THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Civil Litigation Committee

Submission to the NSW Law Reform Commission Review of the *Law Reform (Miscellaneous Provisions) Act 1946*

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NSW Law Reform Commission
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The NSW Young Lawyers Civil Litigation Committee (**Committee**) makes the following submission in response to the NSW Law Reform Commission (**NSWLRC**) review of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* (**LRMPA**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Civil Litigation Committee comprises of a group of over 1200 members and covers all aspects of civil litigation with a focus on advocacy, evidence and procedure in all jurisdictions. Our activities, direction and focus are very much driven by our members, which include barristers, solicitors and law students. The Committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

Purpose of Section 6

Section 6 of the LRMPA generally permits third party claims over insurance money. It provides claimants with a mechanism to assert and enforce a statutory charge over insurance money owed to an insured person where the insured person is at risk of insolvency, or in a number of other situations. Consultation Paper 17 (**CP17**) describes its function as:[1]

> *Section 6 deals with a situation where there is:*
>
> *a plaintiff*
>
> *a defendant who is insured against liability to the plaintiff ("the insured"), and*
>
> *the defendant's insurer –*
>
> *and the plaintiff is unable to recover damages or compensation from the defendant. The section provides the plaintiff with an avenue to recover the proceeds of the insurance directly from the defendant's insurer.*

This purpose was supported in the second reading speech for the LRMPA. It was stressed that the provision was so designed so as to address the following problems with claims on insurance money:[2]

[1] New South Wales Law Reform Commission, Consultation Paper 17, *"Third party claims on insurance money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946*, April 2016, 1.
[2] NSW, Parliamentary Debates, Legislative Assembly, 20 March 1946, 2809

> *before trial, an insured person enters into a collusive agreement with the insurer, accepts a lump sum and spends it all or disappears so that the plaintiff, if he or she obtains a verdict, can recover nothing from the insured, and…after a trial, the insurer pays the insured the amount set by the indemnity policy and the insured spends it all or disappears so that the plaintiff can recover nothing.*

More recently, one author has noted the benefits of third party statutory charges over insurance money also applying in other situations, such as:[3]

> *(a) where the third party is aware of the identity of the insurer but cannot locate the insured because, for example, the insured is dead (if it was a natural person), deregistered (if it was a corporate entity) or cannot be found;*
> *(b) where the insured cannot personally satisfy any judgment against it in favour of the third party; and*
> *(c) where the insured is bankrupt or in liquidation (at common law the third party is simply an unsecured creditor of the insured).*

The provision was enacted out of uncertainty for the payment of insurance money to worthy claimants. Its design was to safeguard the rights of claimants in situations of dishonesty, insolvency, or ill luck, where there was a real risk that an individual wronged would not be able to be remediated for their loss. The provision was not enacted to extend the liability of insurers, but rather to enforce a valid right to compensation for loss.[4] The basis for the section is a noble one; but the real question, dealt with in the following section, is whether the purpose for the provision is now relevant given the impact of federal legislative change.

Is the purpose still relevant?

The provision was implemented in 1946 and, as is expected, legislative change since that time has brought into question its continued relevance. It is arguable that a variety of federal statutes now 'cover the field' in this area and effectively render the provision irrelevant to modern proceedings. Proponents of this viewpoint to section 51 of the *Insurance Contracts Act 1984* (Cth) (**ICA**), section 117 of the *Bankruptcy Act 1966* (Cth) (**BA**), and various provisions of the *Corporations Act 2001* (Cth) (**CA**) to argue that federal statutes now 'cover the field', rendering section 6 irrelevant. Other NSW-based legislation such as the *Workers Compensation Act 1987* (NSW) and the *Motor Vehicle Accidents Compensation Act 1999* (NSW) also provide limited protection to claimants and provide further support to this argument.

However, the Committee is of the view that these statutes do not 'cover the field.' As has been articulated by various authors, the relevant federal legislation is limited in a number of areas. Section 51 of the ICA arguably only applies to natural persons and not

[3] Carolyn Coventry, 'A review of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)' (2007) 18 *Insurance Law Journal* (2007) 212, 12.
[4] Hon Justice R D Giles, 'Reflections on Section 6' (1996) 7 IL.1152 at 155.

corporations.[5] Moreover, there are issues as to whether liability under section 51 arises before a settlement or judgment is made.[6] Similar problems arise with section 601AG of the CA, which only applies to corporations that have been *deregistered*.[7] That is, corporations that may be on the cusp of deregistration, or undergoing liquidation, may be exempt from this provision.[8] Other sections of the CA that purport to provide protection to legitimate claimants, such as sections 562 and 562A, are limited only to companies in liquidation.[9] Finally, section 117 of the BA only applies to situations of bankruptcy, and does not provide third parties with direct access against insurers.[10]

It is therefore apparent that the collection of federal statutes do not 'cover the field' in this area and that section 6 of the LRMPA is broader in scope, providing a further safeguard for legitimate claims on insurance money. For example, the provision can be applied where the solvency of the insured is doubtful; this goes above and beyond the provisions in the CA. There is obvious overlap, however the provision does confer rights on the third party that would not exist otherwise.

The Committee notes the argument that this provision does not exist in other states in Australia. Having said this, this is not in and of itself an argument for the removal of the provision. In respect to this, it could also be argued that similar provisions exist in common law jurisdictions such as New Zealand and the United Kingdom (**UK**), and arguably their own provisions have a broader scope than the LRMPA. For example, in the UK the *Third Parties (Rights Against Insurers) Act 1930* provides that some of the rights of the insured transfer to the third party, allowing them to make a claim directly against the insurer.[11] This takes the right further than a mere statutory charge. The continued presence of these provisions in other common law jurisdictions counteracts the argument that the LRMPA is irrelevant in a NSW context.

A long history of interpretation

Section 6 has a long and tumultuous history with judicial reasoning, partly caused by the out-dated and complex wording of the provision which has provided wide scope for interpretation. This is most apparent over whether the LRMPA creates a statutory charge over policies entered into after the occurrence of the insured event. On this question the Supreme Court of NSW and the Federal Court have been divided. In *Manettas v Underwriters at Lloyd's* the Supreme Court of NSW held that any statutory charge commences on the happening of the insured event, and therefore if a policy is created

[5] However, we note that a more liberal construction was taken by Olsson J in *Norsworthy v SGIC* [1999] SASC 496 which extended the scope of the provision to corporations.
[6] Coventry, above n 3, 12.
[7] Coventry, above n 3, 12.
[8] Josh Mennen, 'Recent Developments in Financial Advice Disputes', *Precedent*, Issue 121 (March/April 2014).
[9] Coventry, above n 3, 12.
[10] Ibid, 12.
[11] Ibid, 12.

after the event the charge cannot attach.[12] This was contradicted in *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd (No 4)* where the Federal Court held that the statutory charge is much like a 'floating charge' and attaches to any subsequent policy entered into.[13]

Similarly, there has been wide dispute over the application of the LRMPA to defendant legal costs in the case of director and officer policies. When the New Zealand Supreme Court handed down their decision in *Steigrad v BFSL 2007 & Others*, the insurance industry and legal profession responded with concern over the ramifications for the decision in Australia.[14] The decision held that section 9 of the *Law Reform Act 1936* (the equivalent to section 6 of the LRMPA) attaches to all funds available in director and officer liability policies such that it prevented the advancement of legal defence costs to directors and officers. The Court of Appeal and Supreme Court of NSW later grappled with this question in the context of the LRMPA, with the full bench of the Court of Appeal agreeing that the statutory charge in section 6 would not extend to defence costs incurred before judgment or settlement.[15]

These are only a few examples of where the courts have struggled under the language and reading of the provision, but they highlight that the provision, despite being in existence for well over half a century, is still subject to rigorous analysis. The NSW Parliament could reasonably resolve this through legislative intervention. Indeed, Emmett JA and Ball J in *Chubb Insurance v Moore* indicated judicial support for this proposition:[16]

> *The language of s 6 has been described as "undoubtedly opaque and ambiguous" (New South Wales Medical Defence Union v Crawford (1993) 31 NSWLR 469 at 479D). It has also been said that its "ambiguity may be its only clear feature" (McMillan v Mannix (1993) 31 NSWLR 538 at 542B). Section 6 should be repealed altogether or completely redrafted in an intelligible form, so as to achieve the objects for which it was enacted.*

Recommendation

In light of the above, the Committee cannot support the entire removal of the provision, as it is clear that this will cause detriment to the rights of legitimate claimants who exercise statutory charges to protect compensation for their losses. Without extending the scope of federal legislation, removal of this provision would be a backward step for third parties with legitimate claims. The Committee therefore **rejects Option 4** of CP17. The Committee **endorses Option 5** providing that the NSWLRC ensures that the thrust of judicial interpretation is maintained.

[12] (1993) 7 ANZ Ins Case 61-180.
[13] [1996] 138 ALR 409.
[14] [2013] NZSC 156.
[15] *Chubb Insurance Company of Australia Limited v Moore* [2013] NSWCA 212.
[16] Ibid, at 58.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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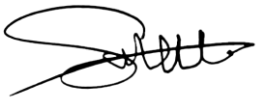

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