

The Law Reform Commission of NSW  
GPO Box 31  
SYDNEY NSW 2001

25 May 2016

By Email to: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

Dear NSW Law Reform Commission,

**CONSULTATION PAPER 17: THIRD PARTY CLAIMS ON INSURANCE MONEY:  
REVIEW OF S.6 OF THE *LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1946***

The Australian Lawyers Alliance provides this submission in response to the invitation of the NSW Law Reform Commission in Consultation Paper No. 17 in respect of s.6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

1. The Australian Lawyers Alliance believes that whilst s.6 has served a worthwhile purpose, its ambiguities and complexities mean that it would be desirable to replace it with a modern-worded provision similar to s.601AG of the *Corporations Act 2001* (Cth), providing that it is expressly extended to natural persons as well as corporations.
2. The reference in *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212, effectively by the Court at [55], to the language of s.6 as “*undoubtedly opaque and ambiguous*” and “*ambiguity may be its only clear feature*” in previous authorities reflects the old-fashioned and obscure drafting of this provision.
3. Moreover, there are apparently contradictory decisions in the NSW Court of Appeal as to whether the 1946 Act extends to an event that occurs before the inception of a “claims-made” policy.
4. See the aforementioned decision in *Chubb and Registrar-General of NSW v LawCover Insurance Pty Ltd* [2014] NSWCA 241. This uncertainty is unacceptable.

5. The purpose identified in the Second Reading Speech in the NSW Legislative Council on 20 March 1946, at page 2809, was to ensure that where a person had a liability in law and was insured for that liability, they could not so fritter away the insurance payout as to leave the party entitled to damages without any effective remedy.
6. It is the view of the Australian Lawyers Alliance that the most appropriate remedy is to repeal and replace s.6 of the 1946 Act with a plain-language provision, similar to s.601AG of the Corporations Act, which is in terms:

*“A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:*

  - (a) the company had a liability to the person; and*
  - (b) the insurance contract covered that liability immediately before deregistration.”*
7. It would be necessary to amend that provision so that deregistration is not a criteria and so that the remedy covers natural persons as well as insured corporations. The clear object is to permit a claimant to take direct action against the insurer of a potential tortfeasor in circumstances where it is feared that any payout by the insurer may not reach the victim.

The Australian Lawyers Alliance recommends accordingly.

Yours sincerely



Roshana May  
NSW Branch President  
Australian Lawyers Alliance