The traditional role of an insurance broker is well known. Simply put, a broker acts as a professional adviser to insureds, or parties seeking insurance. They apply their experience and knowledge of the insurance market and insurance practice to assist their clients to decide what risks to insure, and what insurance to purchase.

Although the exact role a broker will play is primarily governed by the terms of their contract with the client, implicit in their role is an expectation that a broker will identify and recommend insurance products that are appropriate and relevant to their clients’ individual needs and circumstances and arrange contracts of insurance accordingly.

In Australia, brokers are subject to applicable provisions of the Corporations Act 2001 (Cth), and common law principles.

As holders of an Australian Financial Services License (AFSL), or as an authorised representative of an AFSL licensee, brokers’ conduct is monitored by the Australian Securities and Investments Commission (ASIC) to ensure, amongst other things, brokers have and maintain appropriate skill levels and compliance systems.

In recent media statements ASIC Deputy Chair, Peter Kell, has said ASIC will not tolerate dishonest conduct by brokers, “…will act to remove those who behave without regard to their obligations to their clients…”[1] and “…consumers are entitled to expect that insurance brokers will uphold the highest standards of conduct …”.[2]

Brokers who are members of the National Insurance Brokers Association (NIBA) must also comply with the standards of professional practice encompassed by the Insurance Brokers Code of Practice.[3]

Additionally, it should be remembered that when acting as an agent of their clients, brokers also owe a duty of utmost good faith to insurers.[4]

For the purposes of the duty owed by brokers to their clients what does this proliferation of laws, regulations, and codes boil down to in practical terms?

Fundamentally it is this: a broker owes their clients a duty to apply reasonable skill, care and judgment to a standard the average person of common prudence in the same position and profession can be reasonably expected to apply so as to avoid economic loss.

While each case will turn on its own facts, a number of recent court decisions usefully illustrate the operation of the duty.
SKM Industries Pty Ltd v Australian Reliance Pty Ltd\(^5\) involved a claim against a broker who it was alleged breached its common law duty and an implied contractual duty of care to the insured. Amongst other things, it was contended the broker had not adequately or clearly advised, or made enquiries of, the insured about certain written declarations to the insurer and thereby reduced the indemnity to which the plaintiff was entitled under the policy. The broker admitted it was both negligent and responsible for the plaintiff’s reduced indemnity entitlement.

In expounding the principles attaching to the exercise of reasonable care by a broker, the court found that to satisfy the requisite standard of care a reasonable broker would take reasonable steps to understand the nature and extent of their client’s instructions for insurance, advise their client about the insurance available that responds to their instructions, and arrange the insurance as instructed.\(^6\)

Additionally, the court said a reasonable broker determining what steps to take would take into account all relevant circumstances. These would include the client’s commercial sophistication, whether the relevant insurance advice had been provided to the client in previous years, whether the broker had assumed responsibility to perform calculations necessary to complete the client’s insurance application or renewal questionnaire, and whether the broker had reason to suspect any information provided by the client was inaccurate.\(^7\)

Although not binding on Australian courts, recent decisions of the courts of England and Wales also provide illumination.

In Channon v Ward\(^8\) the Court of Appeal ruled a broker was negligent by failing to place an indemnity insurance policy for the claimant. In RR Securities v Towergate\(^9\) a broker’s breach of duty and liability were not disputed in circumstances where the broker’s client had failed to comply with certain security requirements to which the broker had not drawn their client’s attention prior to policy inception. In another High Court case a producing broker and placing broker were both found to be negligent by providing only a limited notification of circumstances to insurers when a block notification should have been given.\(^10\)

All this is well and good. However, the traditional role of brokers is under pressure as client expectations, market competition, and legal and operational compliance obligations collide with an ever more complex, globalising, and fast-changing risk environment. That the risk environment is changing is hardly novel. However, the nature of emerging risk, particularly on the technology front, certainly is.

In response, to keep up with and even ahead of the game, brokers are increasingly acting beyond their traditional role to also provide complementary services to their clients, including risk audits and benchmarking, and risk and claims management.

It is more important than ever for brokers to remain vigilant about discharging the duty of care they owe to their clients as unlike the turbulence of the risk environment, this legal obligation is and remains a constant.


\(^5\) [2017] VSC 159.

\(^6\) Ibid [77].
[7] Ibid [80].


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