

24 May 2016

To New South Wales Law Reform Commission
Email — nsw_lrc@agd.nsw.gov.au

Third party claims on insurance money — reform of Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*

Thank you for the opportunity to present this submission concerning section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* (“**Section 6**”). King & Wood Mallesons has extensive and recent experience acting in respect of third party claims on insurance moneys, on behalf of insurers as well as insolvency practitioners.

We consider that the major limitation of Section 6 is its territorial limits. By constitutional necessity, Section 6 has territorial limitations, which may not include the whole of Australia. While equivalent legislation exists in the Northern Territory and the ACT, no such legislation exists in the other states of Australia. Therefore, whether or not Section 6 is reformed, we expect there to be continued litigation concerning its territorial application, as well as its intersection with certain provisions of Commonwealth legislation, notably s 562 of the *Corporations Act 2001 (Cth)* and s 117 of the *Bankruptcy Act 1966 (Cth)*.

It does not appear to us that these threshold issues can be resolved by way of any amendment to Section 6. On that basis, we consider that the expenditure of effort required to simplify Section 6 would be more appropriately directed towards the consideration of potential reform at the Commonwealth level.

We do not express a view as to whether there ought to be a statutory charge mechanism at the Commonwealth level. However, we note that the issues that are sought to be addressed in Section 6 are issues that potentially affect insurance policies written throughout Australia. For this reason, we consider that it is more appropriate for the issues raised by Section 6 to be addressed at the Commonwealth level through the consideration of potential amendments to the *Insurance Contracts Act 1984 (Cth)*, the *Corporations Act 2001 (Cth)* and the *Bankruptcy Act 1966 (Cth)*.

In light of this view, we consider that Section 6 should not be substantially amended at this time. As the Commission’s Consultation Paper recognises, there is a considerable body of case law surrounding Section 6. As such, and although it may be complicated, it can now be reasonably well understood by practitioners.

What uncertainty does remain, particularly concerning defence costs, could be addressed by way of a minor amendment to Section 6 to clarify whether the Section 6 charge has priority over defence costs.

We note for completeness the imminent entry into force of the *Third Parties (Rights against Insurers) Act 2010 (UK)*. That Act, as well as the relevant Consultation Papers and Reports of the United Kingdom Law Reform Commission which led to it, may provide guidance as to an appropriate path forward at a national level.

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Yours sincerely



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