
# HIGH COURT CLARIFIES SECTION 54

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The High Court in ***Maxwell v Highway Hauliers Pty Ltd*** [2014] HCA 33 has:

+ clarified the operation of section 54 of **Insurance Contract Act (Cth) 1984**; and
+ resolved the tension between 2 potentially conflicting decisions in ***Johnson v Triple C Furniture & Electrical*** [2010] QCA 282 (***Johnson***) and ***Matthew Maxwell v Highway Hauliers Pty Ltd*** [2013] WASCA 115.

## The Facts

Highway Hauliers Pty Ltd (**the Insured**) operated a trucking business which held an "occurrence based" policy with Lloyds underwriters (**the Insurers**) covering accidental damage to its trucks.

In June 2004 and April 2005 two trucks were damaged in separate accidents and the Insured made 2 claims against the policy within the policy period. The policy contained an endorsement which excluded cover if the driver did not have a PAQS score of 36 (PAQS is a psychological test which measures a driver's attitude towards safety).

The Insurers accepted that the absence of PAQS testing did not cause the accidents and that they did not suffer any prejudice as a result of the omissions, however the Insurers still declined indemnity on the basis of the PAQS endorsement, that is there was "*an absence of relevant cover... by virtue of the fact that the vehicle was being driven by an untested driver*".

The Insured sued the Insurers for indemnity and was successful at first instance and on appeal. The Insurers appealed to the High Court.

## The Competing Decisions

The High Court decision was eagerly awaited because there was a potential conflict between the Queensland Court of Appeal's decision in ***Johnson*** and the WA Court of Appeal's decision in ***Maxwell***.

In ***Johnson***, the Queensland Court of Appeal held that section 54 did not apply because the insured breached its requirement under the policy to ensure that its pilot completed a mandatory flight review. Specifically, the Court in ***Johnson*** found that there was no valid 'claim' for the purposes of section 54, because the claim was excluded. Contrastingly in ***Maxwell***, the WA Court of Appeal found section 54 applied even if the PAQS test was a condition of cover.

Before the High Court in ***Maxwell***, the Insured argued that the drivers' failure to undertake the PAQS test was an omission after the insurance contract was entered into, so that section 54 applied. Relevantly, section 54 provides relief to insureds whose acts or omissions (after the inception of the policy) would otherwise entitle an insurer to refuse to pay a claim.

The Insurers adopted the reasoning in ***Johnson*** and argued section 54 did not apply because the PAQS endorsement took the claims outside the scope of cover under the policy.

## The Decision

The High Court unanimously dismissed the Insurers' appeal and held that:

+ the meaning of a 'claim' under section 54 is not limited to a claim for an insured risk;
+ the decision in ***Johnson*** was wrongly decided; and
+ the insured's omissions in having untested drivers were effectively remedied by section 54, because the omissions were not causative of the loss.


In resolving the tension between ***Johnson*** and ***Maxwell*** the High Court reiterated its position in ***Antico v Heath Fielding Australia Pty Ltd*** [1997] HCA 35 that any interpretation of section 54 needs to focus on the substance of the policy rather than its form, so that there is no difference between the "*provisions of a contract which define the scope of cover, and those provisions which are conditions affecting an entitlement to claim*".

## Implications

Following the High Court's decision in ***Maxwell***, it is clear that for the purposes of section 54, Australian courts will not distinguish between a policy term that may be framed as:

+ an obligation of the insured (e.g. "*the insured is under an obligation to keep the motor vehicle in a roadworthy condition*");
+ a continuing warranty of the insured (e.g. "*the insured warrants he will keep the motor vehicle in a roadworthy condition*");
+ a limitation on the defined risk (e.g. "*this contract provides cover for the motor vehicle while it is roadworthy*"); and
+ a temporal exclusion from cover (e.g. "*this cover will not apply while the motor vehicle is unroadworthy*").

However, it is important to note that the result in ***Maxwell*** would have been different had the lack of PAQS testing caused either prejudice to the Insurer or the loss itself. In those circumstances, section 54 expressly allows an insurer to:

+ reduce its liability to the extent that its interests were prejudiced by the act or omission (section 54(1)); or
+ refuse to pay the claim if the act or omission caused or contributed to the loss (section 54(2)).

The High Court decision is significant for insurers because it clarifies that:

+ seemingly clear policy provisions may still be overridden by section 54; and
+ Australian courts will give effect to the intent of section 54 so that insurers will be prevented from relying on technical drafting devices (form over substance) to refuse or limit cover in circumstances where the insured's act or omission did not cause:
  - any prejudice to the insurer; or
  - contribute to the loss itself.

In the above example of an exclusion for an unroadworthy vehicle, the insurer would have the burden of establishing that:

+ the vehicle was unroadworthy (so as to trigger the exclusion); and
+ the insured's failure to maintain the roadworthiness (the insured's omission) caused the accident.

The former is likely to be easier to establish then the latter. Similar examples could potentially arise (given the right temporal circumstances) under other types of insurance policies that involve stipulated requirements for cover which could be argued are not causative of the loss. ▪

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