IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P12 of 2014

BETWEEN

MATTHEW MAXWELL (the authorised, nominated representative on behalf of various Lloyds underwriters)

Appellant

and

HIGHWAY HAULIERS PTY LTD (ACN 008 863 214)

Respondent

APPELLANT'S SUBMISSIONS

PART I: Internet publication

1 These submissions are in a form suitable for publication on the Internet.

PART II: Issues

2 Did the Court of Appeal of Western Australia impermissibly extend the operation of sub-sec 54(1) of the *Insurance Contracts Act* 1984 (Cth) ("**the Act**") by characterising the failure of the respondent ("**the Insured**") to comply with an endorsement to an insurance policy as an "act" or "omission" rather than as manifesting an inherent restriction or limitation upon the scope of cover provided by policy of the appellant ("**the Insurers**")?

3 In reaching the conclusion that the Insured must be indemnified, did the Court of Appeal below erroneously consider the approach taken to the interpretation of sub-sec 54(1) of the Act by the unanimous Queensland Court of Appeal in *Johnson v Triple C Furniture & Electrical Pty Ltd* [2012] 2 Qd R 337 ("***Johnson v Triple C***"), in explicitly declining to follow or apply that case (McLure P, who thought that *Johnson v Triple C* was wrongly decided), or in attempting to distinguish the reasoning from, or adapt the reasoning to, the present case (Murphy JA and Pullin JA respectively) where the Insurers contend that the approaches by the two courts to the construction of the statutory provision are irreconcilable (as McLure P recognised) and where the application of the principles expressed in *Johnson v Triple C* is submitted by the Insurers to be consistent with sub-sec 54(1) as it has been explained by this Court?

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PART III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act* 1903 (Cth) should be given, with the conclusion that it is not necessary.

PART IV: Citations

5 The reasons for judgment of the Court of Appeal of the Supreme Court of Western Australia are in the authorised reports at (2013) 45 WAR 297. The reasons for judgment of the primary judge, Corboy J, are not reported. The Internet citation is [2012] WASC 53.

PART V: Facts

6 The Insured carried on a freight transport business hauling cargo on a fleet of trucks and trailers between Western Australia and the "Eastern States" ("**the east-west run**").

7 On 7 February 2004, SRS Underwriting Agency ("**SRS**"), the agent of the Insurers, received a completed proposal from the Insured's broker, Phoenix Insurance Brokers Pty Ltd, ("**the Broker**") requesting insurance coverage of the Insured's heavy motor vehicle fleet: (TJ [11]-[12]). That proposal stipulated that drivers of the Insured's vehicles were required to undertake a driver test known as the People and Quality Services or PAQS test, which was a written assessment carried out under controlled conditions used to assess a prospective driver's aptitude for long haul driving of prime mover vehicles. The trial judge accepted that, during the period of insurance, there was an industry practice of requiring PAQS testing for drivers of commercial vehicles where the insured's business involved east-west runs (TJ [98]). East-west runs were "...generally regarded in the insurance industry as 'high risk'" (TJ [95], [98]). On 29 April 2004, SRS sent a one page facsimile to the Broker which indicated that the endorsements on an insurance policy would include a requirement that all drivers undertaking the east-west run would have PAQS testing.

8 On 5 May 2004, closings and various documents were provided by the Broker to SRS. On the covering page of the facsimile, the Broker represented to SRS that "PAQS testing for all drivers will be carried out on 28 May 2004...with the minimum score set at 36" and additionally represented that "[o]ne staff member is being trained ... for ongoing PAQS testing of other staff at regular intervals" (TJ [19]). The claims history showed that the Insured had made 13 claims in the previous two years (CA [33]). The respondent accepted that its claim history was "...poor and that it presented difficulties in renewing insurance" (TJ [14]).

9 On 27 May 2004, the insurance contract ("**the Policy**") was issued to the Broker for a period of cover of 29 April 2004 to 30 April 2005 (TJ [24]). The Policy was occurrence based.

10 The schedule of cover to the Policy described the cover as "material damage cover" and "third party liability cover" which included third party property damage cover and third party bodily injury supplementary cover (CA [21]). Clause 1 of the Policy, relevantly to the damage suffered in the case, provided that, at the Insurers' option, they would pay the reasonable cost of replacing a vehicle or repair or replace a vehicle if it incurred accidental damage.

11 The Policy described the agreement between the parties in the following manner:

> After You have paid or agree to pay the premium, including endorsement premiums, We will insure You against loss, damage or liability as described herein, occurring within the Commonwealth of Australia, during the Period of Insurance subject to the terms and conditions of the Policy and Your being truthful in all Your statements.
>
> The Policy, together with the Insurance Proposal, Driver Declaration and any other statement or Endorsement, set out Our agreement. All form part of this policy of Insurance and are always to be considered together.

12 There were only two significant endorsements to the Policy. One provided for certain excesses for drivers (of certain ages and limited experience) of non-articulated vehicles and was given the code ANZ 8. The second endorsement (which was agreed by the parties at trial to form part of the Policy from its commencement (TJ [58], CA [31]) was given the code ANZ 3. It provided:

> No indemnity is provided under this policy of Insurance when Your Vehicle/s are being operated by drivers of B Doubles, B Triples or Road Trains as deemed under the Australian National license [sic] category MC (Multi Combination) unless the driver:
>
> - Is at least 28 years of age and has a minimum of 3 years proven continuous recent experience in [the specified vehicles], and,
> - Has a PAQS driver profile score of at least 36, or an equivalent program approved by Us and,
> - Does not have diabetes … and,
> - Has been approved in writing by Us to drive Your Vehicle

13 The Policy Schedule was amended in July 2004 (extracted at CA [30]) to include another endorsement, materially equivalent to ANZ 3 in respect of the PAQS score, but (immaterially for the purposes of this case) different in respect of the other criteria. The variation provided that there was "no cover under the Policy" if the PAQS score was not met.

14 The Insured made claims under the Policy in respect of two accidents during the period of insurance, one in June 2004 and the other in April 2005. The claims were for the cost of repairing or replacing the damaged vehicles. An investigation undertaken after the second accident discovered that none of the Insured's drivers (including the two that had been driving in the accidents) had undergone PAQS testing, much less received a minimum score of 36 (TJ

[48]-[49]). The representations made by the Insured to the Insurer, in order to secure cover, that PAQS testing of all drivers would take place on a nominated date and that a trained staff member would ensure ongoing compliance were thus, in the event, false. The Insurers refused the claims on the basis that the drivers had not met the requirement for PAQS testing in the endorsement ("**the PAQS endorsement**") and also on the basis that the drivers were "non-declared" for the purposes of a contractual exclusion. It is the failure to comply with the PAQS endorsement that is relevant to this appeal. The evidence at trial established that the failures of the Insured that were given as reasons for denying indemnity did not, as a matter of fact, cause or contribute to the losses the subject of the claims (CA [3]-[4]).

History of the litigation

15 The Insured sued the Insurers for indemnity against the repair costs for the trucks and trailers involved in the accidents. There was an additional claim made for damages for breach of the insurance contract in refusing to indemnify, in the form of loss of profits caused by not being able use the damaged trucks and trailers (CA [6]).

16 The trial judge (Corboy J) held first, that the Insurers were obliged to indemnify the Insured for the cost of repairing the damage to the trucks and trailers due to the operation of sub-sec 54(1) of the Act, and secondly, that by denying indemnity to the Insured, the Insurers had breached the insurance contract and were liable for consequential loss of profits in the amount of $145,000.

17 The Court of Appeal (McClure P, Pullin and Murphy JJA) dismissed the appeal in respect of both findings. In this Court, the Insurers sought and were granted special leave only in respect of the interpretation given to the operation of sec 54 of the Act, and the consequent conclusion that they are obliged to indemnify, and did not pursue the issue concerning breach of the insurance contract if such an obligation existed. Therefore, attention to the reasoning in the Court below will be confined to the issue of statutory construction.

PART VI: Argument

18 In 2001 this Court, in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 ("***FAI v Australian Hospital Care***"), by reference to the earlier decisions in this Court in *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 ("***Antico v Heath Fielding***") and *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332 ("***Ferrcom v Commercial Union***"), formulated principles that served to resolve the tension central to sec 54 of the Act. That tension is manifested by the need to promote the avowedly remedial purpose of the provision by defeating technicalities in

drafting that result in an insured losing the benefit of their policy after having engaged in conduct that was irrelevant to the risk insured, and on the other hand by paying careful attention to the requirement that insurance policies not be subverted by enabling a remedial provision to enlarge the class of insured perils to which the insurance policy is properly meant to respond. In order to determine the demarcation, the elevation of substance over form applies to both sides of the divide.

19 The decision in *FAI v Australian Hospital Care* represents the high water mark on the reach of sec 54 of the Act. This Court drew a limit however, and that was that sec 54 cannot be invoked to expand the scope of cover afforded by the contract, or, to put it another way, the principle directs attention to whether the effect of the contract which entitles the insurer to refuse to pay a claim arises by virtue of an intrinsic limitation or restriction on the application of the contract to the circumstances of the claim. Section 54 cannot be permitted to allow the insured to circumvent deficiencies in a claim that result in it being outside the scope of cover: *FAI v Australian Hospital Care* at 659 [40]-[41] per McHugh, Gummow and Hayne JJ.

20 In the submission of the Insurers, the principles expressed by the unanimous Queensland Court of Appeal in *Johnson v Triple C* conform to, and recognise the limits imposed on sec 54 by this Court. By either expressing the view that the Queensland Court of Appeal was wrong (McLure P), or by incorrectly distinguishing the reasoning (Pullin JA and Murphy JA), the Court below has erroneously caused sec 54 to operate beyond its proper construction and to characterise insurance contracts at such a level of generality as to make it difficult for insurers to properly and fairly limit the scope of the risk they agree to insure.

21 Section 54 of the Act relevantly provides:

> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
>
> ...
>
> (6) A reference in this section to an act includes a reference to:
>
> (a) an omission;
>
> ...

22 Three sets of disparate reasons were delivered below on the issue concerning the interpretation of sub-sec 54(1) of the Act. President McLure held that the requirement in the PAQS endorsement was a matter of detail of the particular policy, not the type or kind of

policy, and therefore was not an inherent restriction or limitation on the Insured's claim (CA [76]). Her Honour went on to say, in purporting to apply the reasoning of this Court in *Antico v Heath Fielding* and *FAI v Australian Hospital Care* that there was a relevant omission for the purposes of sub-sec 54(1) of the Act in the failure of the Insured's drivers to satisfactorily complete the PAQS test or the failure of the Insured to use drivers who had satisfactorily completed the PAQS test. By failing to meet the requirement before engaging in the relevant conduct, sub-sec 54(1) was engaged and the Insured was entitled to be indemnified: (CA [78], [82]-[83], [86]).

23 Her Honour disagreed with the way in which Chesterman JA (with whom Holmes and White JJA agreed) in *Johnson v Triple C* had interpreted an "omission" for the purposes of sub-sec 54(1) and her Honour, applying the test in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, departed from that interpretation. Her Honour also criticised Chesterman JA for "...in that case not [putting] the failure in its full factual context": CA [84], thereby additionally and delicately stating that Chesterman JA must have wrongly decided the case on the facts before him.

24 In *Johnson v Triple C*, a woman was injured when a plane piloted by her husband crashed on take-off. Her husband was killed in the crash. The plane was owned by the respondent, a company of which the injured woman and her husband were the sole directors and shareholders and which also employed them. The company was insured. The injured woman successfully sued the company for negligence at trial and the insurer was found liable under an insurance aviation policy to indemnify the company.

25 The insurer contended that the claim feel within an exclusion which provided the policy did not apply "whilst the aircraft, with the knowledge of the insured or the insured's agent" was "operated in breach of ... an Appropriate Authority's communications". The Civil Aviation Safety Authority was an Appropriate Authority and "communications" include "regulations...in relation to...the legal operation of the aircraft. Regulation 5.81(1) of the *Civil Aviation Regulations* 1988 (Cth) provided that a private aeroplane pilot "must not fly an aeroplane as pilot in command if the pilot has not, within the period of 2 years immediately before the day of the proposed flight, satisfactorily completed an aeroplane flight review".

26 The evidence established that the pilot husband had not completed an aeroplane flight review within two years before the crash. The insured company asserted that this was not a reason to refuse indemnity as the failure to complete the flight review was an omission to which sec 54 of the Act would respond to prevent the denial of indemnity.

27 The Court of Appeal held that the insurer was entitled to refuse indemnity, and this Court refused special leave to appeal from that decision. The circumstances are on all fours with the present case. Justice Chesterman held that the policy simply "...did not offer indemnity in circumstances where the aircraft was flown by a pilot who had not satisfactorily completed a flight review..." at [77]. His Honour said that as he understood the "exegesis" in *FAI v Australian Hospital Care,* the claim was for indemnity in respect of a loss which the policy did not cover and therefore sec 54 had no application. His Honour said to hold otherwise would be to use the section to "reformulate the claim" and "change the facts on which the claim is based" because it would convert the claim from a loss caused by a pilot who had not completed the flight review into a loss caused by a pilot who had: at [77]-[80]. Justice Chesterman denied that the failure to complete a flight review, was in any event an omission, his Honour describing it as a "state of affairs", as it was not within the power of the pilot husband to defeat the prohibition (at [70]) and was something he could either achieve, or fail to achieve, but not something he could omit: at [72]. But even if it were an omission, his Honour said that the claim would still fail as it would be an omission "...which is relied on to give rise to a claim which the insured could not otherwise make". Putting to one side the use of the phrase "state of affairs" which was merely employed as a descriptor, his Honour's conclusion must be right.

28 Equally, in this case, when the substance of the agreement is viewed as a whole (*FAI v Australian Hospital Care* at 656 [33]) it was central to the risk and the scope of the cover provided that suitable qualified drivers were employed for the notoriously hazardous activity. Putting to one side the fact that ANZ 3 begins with the premise that no indemnity is provided if the PAQS endorsement is not met, rather than it being a breach, it would be the triumph of form to suggest, as was explained below, that the requirement for a PAQS test was a mere endorsement. The insurance never extended to a claim in respect of accidental damage to trucks and trailers operated by non-qualified drivers. This was a case where the Insurers had expressed concerns to the Insured about its prior claim history and where the Insured accepted that its claims history was poor and that it presented difficulties in renewing insurance (TJ [14]). The trial judge accepted that the PAQS testing was a matter that was important to the Insurers (TJ [98]).

29 Justice Pullin at (CA [121]) determined that there was a relevant act or omission because the Insured had given permission to drivers who had not passed the PAQS test to operate the vehicles or the omission was one of the drivers in failing to complete the PAQS test before undertaking the east-west run. His Honour further said that he could reach the same

result by applying the reasoning of Chesterman JA at [80] in *Johnson v Triple C* where, in accordance with the authority in this Court, Chesterman JA had said that sec 54 extends to the performance, or non-performance, of some activity which the contract requires, allows or contemplates and may affect its operation. Justice Pullin said that failing to complete the PAQS test was just such an activity. However, that is directly inconsistent with the reasoning of Chesterman JA who went on to say at [82]-[83] that failing to complete a flight review (like failing to pass the PAQS test), is not a case where the omission gives a right in the insurer to refuse a claim by reason of something in the policy, but is an omission relied on to give rise to a claim which the insured could not otherwise make and therefore sec 54 has no application. The decision in *Johnson v Triple C* cannot be distinguished from the present case.

30 Justice Murphy expressed the view at [149] that Chesterman JA was not intending to lay down any general principle and that there was a distinction between the aviation policy in that case, which "inherently" required compliance with Commonwealth regulations, and this case, where the requirement was only in the Policy. That, with respect, is a difference without relevance. The fact that the aviation policy in *Johnson v Triple C* incorporated the regulations by reference, whereas the Policy in this case set out the requirement explicitly, does not alter the character of the requirement and nor does it negate the fact that this Policy was also referring to a standard which was widely conformed to in the industry, even though it did not have legislative force. His Honour at [145] gave relevantly identical reasons to McLure P and Pullin JA as to why the failure to pass the PAQS test was an "act" or "omission" for the purposes of sec 54.

31 The Court below therefore approached the decision in *Johnson v Triple C* differently amongst its members. President McLure declined to follow it and disapproved of its reasoning, Justice Pullin sought to apply its reasoning to independently reach his conclusion, and Justice Murphy sought to distinguish it. Those contrasting approaches, particularly where the Queensland Court of Appeal was united and where the Insurers submit relevantly identical facts led to the opposite result, reveal that the decision below creates uncertainty in the application of the statutory provision precisely because the disparate reasons encounter difficulty when they depart from the nature of the Policy and stretch the language of sec 54 beyond that which it will bear in order to "remediate" the conduct of the Insured.

32 This case is one that is markedly different from the "failure to notify" cases as exemplified in *FAI v Hospital Care* and similar cases which turn on the accepted risk eventuating but where an insurer seeks to avoid indemnity on an essentially operational term that is sought to be falsely elevated to something higher by drafting techniques. It is

worthwhile noting that whilst the reasons of the majority and dissent in this Court in *Antico v Heath Fielding* and the reasons of the plurality in this Court in *FAI v Hospital Care* all adopted the construction given to sec 54 by the reasons of Gleeson CJ as a member of the NSW Court of Appeal in *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400, Gleeson CJ in dissent in this Court in *FAI v Hospital Care* would himself have applied that interpretation in a markedly more limited manner. The reason for noting this deal of division of judicial opinion that Gleeson CJ remarked upon is because the reasoning that was upheld in *FAI v Hospital Care* and in *Antico v Health Fielding* presents an important boundary, one that was drawn after a significant period of differing opinion amongst experienced insurance lawyers.

33 That boundary recognises an important distinction between an "effect of the contract" which is an instance of the population of risks to which it responds as opposed to one which is merely a circumstance of, or accompanies or affects the materialisation of one of those risks. The Insurer's position is that the Insured never had a valid claim, not that the endorsement allowed the Insurer to avoid a valid claim. Much of the judicial opinion on sec 54 has paid attention to the long title of the Act which provides that the statute is "[a]n Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes". In support of that purpose, a clarion call is regularly made to consider the effect of the contract as a matter of "substance" over "form" (e.g. *Antico v Heath Fielding* at 660, 668-669), but that call must be answered even if the result of that inquiry favours the insurer, if the line drawn in *FAI v Hospital Care* is to be respected and lest sec 54 become an Ouroboros.

34 For surely, it is, with respect, to prefer form over substance to characterise the Policy as the primary judge did below at (TJ [86]) as one "...not concerned with drivers as such as they were not covered; rather it was concerned with the vehicles and their use". The insured trucks and trailers don't move and have no "use" without drivers - the quality of the driver is central to the risk being insured. This approach, supported by the Court below, treats the vehicles and the interests of the Insurers as somehow divorced from the human agents. One may as well ask whether insurers of the aeroplanes used by Qantas or Virgin Australia would not regard at it as central to the risk insured, and that it might affect both the willingness to write the policy and the premium charged, to inquire as to whether those airlines proposed that qualified pilots be at the controls.

35 The substantive promise in the present case is that made by the Insurers to insure the trucks and trailers of the Insured from damage, for the express purpose that those trucks and trailers will be employed on distances of road travel that compare unfavourably to most regular haulage distances known on this planet. The Court below characterised the risk too generally as simple indemnity for accidental damage to vehicles. To suppose that it is included at the core of the contractual bargain that the risk envisaged is one where the insured business can "omit" to use qualified drivers and still be covered is to defeat common and commercial sense. Such an operation of sec 54 would be to, as Chesterman JA expressed it, reformulate the claim to one that could not otherwise be made. Section 54 cannot relieve the Insured of a restriction or limitation that is inherent in its claim, namely to have qualified drivers operating its vehicles. To do so would, as the result below demonstrates, expand the true scope of the risk insured.

36 It may be rhetorically asked how a corporation with a poor accident record, applying for further insurance coverage, that warranted that it was instituting a safety test accepted as being important both in the industry generally and to the Insurers in respect of this policy, and then to disregard that test entirely, could be said to have committed a relevant "act" or "omission" for the purposes of sec 54? What is the protection for the insurer in such a case? To adopt the words of Gleeson CJ in *FAI v Hospital Care* at 649 [11], it may be impossible to measure prejudice for the purposes of the statutory provision in cases such as this. It can readily be seen how offering to give coverage to a corporation with a poor accident record only on terms that drivers pass a safety test would be of central importance to an insurer, but it cannot be readily seen how the same insurer could hope to prove that a particular accident was causally related to that failure. How does it strike a "fair balance" between insured and insurer that such a core promise can be made to secure coverage and then be wantonly avoided and it be left to the insurer to attempt to prove prejudice? In truth, the insurer never insures against the class of risk of having a corporation with a poor accident report who would have difficulty obtaining insurance, failing to observe a contractual promise that serves to remediate the possibility of the risk.

37 The proposition may be tested in the following way. The only alternative to the Insurers if the reasoning below is adopted is to insure trucks by reference to their specific named drivers who had already established passing the PAQS test. This is unrealistic and uncommercial (especially for insureds), but surely that breach (namely using a different driver) would not be one to which sec 54 would respond. For example, it is accepted that failing to declare to a property insurer particular items of jewellery in respect of a personal valuables

policy that covers theft of items of jewellery entitles an insurer to refuse to pay a claim for stolen jewellery not specified to the insurer but within the policy limit: see *Kelly v New Zealand Insurance* (1996) 130 FLR 97 (WASCA). That is because the insured could have had coverage extended to those items had it paid the appropriate premium. Similarly, when an insurance policy dictates that vehicles not be driven further than a particular distance or beyond a particular geographic location the insurer may refuse to pay for damage that occurs outside those dictates – if the insured wanted the insurance to cover those risks it could have asked for it and paid for it: see e.g. *Stapleton v NTI Ltd* [2002] QDC 204 at [34] per McGill DCJ. To adopt the reasoning of the joint judgment in *FAI v Hospital Care* at 659 [42], these happenings are not events that are insured against. The relevant insureds did not have cover for those circumstances and did not choose to extend the insurer's promise to cover those circumstances: *FAI v Hospital Care* at 659-660 [40]-[44].

38 It is convenient at this point to note that the reasoning below was preferred to the reasoning in *Johnson v Triple C* by the NSW Court of Appeal in *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* (2013) 302 ALR 732 at 766-767 [137]-[140]. Meagher JA, with whom Macfarlan and Emmett JJA agreed, said that the interpretation given to sec 54 by Chesterman JA would conflict with *FAI v Hospital Care* and Law Reform Commission Report No 20 "Insurance Contracts" (1982) ("**LRC Report**"), especially at [217], [229] and App A, cl 54, notes 3 and 4; and explanatory memorandum, at [177]–[182]. Those passages in the LRC Report concern the various ways by which drafting can be used to resist an insured's claim under the common law, and that concern was addressed most recently by the propounding of the approach in *FAI v Hospital Care*. However, with respect, the examples given in the LRC Report serve to support the present argument and the reasoning of Chesterman JA, rather than to defeat it. That is shown by note 5 to cl 54 in App A as an example of what the proposed remedial provision was to guard against. Note 5 provides:

> A's motor vehicle policy contains a term which excludes the insurer's liability if the driver of the vehicle is unlicensed. While driving the car, A is involved in an accident. He was unlicensed at the time, having forgotten to renew his licence, which expired 2 weeks previously. A's conduct could not reasonably be supposed to be of a type which could contribute to an accident, so sub-cl (1) only applies. Since the insurer could not have been prejudiced by A's driving the car without a licence, it is liable for the full amount of the claim.

39 That, and the other examples given by the LRC Report are quintessential examples of where it would be unjust for insurers to attempt to defeat the claim of an insured. When an insurer provides coverage for a personal vehicle, it matters not one whit to its interests that the insured forgot to renew his or her licence (as opposed to his or her losing it on the ground of

some demerit as a driver). The renewal of the licence is an administrative or operational process, far distant to the mandatory *qualification* requirement in *Johnson v Triple C* or in this case. Such an "omission" to renew the licence, or the "act" of driving without a licence, says nothing about the nature of the risk that the insurer agreed to cover and there is no way that the insurer could be therefore "prejudiced" within the terms of the provision. However, in the commercial context of the Policy with which this appeal is concerned, there was to be no insurance unless the Insured was prepared to make a particular bargain in light of its poor insurance record. This appeal is, in truth, a better example of the non-applicability of sub-sec 54(1) than was even *Johnson v Triple C*, because whilst it might be argued that the insurer was not concerned in that case with whether the pilot had passed his safety tests (an argument that was rejected), in the present case it was central to the Insured even receiving a policy of insurance that it comply with the endorsements, manifested by the specific representations requested and given concerning the state of compliance of the drivers with the PAQS test. After all, the Insured even specifically represented that it would train an employee to conduct the ongoing PAQS test requirement. The Insurers were not insuring prime movers to cover vast distances unless the persons operating the vehicles had passed the required tests. The prejudice of failing to do so cannot be effectively measured – it might be impossible to prove the factual causation in the particular case.

40 At heart the question in this appeal, and for the resolution of an inquiry into sec 54, is a question as to whether the effect of the Policy was that the Insurers were entitled to refuse indemnity by reason of the Insured's conduct, which happened to be post-contractual, or whether that indemnity was denied because the Policy did not respond the claim that was made. That is the inquiry that is mandated by the interpretation given to sec 54 by this Court in *FAI v Australian Hospital Care*, and, with respect, the operation of that interpretation may, as shown by the dissent of Gleeson CJ, have been slightly strained to reach the result in that case. That said, *FAI v Australian Hospital Care* is not under challenge in this appeal, however given the nature of the equilibrium therein reached, there is no cause to extend the operation of sec 54 even further, which the reasoning below did, in a manner beyond what the provision will rightfully bear. The cover in the present case did not extend to vehicles whose drivers had not passed the PAQS test. The act or omission of the Insured in the present case was its failure to have the relevant insurance coverage – namely to, with its poor record and seeking to insure a notoriously hazardous activity, seek to extend its coverage to drivers expressly excluded from the ultimate cover granted. Used in the manner contended by the Insured, sec 54 is remedial only in the impermissible sense of curing the Insured of having not applied for and received the

insurance it wanted to exploit, rather than permissibly relieving it of its post-contractual conduct.

PART VII: Legislation

Insurance Contracts Act 1984 (Cth), sec 54. The provision, set out in full below, has been in force in the same terms at all relevant times, including as at the date of these submissions.

54 Insurer may not refuse to pay claims in certain circumstances

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

PART VIII: Orders sought

1. Appeal allowed;
2. Set aside order 1 of the Court of Appeal of the Supreme Court of Western Australia made on 6 May 2013 and, in place thereof, order that:
    a. the appeal to that Court be allowed; and

b. the orders, other than the costs orders, of Justice Corby of the Supreme Court of Western Australia made on 21 February 2012 be set aside, and in place thereof order that the action be dismissed;

3. Order that the respondent repay to the appellant the sum of $571,710.03 that was paid by the appellant to the respondent in satisfaction of Order 1 of Justice Corby made on 21 February 2012, with interest from the date of the payment made by the appellant;
4. The appellant pay the respondent's costs in this Court.

PART IX: Oral argument estimate

10 **41** The appellant estimates that he will require no more than two hours to present his oral argument.

Dated 22 April 2014

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