



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



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April 2016

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CP 17 Third party claims on insurance money

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Terms of reference

The Law Reform Commission received the following terms of reference from the Attorney General, the Hon Gabrielle Upton MP on 22 February 2016:

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), which provides a mechanism enabling third parties to assert and enforce a statutory charge over insurance moneys payable to an insured person in circumstances where the insured's solvency is in question.

The Commission is asked to consider whether the section should be repealed or amended, and in this context consider whether the policy objectives remain valid and, if so, whether those objectives could be better achieved.

In undertaking this review, the Commission should have regard to:

- 1 All relevant issues relating to the uncertain practical application of section 6.
- 2 The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
- 3 The impact of any repeal of section 6 on protections for third party claimants seeking to recover the proceeds of a liability insurance policy to which they are entitled.
- 4 Whether any repeal or amendment of section 6 should apply to contracts already in force.
- 5 Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

Introduction

- 1.1 The Attorney General has asked us to review s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).
- 1.2 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.
- 1.3 The section covers two basic situations:
- § where liability is established against the insured, but the insurance proceeds cannot be recovered from the insured, and
 - § where liability is not yet established against the insured and the insured is not available or not worth pursuing.
- 1.4 Before this provision was introduced, at common law, a plaintiff had no right to the proceeds of an insurance policy paid (or payable) to the defendant by an insurer in relation to the defendant’s liability to the plaintiff.¹ Under the doctrine of privity of contract only parties to a contract can enforce it.
- 1.5 For example, if a defendant was bankrupt, the proceeds of insurance would be given to the trustees in bankruptcy and the (successful) plaintiff would become an unsecured creditor to receive, if anything, a partial payment.

The provision

- 1.6 Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) provides:

6 Amount of liability to be charge on insurance moneys payable against that liability

- (1) If any person (hereinafter in this Part referred to as the insured) has, whether before or after the commencement of this Act, entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person’s liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability.

1. See, eg, *Henderson v Gray* (unreported, Supreme Court of Victoria, Byrne J, 1 June 1995); G Reinhardt, “Indemnity Insurance Policies: Entitlement to Proceeds” (1995) 69 *Law Institute Journal* 688.

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- (2) If, on the happening of the event giving rise to any claim for damages or compensation as aforesaid, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have commenced not later than the happening of that event, the provisions of subsection (1) shall apply notwithstanding the winding-up.
- (3) Every charge created by this section shall have priority over all other charges affecting the said insurance moneys, and where the same insurance moneys are subject to two or more charges by virtue of this Part those charges shall have priority between themselves in the order of the dates of the events out of which the liability arose, or, if such charges arise out of events happening on the same date, they shall rank equally between themselves.
- (4) Every such charge as aforesaid shall be enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall, to the extent of the charge, have the same rights and liabilities, and the court shall have the same powers, as if the action were against the insured:

Provided that, except where the provisions of subsection (2) apply, no such action shall be commenced in any court except with the leave of that court. Leave shall not be granted in any case where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken.

- (5) Such an action may be brought although judgment has been already recovered against the insured for damages or compensation in respect of the same matter.
- (6) Any payment made by the insurer under the contract of insurance without actual notice of the existence of any such charge shall to the extent of that payment be a valid discharge to the insurer, notwithstanding anything in this Part contained.
- (7) No insurer shall be liable under this Part for any greater sum than that fixed by the contract of insurance between the insurer and the insured.
- (8) Nothing in this section shall affect the operation of any of the provisions of the *Workers Compensation Act 1987* or the *Motor Vehicles (Third Party Insurance) Act 1942*.
- (9) Despite subsection (8), this section applies in relation to a policy of workers compensation insurance entered into by an employer (whether entered into before or after the commencement of this subsection), where the employer:
 - (a) being a natural person, has died, or is permanently resident outside the Commonwealth and its Territories, or cannot after due inquiry and search be found, or
 - (b) being a corporation (other than a company that has commenced to be wound up), has ceased to exist, or
 - (c) being a company, corporation, society, association or other body (other than a company that has commenced to be wound up), was

at the time when it commenced to employ workers to which the policy relates incorporated outside the Commonwealth and its Territories and registered as a foreign company under the laws of any State or Territory and is not so registered under any such law, or

(d) being a company, is in the course of being wound up.

- 1.7 Numerous courts have disliked s 6's obscurity and called for revision. The NSW Court of Appeal described s 6 as "somewhat enigmatic" and unclear, and called for it to be "completely redrafted in an intelligible form so as to achieve the objects for which it was enacted".² Justice Kirby characterised it as "undoubtedly opaque and ambiguous" and observed that "ambiguity may be its only clear feature".³
- 1.8 Justice Giles, in a 1996 article, reflected that "we face increased resort to s 6 and, after nearly fifty years, significant lack of clarity as to its extent and its operation" and suggested that insurers and lawyers should reconsider the provision.⁴

Purpose

New Zealand

- 1.9 The equivalent NZ provision, upon which the NSW provision is based, consolidated some existing provisions relating to workers compensation and motor accidents that placed liens on insurance money⁵ and made the resulting provision one of general application.⁶ The existing provisions in turn had their origins in NZ workers compensation legislation dating back to 1900.⁷
- 1.10 The proviso requiring the leave of the court to commence a claim was, however, an innovation. It was inserted into the bill by the NZ Statutes Revision Committee which considered it necessary to add the safeguard "so that the insurance companies would have a right to be heard in all cases where actions might be commenced against them".⁸ In part it was included to ensure that the provision was not misused in a time when juries still heard civil matters and were thought to hand down verdicts motivated by sympathy for a plaintiff when insurers (who were seen as being able to pay) were joined in proceedings.⁹

2. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [5], [55].

3. *New South Wales Medical Defence Union v Crawford* (1993) 31 NSWLR 469, 479; *McMillan v Mannix* (1993) 31 NSWLR 538, 542.

4. R D Giles, "Reflections on Section 6" (1996) 7 *Insurance Law Journal* 152, 158.

5. *Workers' Compensation Act 1922* (NZ) s 48 and *Motor-vehicles Insurance (Third-party Risks) Act 1928* (NZ) s 10.

6. NZ, *Parliamentary Debates*, House of Representatives, 17 September 1936, 237-238.

7. *Workers' Compensation for Accidents Act 1900* (NZ) s 17; and *Workers' Compensation Act 1908* (NZ) s 42.

8. NZ, *Parliamentary Debates*, House of Representatives, 17 September 1936, 241.

9. NZ, *Parliamentary Debates*, House of Representatives, 17 September 1936, 243. On the influence of insurance on juries in civil matters, see *Oswald v Bailey* (1987) 11 NSWLR 715, 728-729 (Samuels JA).

New South Wales

Parliament

- 1.11 When the provision was introduced in NSW in 1946, the second reading speech highlighted the following two scenarios as illustrating the situations it was intended to address:
- § 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.¹⁰
- 1.12 The second reading speech also emphasised that it was not the purpose of the provisions “to increase the liability of insurance companies, but merely to prevent any conspiracy between a defendant and an insurance company or any mal-practice on the part of defendants in collecting insurance moneys by way of indemnity for a liability which they do not discharge”.¹¹ It was envisaged that a plaintiff should only take direct action against the insurer where the insurer had failed to make sure that moneys due to the defendant had “made their way to the plaintiff”.¹²
- 1.13 It may well now be unusual for a liability insurer to pay insurance money directly to an insured unless they could be satisfied that the insured had already paid the money to the plaintiff. This change in practice may be as a result of s 6 and/or the effect of stricter prudential and conduct regulation of insurers more recently. In jurisdictions that do not have s 6, there are cases where insurers have compromised with insured parties to release them from any claims for indemnity.¹³
- 1.14 However, the second reading speech also acknowledged that there would be cases where liability would not yet have been determined and the insurance company would, in effect, become the defendant, although it was considered that this “would not be the normal course to follow”.¹⁴
- 1.15 The second reading speech made clear that Parliament intended to give the plaintiff recourse against the insured subject to the equities between the insured and the insurer:
- If the policy is unenforceable by the defendant against the insurer by reason of, say, misrepresentation or default on the insured’s part, then the party sustaining the damage can only claim against the insurer the amount in which the insurer is liable to indemnify its client.¹⁵

10. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2809.

11. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2810.

12. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2809.

13. See, eg, *Henderson v Gray* (unreported, Supreme Court of Victoria, Byrne J, 1 June 1995).

14. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2810.

15. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2810.

- 1.16 The addition to the proviso to s 6(4) setting out the circumstances in which the court is not entitled to grant leave (that is, where the insurer can disclaim liability) was intended to achieve this objective.¹⁶

Courts

- 1.17 The courts have identified the remedial nature of s 6 and have noted its potentially wide application. For example, Justice Moffitt observed:

Cases other than where the insured is in liquidation can be envisaged where to enforce the charge it may be necessary or desirable that the action be brought directly against the insurer, but in the case of sec 6(4) have not been defined but are left to be determined by the exercise of the discretion to grant leave. ...

The legislative purpose of s 6 is to provide for the person to whom the insured is liable direct access to the insurance fund, in those cases where enforcement might be frustrated unless such direct access were available. Section 6 does not ... provide an optional alternative procedure enabling a plaintiff to sue the insurer rather than the insured tortfeasor, for example on some basis of convenience to the plaintiff.¹⁷

- 1.18 In light of the remedial purpose of the provision to give plaintiffs direct recourse to enforce the charge against insurers in appropriate cases, a number of Court of Appeal judgments have observed that the proviso in s 6(4) aims to discourage unnecessary or unwarranted proceedings by plaintiffs against insurers.¹⁸

Problems with s 6

- 1.19 Section 6 was enacted 70 years ago. The drafting does appear obscure and there has been a lot of uncertainty about its application. Over the past 25 years, the courts have resolved some, but not all, of these uncertainties.

- 1.20 The section was enacted in the different legislative and insurance environment of the 1940s. For example, now, the extent of its application is unclear in relation to:

§ **directors' and officers' insurance policies**, especially whether the charge on "all insurance money that is or may become payable" affects the ability of directors and officers to access insurance money to meet ongoing defence legal costs. The Court of Appeal recently confirmed that s 6 did not prevent an insurer from discharging its obligation to an insured to meet legal costs,¹⁹ however, the New Zealand Supreme Court subsequently came to the opposite conclusion²⁰

§ **claims made and notified policies**: the Court of Appeal recently confirmed that s 6 applies to claims made and notified policies,²¹ but, despite misgivings, also

16. NSW, *Parliamentary Debates*, Legislative Council, 9 April 1946, 3177.

17. *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400, 402-403. See also *McMillan v Mannix* (1993) 31 NSWLR 538, 547.

18. *Oswald v Bailey* (1987) 11 NSWLR 715, 725; *Tzaidas v Child* [2004] NSWCA 252; 61 NSWLR 18 [17]; *Energize Fitness Pty Ltd v Vero Insurance Ltd* [2012] NSWCA 213 [59]; *Guild Insurance Ltd v Hepburn* [2014] NSWCA 400 [3].

19. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [122], [124].

20. *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156.

21. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [72]-[87].

confirmed previous authorities that s 6 does not apply to events that took place before such a policy commenced²²

- § **liability for pure economic loss:** questions have been raised about the application of the expression “happening of the event giving rise to the claim for damages or compensation” to cases of pure economic loss,²³ and
- § **contracts for reinsurance:** for example whether s 6 covers situations where an insured cannot proceed against or recover from an insurer and, instead, seeks to recover from the insurer’s reinsurer;²⁴ since it may be that reinsurance indemnifies the reinsured “against liability to pay any damages or compensation”, the words used in s 6.²⁵

1.21 Some other areas of uncertainty may include:

- § **Limitation periods:** While the operation of limitation periods relating to the plaintiff’s claim may have once been uncertain, the Court of Appeal has now held that the remedy established under s 6(4) is, “subject only to other subsections, assimilated to a cause of action against an insured” so that “[t]ime commences to run at the same time as the cause of action in tort or contract accrues to the claimant against the insured”, and “[t]ime ceases to run ... when proceedings are brought against the insured or the insurer, whichever comes first”.²⁶
- § **The insurer’s right to disclaim liability.** The High Court has approved authorities that suggest that leave should not be granted where the insurer can disclaim the policy on the basis that the insured defendant did not perform certain obligations, for example, an obligation to co-operate in the event of a claim.²⁷ This position has been criticised as allowing an “indolent, or malevolent, insured” to thwart a plaintiff’s attempts to recover from an insurer.²⁸ Other examples of potentially problematic terms which may be found in insurance policies include where the insured’s right to be indemnified arises only if a

22. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [57], [88]-[104] following *Owners-Strata Plan 50530 v Walter Construction Group Ltd (in Liq)* [2007] NSWCA 124 [29]-[35], applied by *Registrar-General of NSW v LawCover Insurance Pty Ltd* [2014] NSWCA 241 [35]-[37]. See also authorities cited in *Manettas v Underwriters at Lloyds* (1993) 7 ANZ Ins Cas 61-180 (Cole J); *Schipp v Cameron* [1999] NSWSC 997 (Einstein J); and *FAI General Insurance Co Ltd v McSweeney* (1997) 154 ALR 229 (Lindgren J).

23. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [141].

24. S W Drummond and P Mann, “Abolish Section 6” (1997) 8 *Insurance Law Journal* 79, 90; N G Rein, “Choosing your life raft: A review of Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 6, and its analogues” (2007) 81 *Australian Law Journal* 180, 188-189. Note that contracts of reinsurance are expressly excluded from general Commonwealth regimes: *Corporations Act 2001* (Cth) s 562(1); *Insurance Contracts Act 1984* (Cth) s 9(1)(a).

25. R Cameron, “Reinsurance and the Australian Context: A two part discussion of aspects of the interaction of federal, NSW and common law in the context of reinsurance” (2001) 12 *Insurance Law Journal* 199, 222-231.

26. *Kinzett v McCourt* [1999] NSWCA 7 [107]-[110], overruling earlier conflicting authorities in *New South Wales Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469, 490, 503-504; and *Grimson v Aviation and General (Underwriting) Agents Pty Ltd* (1991) 25 NSWLR 422, 428-429 (Meagher JA).

27. *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399, 448-449 (McHugh and Gummow JJ, Brennan CJ and Deane and Dawson JJ agreeing, 415) approving *McMillan v Mannix* (1993) 31 NSWLR 538, 548.

28. *Gorzynski v W and F T Osmo Pty Ltd* [2009] NSWSC 693 [49]. See also D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0050]. S Drummond, “Direct Claims Against Liability Insurers” (1999) 10 *Insurance Law Journal* 179.

plaintiff obtains judgment against the insured, and where the insurer may avoid the contract if the insured discloses to a third party that the insured has liability insurance cover and the terms of that cover.²⁹

- § **Priority between charges where there are multiple plaintiffs:** s 6(3) makes different provisions depending on whether the events giving rise to the liability occurred on the same or on different days. The provisions for proportional distribution may have the potential to operate unfairly.³⁰
- § **Where the person covered is not the person who entered the contract:** There is recent authority that for s 6 to apply, the person whose liability is covered must also be the person who entered into the contract of insurance.³¹ However, in some cases, the courts have found that officers and directors can be taken to be parties to a contract of insurance entered by their corporation.³²
- § **Failing to obtain leave under s 6(4):** The NSW Court of Appeal has held that failure to obtain leave to commence an action to enforce a charge under s 6(1), invalidates any action taken and prevents any action being revived by retrospective leave.³³ This conclusion continues to be applied in NSW despite some misgivings in other judgments (including in the High Court) and contrary authority from the Northern Territory Court of Appeal.³⁴
- § **Territoriality:** The Court of Appeal has recently confirmed that s 6 applies to an action that a plaintiff brings against an insured in a NSW court,³⁵ however, it did not do this “without doubt”, questioning, in particular, how the section might apply under cross-vesting arrangements.³⁶ Recent Federal Court authority suggests that s 6 may apply to proceedings brought in the NSW registry of the Federal Court.³⁷
- § **Corporate insolvency:** There is a question whether s 6(2) (which deals with any claims while the insured corporation is being wound up or is deemed to be wound up) continues to operate since the referral of corporations power to the Commonwealth in 2001.³⁸ We note that the reason s 6(2) does not deal with priorities in bankruptcy was because the NSW Parliament believed in 1946 that it could not legislate to affect priorities in bankruptcy because the Commonwealth had legislated in the field.³⁹

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- 29. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [107].
 - 30. S W Drummond and P Mann, “Abolish Section 6” (1997) 8 *Insurance Law Journal* 79, 88-89.
 - 31. *Morris v Betcke* [2005] NSWCA 308 [40]-[49]; *Robinson v Vogelsang (No 1)* [2015] NSWSC 1670.
 - 32. *Green v CGU Insurance Ltd* [2005] NSWSC 254 [22]-[34].
 - 33. *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400, 408.
 - 34. *TPFL Ltd v SB Group Property Valuers and Consultants Pty Ltd* [2012] NSWSC 853 [30]-[52]; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, 129, 147-148; *Ceric v C E Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 4 NTLR 135, 145-147.
 - 35. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [197]-[206].
 - 36. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [199].
 - 37. By force of *Judiciary Act 1903* (Cth) s 79(1): *Hopkins v AECOM Australia Pty Ltd (No 4)* [2015] FCA 307 [41]-[43].
 - 38. *Corporations (Commonwealth Powers) Act 2001* (NSW) s 4. See also *Corporations Act 2001* (Cth) s 3(1)(b).
 - 39. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2810-2811. Note that *Law Reform Act 1936* (NZ) s 9(2) covers both insolvency and bankruptcy because it is not constrained by Commonwealth legislative powers.

§ **Workers compensation and motor accidents:** A question arises about the extent to which s 6(8) is needed to preserve the effect of NSW workers compensation and motor accidents legislation.⁴⁰ Particular issues about the interaction with workers compensation legislation include:

- The application of s 6(9). This subsection was added in 1998⁴¹ to overcome a Court of Appeal decision. In that decision the Court held that s 6 does not apply to workers compensation insurance policies.⁴²
- The interaction of the timing provisions in s 6(1) with s 151AB of the *Workers Compensation Act 1987* (NSW) which, in occupational disease cases, makes the last liability insurer liable to indemnify an employer⁴³

In assessing any workers compensation issues, particular attention may need to be given to the impact on litigation in the Dust Diseases Tribunal.⁴⁴

1.22 Some areas of uncertainty may have been resolved by insurers adjusting the policies they offer their customers. For example in the area of directors' and officers' insurance some insurers can offer separate limits or separate policy coverage for defence costs to ensure that directors and officers may still access insurance money to meet ongoing defence legal costs where a plaintiff is making a s 6 claim. However, it is not clear that such arrangements provide the best outcome, for example, where funds not used to meet defence costs are then not available to supplement the funds available to satisfy the judgment.⁴⁵

1.23 We welcome stakeholder submissions on any further areas of uncertainty or ambiguity in s 6.

Other provisions

1.24 At least some of the problems that s 6 originally aimed to resolve were already addressed by other provisions when the section came into force, or have since been addressed by other provisions.

40. See below, para [1.32]-[1.33]. The *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) applies to the use of a motor vehicle before 1 July 1987 and no longer contains s 15 which dealt with situations where the defendant was dead or could not be served.

41. *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW) sch 3.

42. *GIO General Ltd v P Malathounis* (unreported, NSW Court of Appeal, 30 September 1997) applying *Spain v Metropolitan Meat Industry Board* [1971] 1 NSWLR 91, even though *Workers' Compensation Act 1926* (NSW) s 49A (inserted by *Workers' Compensation (Amendment) Act 1966* (NSW) s 5(b)) was intended to facilitate a worker taking action for compensation in certain cases where the worker could not take action against the employer: see NSW, *Parliamentary Debates*, Legislative Assembly, 24 March 1966, 4635.

43. See, eg, *Allianz Australia Insurance Ltd v Pomfret* [2015] NSWCA 4; 88 NSWLR 192 [88].

44. *Dust Diseases Tribunal Regulation 2013* (NSW) cl 18(2)(h) provides that the claims resolution process does not affect the Tribunal's practice and procedures relating to the granting of leave under *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6. See also *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* (NSW) s 30(7)(b).

45. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [125].

Commonwealth provisions

- 1.25 Three Commonwealth Acts deal with the issue of accessing insurance money, namely the *Bankruptcy Act 1966* (Cth), the *Corporations Act 2001* (Cth) and the *Insurance Contracts Act 1984* (Cth). These provide plaintiffs access to insurance proceeds where the insured is bankrupt, missing, deregistered or deceased.
- 1.26 However, in cases of bankruptcy and corporate insolvency, the plaintiff cannot proceed directly against the insurer, but must rely on the trustee or liquidator to recover the money.⁴⁶ The plaintiff may only proceed directly against the insurer when a defendant company is deregistered or the defendant is dead or cannot be found.⁴⁷
- 1.27 There is some uncertainty about the scope and operation of the Commonwealth provisions. For example, the High Court has recently held that, in proceedings against insolvent or potentially bankrupt defendants where the defendants' insurer has declined liability under a policy of insurance and the defendants are unable or unwilling to challenge the insurer's decision, the plaintiff may join the insurer to the proceedings and claim declaratory relief against the insurer in relation to the contract of insurance.⁴⁸
- 1.28 Where the defendant is dead or cannot be found, there is some doubt about whether the relevant provision applies to contracts of liability insurance that only provide cover against liability that has been established by judgment or settlement (rather than liability that is yet to be determined in the third party action).⁴⁹
- 1.29 In cases where the defendant is a corporation, the relevant provision applies to winding up proceedings but not to other circumstances where a company may be in financial difficulty; for example, where a receiver or provisional liquidator has been appointed, the company has been placed in administration or where a deed of company arrangement has been entered into.⁵⁰
- 1.30 While similar provisions to s 6 have been enacted in the Australian Capital Territory and Northern Territory,⁵¹ no other Australian jurisdiction has an equivalent of s 6. Plaintiffs in other States must therefore rely on the Commonwealth provisions, which do not offer the breadth of coverage that s 6 offers.
- 1.31 The patchy coverage of the Commonwealth provisions may encourage “forum shopping” by plaintiffs seeking to assert in NSW (in either State or Federal courts) a s 6 charge that is unavailable in other jurisdictions.

46. *Bankruptcy Act 1966* (Cth) s 117; and *Corporations Act 2001* (Cth) s 562, previously enacted in *Companies Act 1961* (NSW) s 292(5) and *Companies Act 1936* (NSW) s 297(5); and *Bankruptcy Act 1924* (Cth) s 84(1A) inserted by *Bankruptcy Act 1932* (Cth) s 19.

47. *Corporations Act 2001* (Cth) s 601AG; and *Insurance Contracts Act 1984* (Cth) s 51.

48. *CGU Insurance Ltd v Blakeley* [2016] HCA 2 [60]-[70].

49. See *Hannell v Bayswater Car Rental Pty Ltd* (1998) 10 ANZ Ins Cas 61-387; *Webb v Estate of Herbert* [2006] WASCA 43; 31 WAR 492; D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0070].

50. C Coventry, “A Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)” (2007) 18 *Insurance Law Journal* 212, 226.

51. *Civil Law (Wrongs) Act 2002* (ACT) s 206-209, formerly *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 25-28; and *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 26-29.

Other relevant NSW provisions

- 1.32 The *Worker Compensation Act 1987* (NSW), which is expressly not affected by s 6,⁵² gives injured workers access to workers compensation insurance money by requiring a workers compensation policy to provide that:
- § “the insurer as well as the employer is directly liable to any worker insured under the policy ... to pay the compensation ... or other amount ... for which the employer is liable”, and
 - § the insurer is bound by any “judgment, order, decision or award ... in respect of the injury for which the compensation or amount is payable”.⁵³
- 1.33 Current NSW motor accidents legislation allows a claimant to take proceedings against a person's insurer if the person is dead or cannot be served with process.⁵⁴ (We note however that s 6(8) states that s 6 does not affect the operation of the out-dated *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) instead of the current motor accidents legislation.)
- 1.34 Ever since s 2 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) was introduced (two years before s 6 was enacted), plaintiffs have been able to proceed against a deceased defendant's estate,⁵⁵ so that, as noted by Kelly and Ball, the death of the insured defendant “does not provide an insuperable bar to recovery”.⁵⁶ However, there may be good procedural reasons why this is not desirable in all cases; for example, where there is no personal representative of the deceased defendant's estate, the plaintiff may have to apply to appoint an administrator *ad litem*. There may also be problems where an estate is already fully administered.

Provisions in overseas jurisdictions

- 1.35 In the United Kingdom, the rights of an insured defendant against an insurer are transferred to the plaintiff when the insured is insolvent.⁵⁷ However, this arrangement has proved to be of limited use because it only applies in cases of insolvency and only where the liability of the insured to the plaintiff has already been established.⁵⁸
- 1.36 In Ireland, where an insured individual becomes bankrupt or dies or an insured corporate entity is wound up or dissolved, any insurance proceeds payable to the insured:
- § can only be applied to discharging in full all valid claims against the insured in respect of which the proceeds are payable, and

52. *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6(8).

53. *Workers Compensation Act 1987* (NSW) s 159(2)(a), formerly *Workers' Compensation Act 1926* (NSW) s 18(3).

54. *Motor Accidents Compensation Act 1999* (NSW) s 113. See also *Motor Accidents Act 1988* (NSW) s 54; and *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 15 (repealed).

55. *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2.

56. D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0040].

57. *Third Parties (Rights Against Insurers) Act 1930* (UK) s 1.

58. *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363; P Goldsmith, “The Third Party (Rights Against Insurers) Act 1930” (1995) 11 *International Insurance Law Review* 378.

§ will not become assets of the insured or any estate of the insured.⁵⁹

Options for reform

- 1.37 The question of access by plaintiffs to insurers and insurance money has been considered by the Australian Law Reform Commission⁶⁰ and a number of other law reform agencies, including those in Victoria,⁶¹ the UK,⁶² Ireland⁶³ and New Zealand.⁶⁴ Each has recommended introducing, amending, or retaining some provision to give plaintiffs that access.
- 1.38 We see a number of options for dealing with s 6:
1. Do nothing, on the basis that the section continues to be useful and that relevant High Court and NSW Court of Appeal decisions⁶⁵ sufficiently clarify its operation.
 2. Retain the thrust and structure of the section but clarify areas of uncertainty, for example:
 - clarify that s 6 does not affect other obligations under an insurance contract, such as an obligation to meet legal costs; for example, directors' and officers' defence costs
 - clarify how s 6 applies to claims made and notified insurance policies⁶⁶
 - clarify that, for the purposes of the limitation period that applies to a plaintiff's claim against an insurer, time ceases to run against the plaintiff once proceedings are issued against the insured defendant,⁶⁷ and
 - clarify whether s 6 applies to contracts of reinsurance.
 3. Retain the thrust of the section while reforming areas where s 6 has been criticised as problematic or inadequate, for example:

59. *Civil Liability Act 1961* (Eir) s 62. This provision originated in *Road Traffic Act 1961* (Eir) s 76(4); and *Road Traffic Act 1933* (Eir) s 78(2) that were originally based on *Third Parties (Rights Against Insurers) Act 1930* (UK).

60. Australian Law Reform Commission, *Insurance Contracts*, Report 20 (1982) [338]-[340].

61. Victorian Attorney-General's Law Reform Advisory Council, *Final Report* (2000) 16. See also G Reinhardt, "Indemnity Insurance Policies" (1996) 70 *Law Institute Journal* 64; M Ellis, "Give Vics s 6: An Argument for the Expansion of Third Party Access to Proceeds of Insurance in Victoria" (2008) 19 *Insurance Law Journal* 223.

62. England and Wales, Law Commission and Scottish Law Commission, *Third Parties – Rights Against Insurers*, Law Com No 272, Scot Law Com No 184 (2001), resulting in the *Third Parties (Rights Against Insurers) Act 2010* (UK), not yet commenced.

63. Ireland, Law Reform Commission, *Consumer Insurance Contracts*, Report 113 (2015) ch 6.

64. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) ch 5.

65. See, eg, *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399; *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212; *Kinzett v McCourt* [1999] NSWCA 7.

66. See, eg, proposals in New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [102]. See also L Affleck, "Third Parties and the Insolvent Insured: Enforcement of the Statutory Charge Created by Section 9 of the Law Reform Act 1936" (1996) 26 *Victoria University of Wellington Law Review* 627, 648-649.

67. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [101].

- to provide that the person who has “entered into the contract of insurance” includes, for the purposes of s 6(1), the person on whose behalf such a contract has been entered into⁶⁸
 - to provide for priorities between charges where there is more than one plaintiff⁶⁹
 - to provide that the insurer should not be entitled to deny liability because the insured has not complied with an obligation in relation to the claim – an approach that is consistent with s 54 of the *Insurance Contracts Act 1984* (Cth)⁷⁰
 - to provide that a plaintiff should be entitled to fulfil any conditions of a policy such as the payment of an excess or notifying the insurer of a “policyholder event”⁷¹
 - to tighten the leave requirements on the basis that, where plaintiffs are unsuccessful, an insurer will be disadvantaged by not being fully indemnified in costs⁷²
 - to limit the operation of s 6 to liability for personal injury, to the exclusion of property damage and pure economic loss.⁷³
4. Repeal s 6 and leave the field to existing (or revised) Commonwealth provisions and existing State workers compensation and motor accidents regimes – effectively the position in every other State – on the basis that those provisions and regimes and the common law⁷⁴ sufficiently address the need for a direct remedy against insurers, and/or that current insurance practices and regulation means that the risks to which s 6 was directed in 1946 no longer exist.
5. Retain the thrust of s 6, but rewrite it in a contemporary drafting style, while addressing the clarifications discussed above. There are, of course, risks that such a redrafting exercise may inadvertently change the law.
- 1.39 We note that, if s 6 is repealed, it would raise the question of whether s 6 charges which have already attached to insurance moneys should be lifted. It has been pointed out that retrospective application could create problems, especially where the plaintiff has already been granted leave and commenced proceedings against the insurer.⁷⁵

68. See the amendment introduced by the *Insurance Contracts Amendment Act 2013* (Cth) which extends *Insurance Contracts Act 1984* (Cth) s 51 not only to the insured but to “any third party beneficiary under a contract of liability insurance”.

69. See, eg, New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [108]; C Coventry, “A review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)” (2007) 18 *Insurance Law Journal* 212, 233.

70. D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0050].

71. Ireland, Law Reform Commission, *Consumer Insurance Contracts*, Report 113 (2015) [6.54].

72. C Coventry, “A Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)” (2007) 18 *Insurance Law Journal* 212, 232-233.

73. C Coventry, “A Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)” (2007) 18 *Insurance Law Journal* 212, 233.

74. See *CGU Insurance Ltd v Blakeley* [2016] HCA 2.

75. S W Drummond and P Mann, “Abolish Section 6” (1997) 8 *Insurance Law Journal* 79, 99.

Submissions

- 1.40 We invite submissions in writing on or before 20 May 2016 on the options referred to above and on any related matter. We will then consider what further consultation if any is required before finalising our report.

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Justice
Law Reform
Commission

NSW Law Reform Commission
Level 3, Henry Deane Building
20 Lee Street
Sydney NSW 2000 Australia

GPO Box 31
Sydney NSW 2001 Australia

Phone: +61 2 8346 1284
Email: nsw_lrc@agd.nsw.gov.au
Internet: www.lawreform.justice.nsw.gov.au

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