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NSW Law Reform Commission

Third party claims on insurance money: Review of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*

Submission from
Insurance & Care NSW (icare)

May 2016

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EXECUTIVE SUMMARY

This submission is made on behalf of Insurance and Care NSW (icare). icare is the consolidated service provider for New South Wales insurance and compensation schemes. icare was established on 1 September 2015 under section 4 of the *State Insurance and Care Governance Act 2015* (the SICG Act).

icare has the following relevant functions under the SICG Act:

- to act for, and provide services to, the Workers Compensation Nominal Insurer;
- to provide services to any scheme administered by certain entities, including the Workers Compensation (Dust Diseases) Authority under the *Workers Compensation (Dust Diseases) Act 1942*; and
- to monitor the performance of the insurance and compensation schemes in respect of which it provides services.

icare delivers insurance and care services to the people of New South Wales. Whether a person is severely injured in the workplace or on our roads, icare supports their long-term care needs to improve quality of life outcomes, including helping people return to work.

Given the potential impact changes to section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* may have on the entitlement of workers, the Nominal Insurer and the Dust Diseases Authority, icare seeks to make a brief submission in response to the NSW Law Reform Commission's Consultation Paper No 17.

icare is of the view section 6 of the Law Reform Act remains relevant. In the context of claims for compensation or damages arising as a result of workplace injuries, including dust diseases, section 6 ensures:

- an injured worker is able to bring proceedings against the insurer of a tortfeasor who is not an employer, where that tortfeasor is otherwise unable to be sued; and
- the Nominal Insurer and Dust Diseases Authority can seek recovery from a third party tortfeasor of compensation payments made to an injured worker as a result of the third party tortfeasor's negligence.

Without the assistance of section 6, there is no legal avenue via which an injured worker, the Nominal Insurer or the Dust Diseases Authority can bring proceedings against the insurer of a third party tortfeasor where that tortfeasor is otherwise unable to be sued.

Accordingly, icare considers any reform or amendment to section 6 must ensure this legal avenue of recovery is preserved.

SUBMISSION

Section 6 of the Act and its application

Section 6 of the Law Reform Act provides a mechanism via which a party (the plaintiff) can seek compensation or damages directly from the insurer of an alleged tortfeasor (the insured).

This is achieved by creating a charge in favour of the plaintiff, directly enforceable against the insurer with respect to moneys payable by the insurer by way of indemnity against the liability of the insured (section 6(1) of the Law Reform Act).

As mentioned in the Consultation Paper, section 6 covers the following 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.

While the primary purpose of section 6 is to protect a plaintiff's entitlement to recover compensation and/or damages, section 6(4) also provides a level of protection for insurers from "*unwarranted direct action*" by plaintiffs. It does so by requiring a plaintiff to first seek leave of the court in order to rely on section 6.[1]

The provisions most relevant to services provided by icare are section 6(8) and (9), which provide that nothing in section 6 affects the operation of the *Workers Compensation Act 1987* except where the insured:

- has died (if the Insured is a natural person);
- is unable to be located;
- permanently resides outside the Commonwealth of Australia and its Territories;
- is in the process of being wound up;
- has ceased to exist; or
- is de-registered.

[1] See *Tzaidas v Child* (2004) 61 NSWLR 18 per Giles JA.

Section 6 and Workers Compensation Claims

Workers compensation policies are issued to employers by the Workers Compensation Nominal Insurer under Part 7, Division 1 of the Workers Compensation Act. These policies provide for the payment of workers compensation benefits, in accordance with the Act, to employees who suffer a compensable workplace injury.

Under the Act, an eligible worker who receives a compensable injury retains an entitlement to workers compensation benefits regardless of the legal status of the employer.

In this regard, section 155 of the Act requires an employer to obtain and maintain in force a workers compensation policy of insurance. If no policy of insurance is held, the injured worker retains an entitlement to claim compensation against the Nominal Insurer pursuant to Division 6 of the Act (section 140 of the Workers Compensation Act).

Section 159 of the Act outlines various mandatory provisions, which must be included in a workers compensation policy of insurance.

Section 159(2)(a) stipulates that policies of insurance must provide "*the insurer as well as the employer is directly liable to any worker insured under the policy… to pay the compensation under this Act or other amount independently of this Act for which the employer is liable*". Section 159(2)(b) further provides the workers compensation insurer is bound by any judgment, award, decision or orders regarding compensation payable for a work related injury.

Section 162 of the Act further empowers the Workers Compensation Commission to make declarations to the effect that an employer has entered into a contract with an insurer in respect of any liability under the Act, where the employer has died, permanently resides outside the Commonwealth of Australia and its territories, has ceased to exist or is in the process of being wound up.

The effect of these provisions is that injured workers retain an entitlement to workers compensation benefits, including work injury damages, even if the eventualities contemplated by section 6(9) of the Law Reform Act apply (ie; the relevant employer has died, is unable to be located, permanently resides outside the Commonwealth of Australia and its territories, is in the process of being wound up, has ceased to exist or has been de-registered).

However, section 6 of the Law Reform Act remains necessary, as without section 6:

- injured workers would be unable to pursue claims for damages against the insurer of a third party tortfeasor where that tortfeasor is otherwise unable to be sued (for example, because it had died or was de-registered); and
- the Nominal Insurer would be prevented from seeking recovery from the insurer of a de-registered third party tortfeasor of any workers compensation payments it had made to the worker.

EXAMPLE:

A worker employed as a gyprocker by a small business owner suffers an injury at work. The injury occurs while the worker is performing contract work on a site occupied and under the control of a third party principal who is subsequently de-registered. As the worker suffered the injury at work, the Nominal Insurer makes workers compensation payments to the worker on behalf of the employer.

The worker alleges their injury was caused by the negligence of the principal. As the principal is de-registered, the worker will be unable to bring proceedings for damages against it.

If section 6 of the Law Reform Act was repealed, the worker would also be unable to bring proceedings for damages against the insurer of the de-registered principal. Further, the Nominal Insurer would be unable to seek recovery from the principal of any workers compensation payments made to the worker.

icare contends there are good policy reasons to support the retention of these entitlements for both injured workers and the Nominal Insurer.

Section 6 and Workers Compensation (Dust Diseases) Claims

icare delivers insurance and care services to persons with compensable dust diseases under the auspices of the Dust Diseases Authority and in accordance with the *Workers Compensation (Dust Diseases) Act 1942* .

The Dust Diseases Act directs the Authority to pay statutory benefits to workers and their dependants who contract a dust disease as a result of employment in New South Wales.

These benefits are payable where:

- a Medical Assessment Panel constituted under section 8 of the Act certifies the worker is suffering from a dust disease that is reasonably attributable to the inhalation of dust in an occupation which caused the dust disease; and
- the Authority finds the dust disease was either totally or partially attributable to the claimant's employment in New South Wales (section 8 of the Dust Diseases Act).

Section 6 of the Law Reform Act does not affect the liability of the Authority to pay compensation to workers under the Dust Diseases Act. This is because the liability of the Authority is not dependent on a specific policy of insurance taken out by an employer, but arises where the two above-mentioned criteria are met.

Notwithstanding this, section 6 of the Law Reform Act retains its relevance to claims involving the jurisdiction of the Dust Diseases Tribunal, which is a separate entity independent of the Authority, inclusive of recovery claims brought by the Authority.

In relation to proceedings in the Dust Diseases Tribunal:

- Section 11(1) of the *Dust Diseases Tribunal Act 1989* provides proceedings for damages (for both economic and non-economic loss) in respect of a dust-related condition may be brought before the Dust Diseases Tribunal and may not be brought or entertained before any other court or tribunal if:
    - the person is suffering, or has suffered, from a dust-related condition or if deceased, immediately before death, was suffering from a dust-related condition; and,
    - it is alleged the dust-related condition was attributable or partly attributable to a breach of a duty owed to the person by another person; and

- the person who is, or was, suffering from the dust-related condition or a person claiming through that person would, but for the Dust Diseases Act, have been entitled to bring an action for the recovery of damages in respect of that dust-related condition or death.

- Section 11(1A) of the Dust Diseases Act provides proceedings for any tortfeasor liable in respect of damages referred to in section 11(1) to recover contribution from any other tortfeasor liable in respect of that damage may be brought before the Tribunal.
- Under section 8E of the Dust Diseases Act, the Authority is empowered to make cross-claims and claims for recovery against potentially liable third parties. Typically these third parties are occupiers or suppliers. In default of agreement, such matters are to be determined by the Dust Diseases Tribunal.

Accordingly, the Dust Diseases Tribunal has jurisdiction to award damages to workers who have contracted a compensable dust disease. Further, the Authority can seek a determination from the Dust Diseases Tribunal regarding any cross claim for recovery against a third party tortfeasor (other than the employer).

In light of this, section 6 of the Law Reform Act remains relevant to dust diseases claims as it enables:

- a worker to bring proceedings against the insurer of a third party tortfeasor, where that tortfeasor is otherwise unable to be sued (for example, because of death or de-registration); and
- the Authority to make a cross-claim or claim for recovery against the insurer of a de-registered third party tortfeasor who is otherwise unable to be sued (for example, because it has been de-registered).

An example of reliance on section 6 can be found in *Reid v Allianz Australia Insurance Ltd* [2009] NSWDDT 27.

In that case, a plaintiff suffering from a compensable dust disease sought the leave of the Dust Diseases Tribunal under section 6 of the Law Reform Act to sue the workers compensation insurer of two de-registered companies. In granting the plaintiff leave, his Honour, Curtis J, stated at [21] that "*pursuant to section 6(9) of the Law Reform (Miscellaneous Provisions Act) 1946, a plaintiff may, with leave, proceed directly against the insurer of a de-registered corporation, without the necessity of restoring the defunct company to the register for the purposes of suit*".

Accordingly, repeal or substantive amendment of section 6 of the Law Reform Act could result in an injured worker and/or the Authority being unable to bring proceedings against the insurer of a third party tortfeasor where that tortfeasor is otherwise unable to be sued.

icare contends that any reform or amendment to section 6 must ensure injured workers and the Authority retain the right to bring proceedings against the insurer of a third party tortfeasor.

RECOMMENDATION

icare considers that section 6 of the Law Reform Act remains relevant.

In the context of claims for compensation or damages arising as a result of workplace injuries, including dust diseases, section 6 ensures:

- an injured worker is able to bring proceedings against the insurer of a tortfeasor who is not an employer, where that tortfeasor is otherwise unable to be sued; and
- the Nominal Insurer and Dust Diseases Authority can seek recovery 6from a third party tortfeasor of compensation payments made to an injured worker as a result of the third party tortfeasor's negligence.

Without the assistance of section 6, there is no legal avenue via which an injured worker, the Nominal Insurer or the Dust Diseases Authority can bring proceedings against a third party tortfeasor (or its insurer) where that tortfeasor is otherwise unable to be sued.

Accordingly, icare considers that any reform or amendment to section 6 must ensure this legal avenue of recovery is preserved.

CONCLUSION

icare thanks the New South Wales Law Reform Commission for the opportunity to provide comment on its consultation paper for its review of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

We look forward to receiving the outcome of the consultative process and would be happy to discuss any issues with the content of this submission further if required.