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Insurance & Reinsurance 2020

A practical cross-border insight into insurance and reinsurance law

Ninth Edition

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

There are two separate government bodies which regulate general insurance and reinsurance companies in Australia. These are:

- the Australian Securities and Investments Commission (**ASIC**); and
- the Australian Prudential and Regulatory Authority (**APRA**).

ASIC

ASIC, under section 11A of the *Insurance Contracts Act 1984* (Cth) (the **ICA**), is the responsible government body for the administration of the ICA.

ASIC's powers in relation to the ICA include:

- allowing ASIC "*…to do all things that are necessary or convenient to be done in connection with the administration of the relevant legislation…*";
- requiring insurers (and re-insurers) to provide copies of documents relating to insurance cover provided or proposed to be provided by the insurer (or re-insurer);
- to review insurers' (re-insurers') administrative arrangements; and
- to intervene in any proceeding relating to a matter arising under the ICA.

ASIC is also responsible for issuing financial services providers with an Australian Financial Services Licence (**AFSL**) under the *Corporations Act 2001* (Cth) (the **Corporations Act**).

An AFSL permits insurers to provide financial services to Australian clients, which includes the issuing of insurance policies and providing financial product advice for insurance policies.

APRA

APRA has the power to authorise both insurers and reinsurers to carry on a general insurance business in Australia.

APRA is responsible for the administration of the *Insurance Act 1973* (Cth) (the **Insurance Act**). This includes both the publication of legally binding prudential standards for general insurers and the authorisation for an insurer to conduct general insurance business.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Who may apply?

All insurers (and reinsurers) in Australia are required to obtain an authorisation from APRA in order to conduct insurance business in Australia, and an AFSL from ASIC to carry on a financial services business.

The Insurance Act only allows bodies corporate or Lloyd's underwriters to carry out insurance business in Australia, and expressly excludes partnerships or unincorporated entities from applying for APRA authorisation.

A foreign incorporated company is able to seek authorisation from APRA to carry on insurance business in Australia by either establishing a locally incorporated subsidiary, or seek an authority to operate in Australia through a branch.

In circumstances where a general insurer will be a subsidiary of a non-operating holding company (**NOHC**) that does not hold a NOHC authority under the Insurance Act, the NOHC must apply to be authorised under the Insurance Act. The application of the NOHC should be submitted concurrently with the application to be authorised as a general insurer.

Criteria for applicants

APRA's authorisation criteria requires applicants to have the capacity and commitment to conduct insurance business on a continuing basis, with integrity, prudence and professional skill.

It is also an APRA requirement that all applicants are able to comply with all of its prudential requirements, from the commencement of insurance business in Australia and continuously thereafter.

In respect of ownership, the *Financial Sector (Shareholdings) Act 1998* (Cth) (**FSSA**) limits the interests of an individual shareholder or group of associated shareholders in an insurer to 15% of the insurer's voting shares. If the 15% limit is exceeded the applicant must apply for approval under the FSSA.

Applicants are expected to satisfy the governance requirements set out in *Prudential Standard GPS 510* with regard to the composition and functioning of its board. In addition, directors and senior management must satisfy APRA that they are fit and proper for the purposes of *Prudential Standard GPS 520*.

With respect to foreign insurers, they are required under the Insurance Act to appoint an agent in Australia who is required to be an Australian resident.

There are further requirements required by APRA as provided in its prudential standards with respect to capital and assets in Australia, risk management framework, compliance, reinsurance management, and information and accounting systems.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurance companies are permitted to carry on insurance business in Australia subject to authorisation from APRA under the Insurance Act.

If a foreign company wishes to carry on insurance business in Australia they will be subject to the same requirements listed at question 1.2 above, and will also be required to either:

- establish a foreign-owned subsidiary in Australia; and/or
- seek an authority to operate in Australia through a branch company.

In circumstances where a foreign company is not authorised by APRA to carry on a business in Australia, they are still able to write insurance for Australian consumers for:

- risks that cannot be reasonably met by the Australian market;
- insurance required by foreign law;
- atypical risks as designated in the legislation; and
- high-value insureds with operating revenue greater than AUD 200 million.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes, insurance contracts in Australia are subject to the statutory rules in the ICA.

Pursuant to the ICA, certain terms may be void, including:

- clauses which attempt to modify the operation of the ICA;
- arbitration clauses;
- other insurance clauses (other than compulsory insurance); and
- prejudicial contract variance clauses.

As discussed below at question 2.1, in the future insurance contracts will be subject to the unfair contract terms regime.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, but with some exceptions to ensure that directors and/or officers act responsibly and are held accountable for their actions. Section 199A of the Corporations Act prohibits a company or related body corporate from indemnifying directors and/or officers against:

- a liability owed to the company or related body corporate;
- a pecuniary penalty order or compensation order made under certain sections of the Corporations Act; and
- a liability owed to someone (in that person's role for the company) other than the company or related body corporate which arose from conduct that was not in good faith.

Companies are also prohibited from paying insurance premiums on behalf of directors, officers or auditors for risks involving a wilful breach of duty in relation to the company or unlawful use of position of information for personal gain.

Additionally, the Australian Consumer Law (in the *Competition and Consumer Act 2010* (Cth)) prohibits companies indemnifying directors and/or officers for their liability to pay a pecuniary penalty and legal costs in respect of a breach.

Generally companies are able to indemnify directors and/or officers for legal costs incurred in defending proceedings, except in relation to costs incurred in defending or resisting:

- proceedings in which the director and/or officer is found to have a liability for which they could not be indemnified in relation to the above liabilities;
- criminal proceedings in which the director and/or officer is found guilty;
- proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- in connection with proceedings for relief to the director and/or officer under the Corporations Act in which the court denies relief.

1.6 Are there any forms of compulsory insurance?

There are a number of types of compulsory insurance in Australia dependent upon the industry or sector. Some of the most common types are:

- professional liability insurance;
- professional indemnity;
- property insurance;
- workers' compensation insurance;
- product liability insurance;
- motor vehicle insurance; and
- marine or shipping insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally, insurance law in Australia is considered to be more in favour of protecting the interests of insureds, particularly in respect of retail insurance products.

The ICA provides significant protection of the interests of insureds, including:

- section 22: the insurer must, before a contract of insurance is entered into, inform the insured in writing of the nature and effect of the insured's duty of disclosure;
- section 26: certain statements made by the insured which are untrue, but were made on the basis of a belief that the insured held or being a belief that a reasonable person in the circumstances would have held, the statement will not be a misrepresentation;
- section 28: for contract of general insurance if the insured failed to comply with the duty of disclosure or made a misrepresentation to the insurer before the contract was entered into, but the insurer would have entered into the contract for the same premium and on the same terms and conditions, the insurer may not avoid the contract;
- section 52: any provision/s in a contract of insurance which purports to exclude, restrict or modify the operation if the ICA, to the prejudice of a person other than the insurer, is void;
- section 54: prevents an insurer from denying a claim on the basis of an act or omission of the insured provided that the act or omission did not cause the loss; and
- section 58: an insurer cannot cancel a contract of insurance if it has failed to notify the insured of the expiration or renewal of cover.

It was also recommended by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that the unfair contract terms regime be extended to insurance contracts. In addition, it was recommended that for consumer contracts, the duty of disclosure will be replaced with a duty on the customer to take reasonable care not to make a misrepresentation. These recommendations have not yet been passed into legislation.

2.2 Can a third party bring a direct action against an insurer?

On 1 June 2017, the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) commenced operation.

This Act allows third parties to bring a claim against a relevant insurer directly, if the insured has an insured liability to the third party. The third party can recover the amount of the insured liability from the insurer, and if it can be shown that the insurer was on risk under the relevant liability policy. A claimant's right to indemnity under a policy of insurance will only attach to monies owed by the insured to the claimant, rather than all monies under the policy. The third party needs leave to commence such proceedings against an insurer.

The Australian Capital Territory and the Northern Territory also have laws that permit a claim to be brought directly against an insurer.

2.3 Can an insured bring a direct action against a reinsurer?

No, the doctrine of privity of contract prevents an insured bringing a direct action against a reinsurer as there is no direct contractual relationship between the insured and the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Depending on the type of misrepresentation or non-disclosure made by the insured, the insurer may have the right to void the policy *ab initio* under the ICA.

The only circumstance where an insurer may be entitled to avoid the policy is in the case of fraudulent non-disclosure or misrepresentation by the insured.

However, the insurer cannot avoid the contract if:

- the insurer did not inform the insured in writing of the general nature and effect of the insured's statutory duty of disclosure as set out in section 22 of the ICA; and
- the insurer would have entered into the contract with the same premium and on the same terms and conditions despite the misrepresentation or non-disclosure.

If the insured's non-disclosure or misrepresentation is merely negligent or innocent, the insurer cannot avoid the policy and can only reduce its liability by an amount that would put it in the same position it would have been but for the non-disclosure or misrepresentation.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that for consumer contracts, the duty of disclosure will be replaced with a duty on the customer to take reasonable care not to make a misrepresentation. Further, it was recommended that section 29(3) of the ICA should be amended so that an insurer may only avoid a contract of life insurance on the basis of non-disclosure or misrepresentation if it can show that it would not have entered into a contract on any terms.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

An insured has a duty to disclose to insurers, before the contract of insurance is entered into and this obligation is ongoing, every matter known to the insured which the insured knows to be relevant (or a reasonable person could be expected to know to be relevant) to the insurer's decision to accept the risk and the terms.

Insurers should insist on insureds answering all questions being asked to insureds and, where required, make further enquiries, in order to not waive compliance with the insured's duty of disclosure.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

No, there is no automatic right of subrogation available to the insurer upon payment of an indemnity by the insurer. Commonly, a right of subrogation is included in an insurance policy which provides for an express right of subrogation where an insurer agrees to indemnify the insured. In other circumstances, insurers may be able to rely upon equitable principles for their right to subrogation.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Australia, there are both state courts (Local, District and Supreme) and federal courts (Federal Court of Australia, Family Court and Federal Circuit Court).

Cross-vesting legislation allows the state and federal courts to hear both state and federal issues with respect to civil matters, subject to jurisdictional monetary limits.

For example, the courts at the state level only have jurisdiction to hear civil matters for:

- the Local Court up to $100,000;
- the District Court up to $750,000; and
- the Supreme Court for more than $750,000.

Generally, commercial insurance disputes are heard by the relevant Supreme Court or the Federal Court of Australia. The Federal Court of Australia has a specific insurance list which caters for the prompt and efficient resolution of legal issues, involving insurance, to enable the parties to otherwise resolve their disputes without the need for full-blown hearings where a crucial issue could be decided discretely and swiftly.

Jury trials

In Australia, a civil proceeding will not be trial by jury unless the court orders otherwise. In making such an application, the court must be satisfied that a trial by jury in the proceedings is in the interests of justice.

Application for a trial by jury in these circumstances must be made by notice of motion.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

As stated at question 3.1 above, commercial insurance disputes are generally heard by the relevant Supreme Court or the Federal Court of Australia. The fees for commencing a commercial insurance dispute vary depending on whether the person commencing proceedings is a corporation or a person or entity, other than a corporation.

Currently, the state Supreme Courts' filing fee to commence proceedings for a corporation ranges from $939.60 to $4,336.40, depending on the size of the corporation (in some jurisdictions). With persons or entities, other than a corporation, the Supreme Courts' filing fee to commence proceedings ranges from $1,257 to $2,652.

The Federal Court of Australia's current filing fee for a corporation to commence proceedings is $4,100 and for a person or entity other than a corporation, the fee is $1,410.

Filing fees are continually updated throughout the year, and it is therefore recommended that a party check the relevant court website for the current fee amounts.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

There is no defined period which sets out how long a commercial case will take to bring to court once proceedings have been initiated. How quickly the case is heard depends on a number of factors, including the complexity of issues, how many matters are before the court, and how many parties are involved.

In many courts, there is a requirement for the parties and the court to seek to resolve disputes as efficiently as possible. For example, section 56 of the *Civil Procedure Act 2005* (NSW) requires the court to manage disputes and proceedings in conformity with the overriding purpose, being to facilitate the just, quick and cheap resolution of the real issues in proceedings.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts have the power to make an order for discovery for both parties and non-parties in a proceeding. Generally, the court will not make an order for discovery until the close of pleadings so that the issues between the parties have been identified, but before evidence has been exchanged.

For example, in the Equity Division of the Supreme Court of New South Wales, the court will not make an order for discovery unless it is necessary for the resolution of the real issues in dispute. Disclosure will only be considered necessary when it is reasonably required for the fair disposition of the proceedings.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Generally, a party who is required to produce documents may object to the disclosure of documents for the purposes of discovery on the basis of legal professional privilege.

Legal professional privilege may be claimed by the producing party with respect to documents and/or communications between a client and solicitor if such documents or communications were brought into existence for the dominant purpose of either:

- the lawyer providing legal advice to the producing party; and/or
- the client being provided with professional legal services relating to an Australian or overseas proceeding, or anticipated proceeding, wherein the producing party may be, or might have been, a party.

The court in determining whether legal privilege exists will need to address whether the claim for privilege has been established; and if so, has the privilege been waived.

Unlike legal professional privilege, without prejudice settlement offers between the parties may not be disclosed to the court except by the consent of the parties.

However, without prejudice settlement offers may be adduced when courts are determining whether costs should be awarded (see question 4.9 below).

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Australian courts have the power to compel witnesses to attend to give evidence in proceedings by issuing a subpoena. Should a witness fail to attend, they may be held in contempt.

In circumstances where a witness is located in an overseas jurisdiction, courts may allow that witness to attend via video link if their physical attendance would cause undue delay and cost.

4.4 Is evidence from witnesses allowed even if they are not present?

In circumstances where a witness cannot be physically present, due to death, terminal illness or disappearance, a party may be able to rely on an exception to the hearsay rule.

In other circumstances where a witness is available to give evidence, but it would cause undue expense, undue delay, or would not be reasonably practicable to call the witness to give evidence, again the hearsay rule may not apply.

If neither of these exceptions apply, courts will not usually allow witness statements into evidence when the witness is otherwise available.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Courts generally have a broad discretionary power in respect of the use of expert evidence in proceedings, which allows the court to give directions as it considers appropriate.

In certain circumstances, a court may give directions regarding the use of expert witnesses where it considers appropriate. This may include a direction:

- as to the time for service of expert reports;
- that expert evidence may not be adduced on a specified issue, or only on leave of the court;
- that expert evidence may be adduced on specified issues only;
- limiting the number of expert witnesses who may be called to give evidence on a specified issue;
- instructing the parties to instruct a single expert or a court-appointed expert in relation to a specified issue;
- requiring experts in relation to the same issue to confer;
- that may assist an expert in the exercise of the expert's functions; or
- for an expert who has prepared several reports to prepare a single report to reflect their evidence-in-chief.

An increasingly popular approach adopted recently by Australian courts is the concept of hot-tubbing (experts giving evidence concurrently) to assist the parties in identifying the legal issues in dispute. Before trial, each party instructs their own experts to prepare their own reports, and once completed, their reports are exchanged. Thereafter, both parties' experts meet to draft a joint report which summarises all areas of agreement and disagreement. This joint report will be then used as a guide for giving expert evidence concurrently at trial.

4.6 What sort of interim remedies are available from the courts?

Australian courts have the power to make several different interim remedies in a proceeding, including:

- freezing orders, to prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment of the court will be unsatisfied;
- ancillary orders, to prevent the frustration of a court's process (for example, an order for a respondent to disclose the nature, location and details of its assets);
- Anton Piller orders, relating to search and seizure;
- interlocutory and interim injunctions, which aim to preserve the status quo by preventing one party from committing, repeating or continuing a wrongful act prior to trial;
- declaratory relief, by which a court can make an order declaring a particular factual state exists, with a particular legal outcome;
- security for costs, by which a court may order a plaintiff to pay money into court to ensure that unsuccessful proceedings do not disadvantage defendants; and
- stay of pending proceedings, by which all courts have the statutory power to stay any proceedings permanently or temporarily before the court.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

At first instance, there is no automatic right to an appeal, with an appeal permitted where allowed by legislation or leave of the court.

If a party to a proceeding wishes to make an appeal, generally an application must be made to the court within 14 to 28 days (depending on the jurisdiction) after the date on which the decision was given by the court.

At a state level, a party may make an application to bring an appeal from the local, magistrates, county or district courts to the Supreme Court of that particular state or territory. At a federal level, a party may make an application to bring an appeal from the Federal Circuit Court or Federal Court of Australia to the Full Federal Court or the High Court of Australia.

Once an application for appeal has been lodged, depending on the jurisdiction, the length of the appeal may be in the order of 12 months.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Courts generally have discretionary power to award pre-judgment and post-judgment interest on application by a party in proceedings.

In circumstances where a court awards pre-judgment interest, the interest is to be calculated at a rate the court thinks appropriate on part or the whole of the money, and for the whole or part of the period of time the action arose to when the judgment takes effect.

If a court awards post-judgment interest, the rate is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, or at any other rate the court orders.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The standard rule is that costs will ordinarily follow the cause or event unless it appears to the court that some other order should be made. The court may award costs on either a party/party basis or on an indemnity basis.

Some tribunals, such as the state Civil and Administrative Tribunals, and the Fair Work Commission, are a no cost jurisdiction where each party pays their own costs.

Attempting to settle prior to trial, by way of Calderbank offers under common law and/or offers of comprise under statute, is advantageous when seeking to obtain a cost order or indemnity costs from the court.

By way of example, should a plaintiff not accept an offer from a defendant and the judgment awarded was not more favourable to the plaintiff, unless the court orders otherwise, the defendant would be entitled to an order against the plaintiff for their costs on an indemnity basis from the date of the offer.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The court has a wide discretion to make an order to refer any proceedings to mediation if it considers the circumstances are appropriate. Alternatively, the parties can agree to mediation. This aligns with the court's overriding purpose of a just, quick and cheap resolution of a dispute.

In the majority of civil disputes, if mediation is not agreed by the parties, mediation will be ordered by the Court as an interlocutory step before hearing, unless there are very compelling grounds against it.

Alternatively, the courts may refer a matter to other forms of Alternative Dispute Resolution, such as arbitration and conciliation.

A court may refer a matter to arbitration in certain circumstances. For example, in NSW a court may make such a referral where the proceedings are in respect of a claim for the recovery of damages or other money, or for any equitable or other relief ancillary to such claims, subject to several considerations.

A court may also refer a matter to conciliation, wherein an independent third party with professional expertise in the subject matter of the proceedings will provide advice about the issues and options for resolution for the parties. However, conciliators do not make a judgment or decision about the proceedings. Generally, conciliation is suitable in circumstances where the parties want to reach an agreement on some technical or legal issues and/or want advice on the facts in the proceedings.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In circumstances where a court has used its discretion to order mediation, or other forms of Alternative Dispute Resolution, parties have a duty to participate in good faith. This requirement of good faith is directed to the conduct of each of the parties in participating in the mediation, rather than mere attendance.

If a party is found to not be participating in good faith, a plaintiff may be subject to a stay of proceedings, or an adverse costs order made be made against either party impeding the mediation or Alternative Dispute Resolution, and could amount to contempt of court.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

There is a strong legislative framework that governs domestic arbitration and international arbitration in Australia. In recent years, the Australian courts have adopted a pro-arbitration approach which enables domestic and foreign parties to have confidence in the overall process, and expect, where necessary, the Courts to enforce arbitral awards and assist arbitral processes by granting interim relief.

For example, the High Court in *Rinehart v Hancock Prospecting* [2019] HCA 13 confirmed that arbitration agreements should be interpreted broadly and are to be informed by the language used by the parties, the surrounding circumstances, and the purposes and objects of the contract wherein the arbitration agreement is contained.

In some limited circumstances, courts may refuse to recognise an award on the grounds of incapacity of a party, public policy, invalidity, and manifest error on the face of the award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Pursuant to section 43 of the ICA, provisions in a contract of insurance which have the effect of referring disputes to arbitration are void. However, this does not eliminate the possibility of disputes relating to insurance contracts being dealt with through arbitration. The parties to such insurance contracts can mutually agree to arbitration after the dispute has occurred.

Reinsurance is specifically excluded from the ambit of the ICA, and therefore arbitration clauses in reinsurance contracts are not deemed void on principle.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

There are two areas of dispute in which Australian courts will not enforce an arbitration clause.

The first pertains to insurance contracts (refer to question 5.2). The second concerns contracts for the carriage of goods by sea.

Section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) provides that arbitration agreements providing for the Hague Rules to govern the agreement are not effective unless the arbitral location is in Australia. In practice, this provision has been invoked in Australian courts to combat the enforcement of a foreign award in a maritime law dispute.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts have the same power to grant interim relief in relation to arbitration proceedings as it has in relation to proceedings in courts. Examples of such interim relief include security for costs and injunctions (as outlined in question 4.6 above). In addition, courts may also:

(a) issue subpoenas upon the request of a party;
(b) make decisions on the appointment/termination of an arbitrator;
(c) allow or prohibit the disclosure of confidential information in certain circumstances;
(d) set aside arbitral awards, on application; or
(e) order costs where an arbitration has commenced, but fails.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the Model Commercial Arbitration Acts in each State and Territory, the award must be in writing and state the reasons upon which the decision was made, unless the parties agree that no reasons are to be given or the award is made on agreed terms by way of settlement. Unfortunately, there are no guidelines as to how detailed the reasons must be, and the reasons are not expected to be of the same length or detail as judicial reasons.

For parties that are unsure of the reasoning for the decision, there is some recourse. Within 30 days of receipt of the award, parties (with notice to the other party) may request the arbitral tribunal to correct the award with respect to typographical errors or provide an interpretation of a specific point or part of the award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There is a right of appeal to the courts from a decision of an arbitral tribunal; however, the threshold set by the courts is high. Parties seeking to appeal the decision of an arbitral tribunal must apply to set aside an award within three months from the date of the receipt of the award. However, there are limited grounds on which an application can be brought to set aside an award. The award can be set aside in instances of incapacity of a party, public policy, invalidity and manifest error on the face of the award.

Alternatively, parties may also apply to the court to appeal a question of law arising out of an award (after three months have elapsed since the receipt of the award).

Courts also have the power to confirm, vary, remit or set aside the award (in whole or in part).

David Amentas has practised insurance law for more than 20 years and has extensive experience across various areas of insurance, including acting as both defence and coverage counsel.
David's practice involves acting on behalf of clients and for the provision of advice to clients in disputes concerning professional indemnity, directors' and officers' liability, employment practices liability, defamation and management liability.
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Avryl Lattin has a broad practice covering both the insurance and trade and commodities sectors. She advises clients in relation to transactions, regulatory issues and disputes.
Avryl leads the Australian resilience team and is a core member of the global resilience group. The team delivers solutions to clients with the aim of building organisational resilience.
Avryl regularly advises clients on corporate governance and regulatory issues in the context of ASIC, APRA and ACCC investigations and in respect of claims made under directors' and officers' liability insurance policies. Avryl also advises on a range of international regulatory issues, including anti-bribery, corruption and trade sanctions, from both a compliance and enforcement perspective.

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