal form. Had the Commonwealth or its agent taken a novation of the insurance policies the Commonwealth or HCSL as its agent would also have had rights to contribution

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33 Appellant's submissions at [41] and [48].

34 Appellant's submissions at [41].

35 Any assignment of the burden under the HIH policy would require the consent of the creditor or beneficiary of the policy. That is, there must be a novation. See for example the discussion in *Cheshire and Fifoot's Law of Contract*, Ninth Australian Edition, NC Seddon and MP Ellinghaus, at paragraph [8.48].

from other insurers, pursuant to the established application of the doctrine of contribution to situations of double insurance. Equally, however, the insured under the policies would have had rights directly as against the Commonwealth. The Commonwealth would also not have been in a position to prove as a creditor in the HIH winding up.

35. There are many reasons why the Commonwealth may have elected to adopt the legal framework of the Scheme, and avoid a legal structure involving novation:

35.1 it apparently wished to have the benefit of the HIH insured's rights as against HIH in its winding up (as well as any other rights of the insured relating to the indemnified events). As noted in Ashley JA's judgment in the first judgment of the Court of Appeal,[36] the Minister, in his Second Reading Speech for the Appropriate Bill, acknowledged that "the Commonwealth Government will become the largest single creditor of HIH", and

35.2 the Scheme could remain a discretionary Scheme which, as stated in the HIH Scheme documentation,[37] could be withdrawn at any time (at least, in relation to any given individual, prior to payment, and in certain circumstances, after payments had been made).

36. It is not to the point to state, as does the appellant, that "It would have been equally true under a novation or assignment from the insurer that if the respondent had paid before the novation or assignment and when HIH was insolvent, that the respondent would not have been able to seek contribution from the Commonwealth because the rights in the Commonwealth did not yet exist".[38] It was the Commonwealth's decision to structure the arrangements so that it was the fact of payment, and payment alone, which gave rise to the enforceable legal obligation under the HCSL Contract. It did not have to structure the contract in that way, and had it elected to use a novation from HIH, it was open to it to determine when payments would be made. Had a novation from HIH been adopted, it would have been that legal act which then gave rise to an obligation on the part of the Commonwealth or its agent to pay HIH insureds, and it would seem unlikely that payments would have been made before the novation, in the absence of a relevant legal framework.

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36 *Insurance Australia Limited v HIH Casualty & General Insurance (in Liquidation) and Ronald Steele (Trading as Dragon Scaffolding)* (2007) 18 VR 528 at [174].

37 See the references in paragraph 12 above.

38 Appellant's submissions, paragraph 41.

37. It is not, therefore, as the appellant suggests, "inequitable to allow the respondent to escape liability in this case because its co-insurer collapsed and a third party picked up the responsibilities, not through novation or assignment from the insolvent insurer, but by way of an assignment from the insured".[39] First, the appellant did not "pick up its *responsibilities*" through an assignment from the insured – the only assignment was of the insured's rights. The Commonwealth voluntarily assumed the obligations in the HCSL contract subject to that assignment of rights. Secondly, there is nothing inequitable in the result. The unavailability of a right of contribution is a result of the way the Commonwealth elected to establish the Scheme, and the manner in which it set requirements for entry to the Scheme.

Fairness and consistency with the rationale behind the doctrine of contribution

38. The need to ensure that obligors owing a common obligation to a third party should bear that burden equally, and not be subject to the whim of the third party electing to recover from one of them, has been recognised as a driving force behind the equitable doctrine of contribution. In *Friend v Brooker* (2009) 239 CLR 129, 148 at [38] it was observed:

> The 'natural justice' in the provision of a remedy for contribution is the concern that the common exposure of the obligors (or "debtors") to the obligee (or "creditor") and the equality of burden should not be disturbed or defeated by the accident or chance that the creditor has selected or may select one or some rather than all for recovery.[40] Were equity not to intervene, then it would remain within the power of the creditor so to act as to cause one debtor to be relieved of a responsibility shared with another.[41]

39. In the present case, the potential vice of a creditor being able to act so as to relieve one debtor of responsibility at the expense of another is absent. It was entirely within the power of the Commonwealth government, in establishing the Scheme, to determine the conditions upon which payments would be made under it. The Commonwealth could have made it a condition of eligibility for the Scheme that applicants first exhaust their rights under other insurance policies, but it elected not to. Further, at all times until the making of the contract of indemnity, when HCSL made a payment to Steele, the Commonwealth was at liberty to alter the conditions of eligibility. The Commonwealth stated in documents describing eligibility under the Scheme it was a "discretionary, administrative scheme funded by the

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39 Appellant's submissions, paragraph 48.

40 Citing *Tombs v Roch* (1846) 2 Coll 490 at 499 [63 ER 828 at 832]; *Duncan, Fox & Co v North & South Wales Bank* (1880) LR 6 App Cas 1 at 12-14; *Mahoney v McManus* (1981) 180 CLR 370 at 387-388.

41 Citing Story, *Commentaries on Equity Jurisprudence*, 3rd Eng ed (1920), § 489.

Commonwealth", and that "The Commonwealth vary the terms of the Scheme, suspend the Scheme or withdraw the Scheme at any time".

40. Thirdly, instead of paying out the New South Wales judgment the appellant could have required IAL to indemnify Steele under the appellant's assigned rights to enforce that policy.

41. The scope of the appellant's relevant knowledge was wider by the time the HCSL contract was entered into. By the time HCSL advised Mr Steele that his application for assistance had been assessed, and that he was eligible for assistance (on or about 10 October 2001),[42] Mr Steele had already made the claim under the HIH policy, and the NSW proceedings had been instituted against him (on 18 May 1999).[43] HIH had already demanded an admission from SGIC that Steele was insured under the SGIC Policy (on 21 January 2000). The appellant was aware of the status of the claim against it, and of SGIC as another potential indemnifier, before it elected to enter into the contract of indemnity with Mr Steele by making the first payment on his behalf.

42. In circumstances where the Commonwealth:

    42.1 could have adopted any means it wished to assist HIH policyholders (or none at all);

    42.2 could have adopted a legal structure through which to provide assistance which would indisputably have given rise to rights of contribution; or alternatively made it a condition of any relief that the policyholder had no other insurance;

    42.3 could have required the insured to have exhausted all other insurance rights before being eligible to claim from the Scheme, but elected not to do so;

    42.4 enjoys potential rights of recovery in the liquidation of HIH, and against others pursuant to assigned rights; and

    42.5 could have claimed under the SGIC policy pursuant to assigned rights instead of paying the NSW judgment debt,

there is no unfairness or injustice in the Commonwealth bearing the full payment to Steele, subject of course to any future recovery it may make in the liquidation of HIH.

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42 Statement of Agreed Facts, paragraph 19.

43 Statement of Agreed Facts, paragraph 6.

Part VII: Argument in relation to notice of contention

43. The respondent also contends[44] that the decision of the Court of Appeal can be confirmed on grounds which were not specifically addressed by it:

    43.1 that the appellant had no indemnity obligation at the relevant date, being the time of the insuring clause event (the accident) in March 1998; and

    43.2 that the appellant's obligation to indemnify was primary in nature, whereas the respondent's obligation as insurer was secondary in nature.[45]

Date for determining entitlement to contribution

44. A further reason why there were no co-ordinate liabilities was that, as found by the trial judge,[46] HCSL had no indemnity obligation at the date of the event which was the subject of the indemnity under the SGIC policy and the HCSL Contract.

45. The use by the trial judge of the date of the insured event to determine whether coordinate liabilities arose was appropriate, and consistent with *QBE Insurance (Australia) Ltd v Lumley General Insurance Ltd* (2009) 24 VR 326, where it was held that it is consistent with the rationale and purpose of the contribution principles to determine the question as at the date of the insuring clause event. In this respect, the Court of Appeal followed the decision of the NSW Court of Appeal in *AMP Worker's Compensation Insurance v QBE Insurance Ltd* (2001) 53 NSWLR 35, 38, and its analysis of the rationale and purpose underlying the principles of contribution. The Victorian Court of Appeal's conclusion in *QBE v Lumley* was expressed to be subject to the specific qualification that a departure from this position may be warranted where its adoption would subvert rather than promote the underlying rationale and purpose.[47]

46. The trial judge referred expressly to that qualification on the primary principle.[48] It was not submitted before her Honour that any other date was appropriate, and she approached the issue on the basis that it was this date that was relevant, not the date of the NSW judgment nor the date of payments by HCSL.[49]

47. In any case, should it be considered that the date of the "insuring clause event" is not the appropriate time at which to determine the availability of contribution in this

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44 Notice of Contention: Appeal Book at
45 See conclusions reached in Trial Judgment at [138].
46 Trial Judgment at [128].
47 (2009) 24 VR 326 at [69].
48 Trial Judgment at [93] and footnote 67 at [127].
49 See Trial Judgment at [127].

case, there would be no different result reached if the date now relied on by the applicant as the relevant date was "the date on which the indemnity payment was made". Payment of the judgment debt by the appellant extinguished the liability in respect of which it is said the SGIC policy would respond.[50] There could be no mutual liability to indemnify because there would be nothing left to indemnify.

48. Further, given the condition of the HCSL Contract that Steele assign to HCSL all of his rights "in connection with the matters which have given rise to your need to make a claim under the policy",[51] including his rights under the SGIC policy, any obligations of IAL under the SGIC policy would therefore no longer be owed to Steele, but to the appellant itself. After the formation of the HCSL Contract, Steele was no longer the person with beneficial rights as insured under the SGIC policy. The insured was effectively the appellant.

Primary and secondary liabilities

49. In determining the question as to whether liabilities are of the same nature and to the same extent, a relevant consideration is whether the respective obligations possess distinct characteristics which mean that they are not on the same level of liability – that is, one is a primary liability and one a secondary.[52]

50. The trial judge referred to, and applied, authorities to the effect that the general position is that an obligation to indemnify under a contract of indemnity, and one to indemnify under a contract of insurance, are not co-ordinate, because a contract of insurance will constitute a secondary obligation, and a contract of indemnity constitutes a primary obligation: see *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291; and the decision of the House of Lords in *Caledonia North Sea Limited v British Telecommunications plc* [2002] UKHL 4.[53] In the latter case Lord Bingham[54] and Lord Mackay,[55] in addition to expressing their reasoning for the view that insurance contracts will generally be

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50 See for example *AMP Worker's Compensation Insurance v QBE Insurance Ltd* (2001) 53 NSWLR 35, 38 at [13] and [14].

51 See paragraph 8 of Court of Appeal Judgment.

52 See eg *Street v Retravision* (1995) 56 FCR 588, 599 per Gummow J, citing *A M Spicer & Son Pty Ltd (In liq) v Spicer* (1931) 47 CLR 151 at 185.

53 Affirming the decision of the Inner House of the Court of Session in *Caledonia North Sea Ltd v London Bridge Engineering Co* [2000] Lloyd's Rep IR 249.

54 [2002] UKHL 4, at [16].

55 [2002] UKHL 4, at [61]. Lord Nicholls agreed with the judgments of both Lord Bingham and Lord Mackay (at [71]), and Lord Scott agreed with the reasons of Lord Mackay (at [103]).

secondary to contracts of indemnity, also referred with approval to the decision in *Speno Rail.*

51. In *Speno Rail*, Malcolm CJ and Ipp J tended to the view that as a matter of principle, liability under a contract of insurance and liability under a contract of indemnity will never be co-ordinate.[56]

52. The reasons of the House of Lords in *Caledonia North Sea*, while not excluding the possibility that there may be a general principle to the effect that a contractual indemnity is primary and an insurance contract is secondary, stated that the position might be better understood by approaching the issue on the basis that there is a general presumption to that effect. However, it is ultimately a question of construction and the presumption could be displaced when reference is had to the terms of the contract of indemnity in question.[57]

53. Even approaching the matter on the basis that a particular contract of indemnity may by its terms place itself on a level with a contract of insurance, an examination of the HCSL contractual indemnity in this case shows that this was not so: the liability of IAL as insurer under the SGIC policy was secondary to the contractual liability of HCSL. The appellant rejects the trial judge's conclusion that the appellant's obligation was primary and the respondent's secondary,[58] and says that the task of this Court is to "analyse the substance of the liabilities to determine whether the just result is that they be accorded a co-ordinate status". It is agreed that this analysis must be undertaken, but it must involve reference to the terms of the relevant indemnifying obligation, in this case the HCSL Contract.

Terms of the HCSL Contract

54. The HCSL Contract contained no term that relevantly qualified the obligation of HCSL to pay benefits, in such a way as to indicate that it would be secondary to any other rights of, or liabilities to, the beneficiary. Neither the Application nor the Offer qualified the beneficiaries' entitlements under the Scheme by reference to any

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56 *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291 Malcolm CJ at [24] and Ipp J at [93]. Lord Bingham and Lord Mackay expressed the same view in *Caledonia North Sea Limited* at [16] and [62].

57 This appeared to be the position taken by Wheeler J in *Speno Rail* at [167]. Her Honour stated that it is "generally appropriate to regard the insurance as a secondary rather than a co-ordinate obligation".

58 Appellant's submissions at [43].

other rights the applicant may have had, other than to require all rights relating to the claim to be assigned to HCSL.

55. The terms of the Offer disclose no intention that the benefits offered under the Scheme are not available if the applicant already holds relevant insurance, or that they are to be secondary rights to other entitlements the applicant may have. The principal condition is that the applicant offers to assign to HCSL all rights in relation to the subject matter of the claim. The consequence is that the applicant (in this case Steele) can no longer pursue any of those other rights, and its primary, indeed its only, rights in relation to indemnification for the relevant claim are its rights under the HCSL Contract. Here, the only rights remaining in Steele against IAL after the assignment were as assignor under the equitable assignment. Any amount recovered from IAL would be held by him on trust for HCSL. This suggests strongly that the indemnification of HCSL under the Contract must be primary to any other applicable obligations.

Terms of the Scheme Documents

56. The documents establishing the Scheme (the HIH Claims Support Trust Deed and the Commonwealth Management Agreement, both dated 6 July 2001), if relevant to this issue in addition to the documents containing the HCSL Contract itself, also indicate the primary nature of the contractual indemnity. The Trust Deed contains no provisions suggesting how payments to policy holders from the Trust relate to any other entitlements the policy holders may have. The relevant provisions of the Trust Deed relating to the purpose for which Scheme funds may be used are very general in their terms and emphasise the objective of granting "assistance" to HIH policy holders affected as a direct result of the appointment of provisional liquidators to the HIH group: see the Recitals A and B to the Trust Deed, and Clause 2, the "Objects of the Trust" clause.[59]

57. Clause 9 of the Trust Deed permits payments to be made to policy holders under the Scheme.[60] Clause 9.1 provides that two accounts shall be established comprising the Trust Fund, a Scheme Payments Trust Account and a Management Expenses Trust Account. Clause 9.3 provides simply that "Funds in the Scheme Payments Trust Account shall only be used for payments of Scheme Payments", defined in turn in very general terms by clause 1.1 as "payments made or to be made by the Trustee to

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59 HIH Claims Support Trust Deed, AB at and .

60 AB .

or on behalf of Applicants of sums funded by the Commonwealth which Applicants are entitled to be paid under the Scheme".[61]

58. The terms of the Trust therefore merely empower HCSL to make the payments to applicants without imposing any restriction, and certainly no restriction relating to any other entitlements that the applicant may have.

59. The Claims Management Agreement[62] also contains no specific provision identifying the relationship of entitlements to payments under the Scheme with any other entitlements of an applicant policy holder, or qualifying the Scheme benefit entitlements of applicants by reference to other rights they have. It does impose on the appellant the obligation to "collect Offers to Assign" from applicants to the Scheme,[63] being offers in the form in Schedule 2 to the Agreement,[64] which was substantially the form in which the Offer was required to be executed.

60. The appellant at AS[45] states:

> The respondent in this case is not some sub-surety stranger to the principal vehicle of liability, or a re-insurer – it was in precisely the same boat as HIH, whose responsibilities the appellant took over. In no regard were its obligations to Steele somehow secondary or collateral to those of the appellant: *Armitage v Pulver* 37 NY 494 (1868).

61. For reasons discussed above, it is inappropriate to equate HCSL with HIH. Specifically it is incorrect to say that the appellant "took over" the responsibilities of HIH, as the Scheme established by the Commonwealth did not take over responsibilities of HIH. Insofar as it imposed obligations reflecting those of the HIH policy, it was selective in its application, having imposed the pre-conditions of eligibility referred to in paragraph 5 above, as well as limiting coverage to 90% of the amount for which HIH would have been obliged to provide indemnity.

62. Secondly, the appellant cites *Armitage v Pulver* 37 NY 494 (1868) as authority for the statement that IAL's obligations were in no regard somehow secondary to those of the appellant. The New York Court of Appeal in that case recognised that the established law relating to contribution was subject to the proviso that "the obligations were for the same debt or duty, and were not other and distinct

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61 AB .
62 AB .
63 Clause 5.3 (d) – AB .
64 AB .

transactions, and where it did not appear that one was intended to be secondary or collateral to the other." The case is of limited assistance by way of precedent. It was a case as between two sureties, whose obligations arose from bonds to guarantee the faithful discharge of an under-sheriff's duties, delivered at the same time (at 494-495), and there is no suggestion in the judgment that there were material differences in the terms in of the bonds: (at 497).

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D.F. JACKSON QC
Tel: 02 8224 3009
Fax: 02 9233 1850
Email: jacksonqc@sevenwentworth.com.au

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20 **MICHAEL THOMPSON**
Tel: 03 9225 8723
Fax: 03 9225 8809
Email: thompsonmw@vicbar.com.au

.....
CLAIRE HARRIS
Tel: 03 9640 3286
Fax: 03 9640 3108
Email: claireharris@vicbar.com.au

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