NSW GOVERNMENT

New South Wales
Law Reform Commission

Report
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Third party claims on insurance money

Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946

November 2016
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November 2016

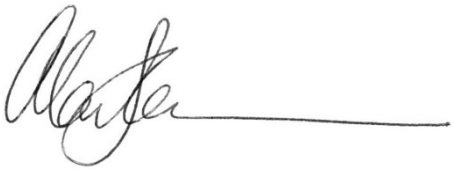
The Hon G Upton MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Third party claims on insurance money

We make this report pursuant to the reference to this Commission received 22 February 2016.

Yours sincerely



Alan Cameron AO
Chairperson

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Participants

Commissioners

Mr Alan Cameron AO (Chairperson)
The Hon Justice Paul Brereton AM, RFD
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Acknowledgements

We acknowledge with gratitude the assistance of the NSW Parliamentary Counsel's Office.

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 The Commission is asked to consider whether the section should be repealed or amended, and in this context consider whether the policy objectives remain valid and, if so, whether those objectives could be better achieved.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

Executive summary

0.1 Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) allows a plaintiff to access proceeds of insurance where proceedings against an insured defendant are not possible or would be pointless because, for example, the defendant is missing or insolvent.

0.2 It achieves this by a special "charge" that attaches to the money that the insurer would be required to pay under the insurance contract. The charge attaches "on the happening of the event giving rise to the claim for damages or compensation".

0.3 The charge has caused many conceptual problems in applying s 6, particularly in relation to claims made policies and claims for pure economic loss, but also in cases where the insurance contract allows for money to be paid, for example, to fund the defence of directors and officers of defendant companies.

0.4 The section has been generally criticised for its obscure drafting and the problems it presents for interpretation. Changes to the insurance market since it was enacted 70 years ago have also made its effect unclear. There are many areas of uncertainty and inadequacy in its application.

0.5 Existing Commonwealth provisions that seek to achieve the same ends do not cover all the situations that s 6 covers and, in some cases, require additional proceedings.

0.6 We believe a provision is needed to meet the situations that s 6 aims to address. However, this provision should do so without the contrivance of the charge – by providing a plaintiff with direct access to the insurer, in appropriate cases.

0.7 Ideally, the Commonwealth should enact a general provision that covers all possible scenarios. This would ensure complete coverage and eliminate "forum shopping". However, pending such an outcome, we consider that NSW should legislate to provide a clearer, more effective provision than the current s 6. The new provision could provide a model for other States and Territories, or the Commonwealth, to adopt.

0.8 We, therefore, propose a new provision to replace the current s 6 that clarifies areas of uncertainty and makes reforms where necessary. The new provision will resolve the issue of payment of defence costs dealt with in the key case, *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212, while ensuring that a plaintiff can recover from an insurer in appropriate cases. Where reform is not required, our recommendations seek to achieve the same effect as the existing provisions. In some cases we have clarified the existing law with words which adopt a preferred interpretation.

0.9 Our recommendations do not increase the liability of insurers. Like the current s 6, the new provision should ensure that an insurer is not liable for more than the insurer would have been liable to pay under the insurance contract. It should also ensure that the insurer can rely on the same defences that the insured defendant could have relied on in an action brought by the plaintiff.

0.10 The Draft Bill in Appendix A gives effect to our recommendations.

Recommendations

1: Plaintiff's right to recover against the defendant's insurer **(page 33)**

If a defendant (being a natural person or a corporation):

(a) has a liability to a plaintiff to pay any damages or compensation

(b) was insured (directly or as a third party) by an insurance contract that would have covered that liability, and

(c) has for any reason failed or is unable to meet the liability in whole or in part

then the plaintiff should be able to recover from the insurer the amount the insurer would have paid to the defendant under the insurance contract in respect of the defendant's liability to the plaintiff.

2: Proceedings against the insurer – leave to proceed **(page 36)**

(1) Whether or not the circumstances in Recommendation 1(a)-(c) have yet been established, the plaintiff should only be able to sue the insurer with the leave of the court.

(2) Leave may be sought and granted before or after the commencement of proceedings against the insurer.

(3) Leave may not be granted if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or any relevant law.

3: The insurer stands in the place of the defendant **(page 37)**

The insurer should stand in the place of the defendant in proceedings brought by the plaintiff as if the action were an action to recover damages or compensation from the insured, so that the parties shall have the same rights and liabilities, and the court shall have the same powers, as if the action were against the defendant.

4: Judgment against defendant no bar to proceedings against insurer **(page 38)**

The plaintiff should be able to proceed against the insurer even though judgment has already been obtained against the defendant for damages or compensation in respect of the same matter, except to the extent that any judgment against the defendant has been satisfied.

5: Limits on insurer's liability to the defendant preserved **(page 38)**

(1) The insurer should not be liable for any greater sum than the insurer is liable to pay the defendant under the relevant insurance contract.

(2) The insurer may raise against the plaintiff any matter in answer to or in reduction of its liability that it could have raised against the defendant.

6: Discharge of insurer's obligations **(page 39)**

Any payment by the insurer to the plaintiff, to the extent of the payment, should discharge any obligation the insurer has to the defendant under the insurance contract.

7: Preventing collusion between the parties **(page 40)**

Any payment the insurer makes to the defendant, or any compromise agreed between the insurer and the defendant in respect to a liability referred to in Recommendation 1, does not discharge the insurer's liability to the plaintiff under this provision, unless and to the extent that the defendant pays the money to the plaintiff.

8: Discovery to find the defendant's insurer **(page 40)**

The provision should not prevent plaintiffs obtaining information about the identity and whereabouts of a defendant's insurer under r 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW).

9: Limitation periods **(page 41)**

For the bringing of proceedings against an insurer under this provision, time should:

(a) commence running against the plaintiff at the same time as the cause of action accrues to the plaintiff against the defendant, and

(b) stop running against a plaintiff when the plaintiff commences proceedings against the defendant or the insurer, whichever is earlier.

10: Effect on workers compensation and other provisions **(page 42)**

The new provision should:

(a) not affect the operation of any of the provisions of workers compensation or any other legislation to the extent that they allow plaintiffs to access insurance money, and

(b) be in addition to rights conferred under workers compensation or any other legislation.

11: Territorial application **(page 42)**

The new provision should apply to an action that a plaintiff brings in a New South Wales court.

12: Reinsurance **(page 43)**

The new provision should expressly not extend to reinsurers under contracts of reinsurance.

13: Transitional provisions **(page 43)**

Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) should continue to apply to and in respect of proceedings commenced against insurers before the commencement of the new provisions.

1. Background

In brief

In cases where a plaintiff cannot recover damages or compensation from an insured defendant, s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) provides a plaintiff with an avenue to recover directly from the defendant's insurer.

Terms of reference

1.1 The Attorney General has asked us to review s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). In particular, the Attorney General asked us

> 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.

1.2 As we describe in Chapter 2, this reference has been given against a backdrop of general dissatisfaction with the drafting of s 6 and the problems that this has presented for interpretation generally. The section has also presented particular problems in light of changes to the insurance market since it was enacted 70 years ago. Over the past 25 years, the courts have resolved some, but not all, of the uncertainties about the interpretation of s 6.

1.3 Of particular concern in recent years has been the uncertainty surrounding the effect of s 6 in cases where the defence costs of directors and officers of a company are funded from the same pool of funds as that available to meet the company's

liability to plaintiffs, and whether the charge created by s 6 prevents insurers paying defence costs.

The provision

1.4 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.
>
> (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.

1.5 Section 6 deals with the following parties:

- a plaintiff
- a defendant who is insured against liability to the plaintiff ("the insured"), and
- the defendant's insurer.

The section provides the plaintiff with an avenue to recover the proceeds of the insurance directly from the defendant's insurer. This direct access is broadly available in circumstances where:

- liability is established against the insured, but the plaintiff cannot recover damages or compensation from the insured, and
- liability is not yet established against the insured and the insured is not available or not worth pursuing.

1.6 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. 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.

1.7 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.

Consultation

1.8 In response to the terms of reference, we released Consultation Paper 17 which identified uncertainties in the application of s 6 and raised five options for reform:

1. Do nothing, on the basis that s 6 continues to be useful and that relevant High Court and NSW Court of Appeal decisions sufficiently clarify its operation.[2]

2. Retain the thrust and structure of s 6 but clarify areas of uncertainty.

3. Retain the thrust of s 6 while reforming areas where it has been criticised as problematic or inadequate.

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 law[3] sufficiently address the need for a direct remedy against insurers, and/or that current insurance practices and regulation mean 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 in (2) above.[4]

1.9 We received 13 submissions from interested stakeholders, including lawyers and representatives of the insurance industry. These are listed in Appendix B.

1.10 Following these submissions, we produced a set of draft proposals that were considered at a roundtable of interested stakeholders. These stakeholders are listed in Appendix C.

1.11 The NSW Parliamentary Counsel's Office then drafted a bill to implement the amended proposals. We circulated it to the organisations represented at the roundtable for comment as to its practical operation. The bill, as amended to take into account the responses received, is reproduced in Appendix A.

This report

1.12 Chapters 2 and 3 set out the patchwork of existing State and Commonwealth provisions that allow plaintiffs to access insurance money in certain circumstances and highlight some of their inadequacies.

---

2. 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.
3. *CGU Insurance Ltd v Blakeley* [2016] HCA 2.
4. NSW Law Reform Commission, *Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946,* Consultation Paper 17 (2016) [1.38].

1.13 In Chapter 4 we set out our preferred approach and recommendations for reform that are implemented in the draft bill.

2. The existing NSW provision

In brief

Section 6 had its origins in a New Zealand provision. The section has been criticised for its obscure drafting and the problems it presents for interpretation particularly in light of changes to the insurance market since it was enacted 70 years ago. There are a substantial number of areas of uncertainty and inadequacy in the application of s 6.

2.1 This chapter sets out the origins and purpose of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and some general criticisms before describing some particular areas of uncertainty and inadequacy in its application.

Origins and purpose

2.2 Section 6 is based on a New Zealand (NZ) section – s 9 of the *Law Reform Act 1936* (NZ).

New Zealand

2.3 Section 9 of the *Law Reform Act 1936* (NZ) consolidated some existing provisions relating to workers compensation and motor accidents that placed liens on

insurance money,[1] and made the resulting provision apply generally.[2] The existing provisions in turn had their origins in NZ workers compensation legislation dating back to 1900.[3]

2.4 The provision 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".[4] 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.[5]

2.5 One NZ judge has recognised the need to ensure that all parties' positions are preserved, summarising the object of the NZ provision as follows:

> In a word, the object of the section is to preserve the plaintiff's position by avoiding unjust profit to the insurer. There is therefore no justification for an approach that enhances the plaintiff's position at the insurer's expense.[6]

New South Wales

2.6 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.[7]

2.7 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".[8] It was envisaged that a plaintiff should only take direct action against the insurer where the insurer had

1. *Workers' Compensation Act 1922* (NZ) s 48; *Motor-vehicles Insurance (Third-party Risks) Act 1928* (NZ) s 10.
2. NZ, *Parliamentary Debates,* House of Representatives, 17 September 1936, 237-238.
3. *Workers' Compensation for Accidents Act 1900* (NZ) s 17; *Workers' Compensation Act 1908* (NZ) s 42.
4. NZ, *Parliamentary Debates,* House of Representatives, 17 September 1936, 241.
5. 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).
6. *FAI (NZ) v Blundell and Brown Ltd* [1994] 1 NZLR 11, 18 (Hardie Boys J).
7. NSW, *Parliamentary Debates,* Legislative Assembly, 20 March 1946, 2809.
8. NSW, *Parliamentary Debates,* Legislative Assembly, 20 March 1946, 2810.

failed to make sure that moneys due to the defendant had "made their way to the plaintiff".[9]

2.8 As we note below, 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. 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".[10]

2.9 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.[11]

2.10 The addition of 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.[12]

2.11 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 s 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.[13]

2.12 In light of the provision's remedial purpose 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.[14]

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9. NSW, *Parliamentary Debates,* Legislative Assembly, 20 March 1946, 2809.
10. NSW, *Parliamentary Debates,* Legislative Assembly, 20 March 1946, 2810.
11. NSW, *Parliamentary Debates,* Legislative Assembly, 20 March 1946, 2810.
12. NSW, *Parliamentary Debates*, Legislative Council, 9 April 1946, 3177.
13. *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.
14. *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].

General criticisms

2.13 The current s 6 has been the subject of general criticism. 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".[15] Justice Kirby characterised it as "undoubtedly opaque and ambiguous" and observed that "ambiguity may be its only clear feature".[16]

2.14 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.[17]

2.15 However, there are also more particular criticisms arising not only from its drafting but also from the change in circumstances since it was enacted.

2.16 Section 6 was enacted 70 years ago 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
- claims made and notified policies
- liability for pure economic loss, and
- contracts for reinsurance.

2.17 On the other hand, it has been suggested that other changes in circumstances have rendered the current provision unnecessary. For example, it has been pointed out that the Australian Securities and Investments Commission (established in 1991) and the Australian Prudential Regulation Authority (established in 1998) now oversee the behaviour of insurance companies in administering their insurance policies and handling claims.[18] It has also been suggested that modern insurance practice has largely overcome the concerns to which s 6 was originally addressed:

> Modern insurance practices also contribute to effectively preclude the development of conspiracies between a defendant and insurer or any malpractice on the part of defendants in collecting insurance moneys by way of indemnity for a liability they do not discharge.
>
> Contemporary liability insurance policy wordings are usually structured in a way that the obligation of the insurer is to discharge the liability by payment to the ultimate claimant; they are not structured in a manner that would involve the insurer paying the insured unless the insured had previously discharged the obligation to the claimant.[19]

15. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [5], [55].
16. *New South Wales Medical Defence Union v Crawford* (1993) 31 NSWLR 469, 479; *McMillan v Mannix* (1993) 31 NSWLR 538, 542.
17. R D Giles, "Reflections on Section 6" (1996) 7 *Insurance Law Journal* 152, 158.
18. Insurance Council of Australia, *Submission TP3*, Attachment, 3.
19. Insurance Council of Australia, *Submission TP3*, Attachment, 4. See also National Insurance Brokers of Australia, *Submission TP4*, 9; Miga, *Submission TP5*, 1-2; Australian Institute of Company Directors, *Submission TP13*, 4.

2.18 We note, however, that 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.[20]

The nature of the charge

2.19 A major cause of difficulty with s 6 has been its use of a special statutory charge imposed on the proceeds of the insurance. "Charge" is a term that originated in the NZ legislation and had its origins in NZ's workers compensation legislation and motor accidents legislation.[21] The charge is a statutory charge over the insurance money payable to the insured under the insurance contract. The charge is independent of the contractual relationship between the insurer and the insured defendant.[22]

2.20 The High Court has observed in relation to the charge that s 6 creates "a new right with an associated remedy to enforce it":

> By its own force, the statute, in circumstances where it applies, creates, on the happening of the event giving rise to the claim for damages or compensation, a charge on all insurance moneys which are then payable in respect of the liability against which the insured is indemnified and on all such insurance moneys that may become payable in respect of that liability.[23]

2.21 The NSW Court of Appeal highlighted some of the problems with the charge in 2013. It observed that insufficient regard may have been paid to the fact that the right created by s 6 is in a category of its own. There may, therefore, be nothing unusual in saying that the charge can fix on insurance moneys that become payable under a contract that was entered into after the charge came into existence.[24]

Application to directors' and officers' insurance policies

2.22 One question is whether the charge on "all insurance moneys that are or may become payable" affects the ability of directors and officers of a corporation to access insurance money to meet ongoing defence legal costs. This is a particular concern because, on one possible interpretation, the defendant directors and officers might be prevented from accessing money to fund their defence costs because the charge has, on the happening of the event giving rise to the liability, attached to "all insurance money that is or may become payable in respect of that liability".

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20. See, eg, *Henderson v Gray* (Unreported, Supreme Court of Victoria, Byrne J, 1 June 1995).
21. See para [2.3]-[2.4].
22. See 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, 627-628.
23. *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399, 446-448 (McHugh and Gummow JJ, Brennan CJ and Deane and Dawson JJ agreeing, 415).
24. *Chubb Insurance Company of Australia Ltd* v *Moore* [2013] NSWCA 212 [97].

2.23 The NSW Court of Appeal recently confirmed that s 6 did not prevent an insurer from discharging its obligation to an insured to meet legal costs,[25] however, the NZ Supreme Court subsequently came to the opposite conclusion.[26]

2.24 The Court of Appeal held that the word "liability" in the phrase "all insurance money that is or may become payable in respect of that liability" refers back to the "liability of an insured to pay damages or compensation to the claimant" and that "[t]he charge is not expressed to catch all moneys that might be payable under the contract of insurance".[27] The Court noted that while s 6 was intended to ensure that insurance moneys were not depleted to the detriment of a plaintiff, there "is nothing to suggest that the purpose of s 6 is to prevent insurance moneys being paid to discharge other obligations that an insurer may have to an insured under a contract of insurance".[28] The Court observed:

> Importantly, if s 6 were construed as catching all moneys available at the time when the charge arises, that would alter the contractual rights between insurer and insured. In the present case, each insured under the Primary Policy has a contractual right to be advanced defence costs within 30 days of receipt of an invoice from defence counsel. That right exists even if the right to indemnity under the Primary Policy has not yet been determined. The Primary Policy contains a provision permitting the Insurer to recover amounts so advanced in the event that it is ultimately determined that the Primary Policy does not respond to the claim in question. ...
>
> There is nothing on the face of s 6 to suggest that it was intended to alter the contractual rights of the parties in such a radical fashion. If the New South Wales Parliament intended s 6 to have such a drastic effect on the contractual rights of an insured, it could be expected to have provided so in express terms.[29]

2.25 The NZ Supreme Court, on the other hand, has held that "all insurance money that is or may become payable in respect of that liability" means that the charge applies to all money that was available under the policy in relation to liabilities at the time the charge arose.[30]

2.26 Some of the areas of uncertainty for directors' and officers' insurance may have been resolved by insurers adjusting the policies they offer their customers. For example, some insurers are understood to 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.[31] It has also been suggested that such actions cannot address all of the uncertainties flowing from the drafting of s 6.[32]

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25. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [122], [124].
26. *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304.
27. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [120], citing *Steigrad v BFSL 2007 Ltd* [2012] NZCA 604 [25].
28. *Chubb Insurance Company of Australia Ltd* v *Moore* [2013] NSWCA 212 [122.
29. *Chubb Insurance Company of Australia Ltd* v *Moore* [2013] NSWCA 212 [122], [124].
30. *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156, [2014] 1 NZLR 304 [25].
31. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [125].
32. Insurance Council of Australia, *Submission TP3*, Attachment, 2.

Application to claims made and notified policies

2.27 Another question is how claims made and notified policies may interact with the current drafting: "on the happening of the event giving rise to the claim for damages or compensation".[33] For example, a negligent act or omission (or loss arising from it) may occur before the claim which triggers the policy is made. Sometimes there can be a gap of some years between the negligent act or the accrual of the cause of action and the claim against the insured.

2.28 The NSW Court of Appeal recently confirmed that s 6 applies to claims made and notified policies,[34] but, despite misgivings, also confirmed previous authorities that s 6 does not apply to events that took place before such a policy commenced.[35] Authorities had previously gone both ways on this point.[36]

2.29 The NZ Law Commission has proposed that the NZ provision should clarify that it applies to all insurance policies, including claims made policies.[37]

Liability for pure economic loss

2.30 Questions have been raised about how the expression "on the happening of the event giving rise to the claim for damages or compensation" applies to cases of pure economic loss. In cases of pure economic loss, time starts to run when the damage accrues, even if the plaintiff is unaware of it.[38] The particular question is whether the occurrence of the damage (which is an essential element of the cause of action) is "the event giving rise to the claim for damages or compensation, or whether it is an earlier act or omission that is the cause of subsequent damage".[39]

2.31 The special rules developed for identifying the accrual of a cause of action in negligence founded upon pure economic loss may, in the view of the NSW Court of Appeal, "make it difficult to determine when the rights conferred by s 6 arise".[40]

33. *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6(1).
34. *Chubb Insurance Company of Australia Ltd* v *Moore* [2013] NSWCA 212 [72]-[87].
35. *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; *Schipp v Cameron* [1999] NSWSC 997; *FAI General Insurance Co Ltd v McSweeney* (1997) 73 FCR 379.
36. See authorities cited in *Manettas v Underwriters at Lloyds* (1993) 7 ANZ Ins Cas 61-180; *Schipp v Cameron* [1999] NSWSC 997; *FAI General Insurance Co Ltd v McSweeney* (1997) 73 FCR 379.
37. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [102].
38. *Scarcella v Lettice* [2000] NSWCA 289; 51 NSWLR 302 [15].
39. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [141].
40. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [141].

Contracts for reinsurance

2.32 Another question is whether s 6 applies to reinsurance arrangements, that is, where the insured (the defendant who is covered by an insurance contract with respect to the defendant's liability):

- has sought to recover from an insurer, but the insurer has failed or is unable to pay out in accordance with the contract of insurance
- the insurer has a contract of reinsurance with a reinsurer, and
- the defendant instead seeks to recover against the reinsurer.

2.33 It is unclear whether s 6 covers these situations.[41] This depends on whether reinsurance indemnifies the reinsured "against liability to pay any damages or compensation", as stated in s 6.[42]

Priority between charges where there are multiple plaintiffs

2.34 Subsection 6(3) makes different provisions where the same insurance moneys are subject to more than one charge depending on whether the events giving rise to the liability occurred on the same or on different days. This means that, where the events out of which each liability arose:

- happened on different days, the charges have priority between themselves according to when the events out of which the liability arose occurred, or
- happened on the same day, the charges rank equally between themselves.

2.35 The NZ Law Commission considered that, of the priority provisions, the provision that ranks charges equally when the events giving rise to the liability occur on the same day was "more equitable" than the provision that ranks the charges in order of the events giving rise to the liability when they occur on different days. The Commission, therefore, proposed that "where the insurance money is insufficient to satisfy fully two or more third party claims, each claim should abate proportionately".[43]

2.36 However, proportional distribution can only take place once all claims (of which the insurer has notice) have worked their way through the system. This arrangement may also have the potential to operate unfairly.[44]

41. 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.
42. 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.
43. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [108].
44. S W Drummond and P Mann, "Abolish Section 6" (1997) 8 *Insurance Law Journal* 79, 88-89.

Where the person covered did not enter the contract

2.37 There is authority to suggest that for s 6 to apply, the person whose liability is covered must also be the person who "entered into [the] contract of insurance by which the person is indemnified".[45] This means that the provision does not extend to situations where the defendant is protected by insurance that has been entered into by another person, for example, a defendant who was insured only by virtue of a contract entered into by her defacto partner.[46] In such a case, the charge would not arise and the plaintiff would not be able to proceed against the insurer despite the fact that the contract of insurance covered the liability.

2.38 However, in some cases, the courts have found that officers and directors can be taken to be parties to a contract of insurance entered into by their corporation.[47]

Limitation periods

2.39 There is no statutory limitation period prescribed for a claim brought under s 6.[48] This raises the question of what occurs in situations where the plaintiff seeks to join or bring an action against the insurer outside of the limitation period for the cause of action between the plaintiff and the defendant.

2.40 While the operation of limitation periods relating to the plaintiff's claim may have once been uncertain, the NSW 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".[49]

2.41 This overruled earlier conflicting authorities that:

- leave of the court was a necessary element of the cause of action under s 6(4) so that time does not begin to run until leave is granted,[50] and
- a court could refuse leave to proceed against the insurer under s 6(4) if the action against the insured would be statute barred, even if the plaintiff had already commenced proceedings against the insured within time.[51]

2.42 The NZ Law Commission observed that, given the purpose of granting the plaintiff direct access to the insurer, there seemed to be no reason for a plaintiff who has commenced proceedings against the insured defendant within time to be required to commence proceedings against the insurer also within time. The Commission

45. *Morris v Betcke* [2005] NSWCA 308 [40]-[49].
46. *Robinson v Vogelsang (No 1)* [2015] NSWSC 1670.
47. *Green v CGU Insurance Ltd* [2005] NSWSC 254 [22]-[34].
48. See *Kinzett v McCourt* [1999] NSWCA 7, 46 NSWLR 32 [55]-[57].
49. *Kinzett v McCourt* [1999] NSWCA 7, 46 NSWLR 32 [107]-[110].
50. *New South Wales Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469, 490, 503-504.
51. *Grimson v Aviation and General (Underwriting) Agents Pty Ltd* (1991) 25 NSWLR 422 (Meagher JA) 428-429.

observed that, so long as the defences available to the insurer against the insured also prevail over the plaintiff, there was no apparent prejudice to the insurer. However, there would be potentially much prejudice to a plaintiff who had commenced proceedings against the defendant within time but was barred from proceeding against the insurer because the defendant entered insolvency after the limitation period expired. The Commission recommended that the NZ provision clarify that time ceases to run against the plaintiff once proceedings are issued against the insured defendant.[52]

Granting leave to proceed against an insurer

2.43 In NSW, a court has a general discretion to grant leave to a plaintiff to join or proceed against an insurer. But NSW, unlike NZ, also includes a proviso that leave may not be granted where the insured is entitled to disclaim under the policy.[53] This proviso operates in addition to the court's general discretion, as the High Court has explained:

> This provision is not directing the court that leave be denied only in a case where it is satisfied both of entitlement to disclaim liability and that necessary steps have been taken to establish entitlement to do so. Leave may be refused in other cases but must be refused in these cases.[54]

2.44 The provision requiring the leave of the court to commence a claim against the insurer was originally formulated 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".[55] In part it was included to ensure that the provision was not misused at 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.[56]

2.45 Concerns have been expressed that "the easier the test becomes for claimants, the greater must be the likelihood that insurers will be joined to proceedings simply as alternative, and convenient, defendants".[57]

Court's general discretion

2.46 The provision does not specify when leave may be granted. The approach of the courts has generally been to require that the plaintiff show three things:

- that there is an arguable case of liability against the defendant
- that there is an arguable case that the insurer's policy responds to that liability, and

52. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [101].
53. *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6(4).
54. *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399, 448 (McHugh and Gummow JJ, Brennan CJ and Deane and Dawson JJ agreeing, at 415).
55. NZ, *Parliamentary Debates,* House of Representatives, 17 September 1936, 241.
56. 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).
57. S W Drummond and P Mann, "Abolish Section 6" (1997) 8 *Insurance Law Journal* 79, 87.

- there is a real possibility that, if the plaintiff obtains judgment against the defendant, the defendant will not be able to meet it.[58]

2.47 These criteria appear to be well settled. There are also further considerations that courts may take into account in deciding whether to grant leave, as set out below.

Arguable case

2.48 The requirement that there be an arguable case against the defendant has been described as a "relatively modest hurdle".[59] The NSW Court of Appeal has recently explained:

> The standard for when it is justifiable to bring an insurer in is fairly low, namely that there is an arguable case, but an arguable case exists only when there is both an arguable case that certain facts exist, and an arguable case that those facts provide grounds for legal relief.[60]

Defendant unable to pay

2.49 A court may refuse leave to join an insurer if it is satisfied that a defendant is available to be sued and can meet any claim, that is, that there is a "perfectly good common law defendant" available.[61] Conversely, leave will be granted if there is doubt about a defendant's capacity to pay. For example, if a defendant is subject to multiple proceedings that might see the value of his or her property reduced substantially.[62]

Other considerations

2.50 The grant of leave may be refused for other proper reasons such as, for example, where the claim was statute barred or where the insurer could demonstrate irreparable prejudice.[63] Avoiding a multiplicity of proceedings is also a relevant consideration in determining whether to grant leave.[64]

2.51 Justice Moffitt has also stated that it would be wrong to grant leave on the basis that "a plaintiff finds it distasteful to sue a tortfeasor because he is a relative, an employee, a fellow employee or employer or because it is considered that their future relationship may be affected in some way".[65]

Court must refuse leave where insurer is entitled to disclaim liability

2.52 We have already noted that the aim of the proviso to s 6(4), which requires the court to refuse leave if the insurer can disclaim liability, is to prevent unwarranted

58. *Bede Polding College v Limit (No 3) Ltd* [2008] NSWSC 887 [6]; *Oswald* v *Bailey* (1987) 11 NSWLR 715, 727.
59. *Tzaidas v Child* [2004] NSWCA 252, 61 NSWLR 18 [140].
60. *Energize Fitness Pty Ltd* v *Vero Insurance Ltd* [2012] NSWCA 213 [59].
61. *Tzaidas v Child* [2004] NSWCA 252, 61 NSWLR 18 [50].
62. *Oswald v Bailey* (1987) 11 NSWLR 715, 725-726.
63. *Gorczynski v W & FT Osmo Pty Ltd* [2009] NSWSC 693 [60]; *Opes Prime Stockbroking Ltd v Stevens* [2014] NSWSC 659 [19]. The Court of Appeal did not overturn this statement of the law in *Gorczynski v W & FT Osmo Pty Ltd* [2010] NSWCA 163, 77 NSWLR 62.
64. *Oswald v Bailey* (1987) 11 NSWLR 715, 727; *Schipp v Cameron* (1995) 8 ANZ Ins Cas 61-256, 75,870-75,871.
65. *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400, 403.

proceedings against insurers. A number of NSW Court of Appeal judgments have observed this.[66]

2.53 The usual bases for refusing to indemnify include:

- the incident that is the subject of the claim occurred outside the relevant policy period (in an occurrence based policy)
- the claim against the insured was made outside the relevant period (in a claims made policy)
- the claim is not covered by the policy
- the claim falls within an exception to the policy, or
- the insurer can avoid the policy for non-disclosure and/or misrepresentation.[67]

2.54 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.[68] The High Court has made a general observation about the effect of s 6(4) suggesting that:

> once the charge has descended on the happening of the event giving rise to the claim for damages or compensation, no mutual or unilateral action of insurer or insured which is taken otherwise than under or pursuant to the contract of insurance or the general law as it operates upon the contract may vary, discharge or otherwise qualify or abrogate the contract of insurance so as to deny to the claimant what otherwise would be the fruits of enforcement of the charge by action taken under s 6(4) against the insurer.[69]

2.55 In some cases the insurer can be precluded from disclaiming by the operation of law or statute. The phrase "under the contract of insurance" can be taken to include the general law of insurance and provisions that operate to prevent an insurer from declining to pay.[70] For example, s 54 of the *Insurance Contracts Act 1984* (Cth) provides that an insurer in certain circumstances may not refuse to pay claims because of an act of the insured, except to the extent that the insured's act contributed to the loss.

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66. *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].
67. N G Rein, "Liability Policies: The Relationship of the Claim Against the Insured and the Insured's Claim on the Insurer" (1994) 6 *Insurance Law Journal* 193, 193. See also *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399, 448 (McHugh and Gummow JJ, Brennan CJ and Deane and Dawson JJ agreeing, 415).
68. *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.
69. *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399, 450.
70. *Tzaidas v Child* [2004] NSWCA 252, 61 NSWLR 18 [45]-[49]; *Gorczynski v W & FT Osmo Pty Ltd* [2010] NSWCA 163, 77 NSWLR 62 [105].

2.56 The High Court's position has been criticised as allowing an "indolent, or malevolent, insured" to thwart a plaintiff's attempts to recover from an insurer.[71] As Justice Simpson has observed:

> An indolent, or malevolent, insured (especially if impecunious and with nothing to lose) could, by merely refraining from or failing to give the proper notice, entitle the insurer to disclaim the policy, thereby thwarting an attempt by a third party claimant to exercise the right conferred by s 6. In such circumstances, if the insurer were held entitled, by reason of the failure of the insured to notify, to disclaim to the insured, it would equally be entitled to disclaim a claim made by a third party, and it would be futile to grant leave under s 6(4). It might therefore be assumed that leave under s 6(4) would not be granted.[72]

2.57 Kelly and Ball have observed:

> The better view is that the insurer should not be entitled to deny liability because the insured has not complied with an obligation in relation to the claim. To permit the insurer to do so would defeat the whole purpose of direct recourse provisions.[73]

2.58 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 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.[74]

2.59 A concern addressed by the Irish Law Reform Commission was the use of non-payment of an excess as grounds for an insurer to repudiate liability. Excess conditions in insurance contracts often made the payment of an excess by the insured a precondition to the provision of indemnity. The non-payment of an excess was therefore grounds for the insurer to repudiate liability. The Irish Commission considered that "a third party, who is entitled to pursue an insurer directly, should also be entitled to fulfil any conditions of the policy" such as the payment of an excess or notifying the insurer of a "policyholder event".[75]

The result of failing to obtain leave

2.60 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.[76]

2.61 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.[77]

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71. *Gorczynski v W & F T Osmo Pty Ltd* [2009] NSWSC 693 [49]. See also S Drummond, "Direct Claims Against Liability Insurers – Section 601AG and Ideas for Further Reform" (1999) 10 *Insurance Law Journal* 179.
72. *Gorczynski v W and F T Osmo Pty Ltd* [2009] NSWSC 693 [49].
73. D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0050]; S Drummond, "Direct Claims Against Liability Insurers – Section 601AG and Ideas for Further Reform" (1999) 10 *Insurance Law Journal* 179.
74. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [107].
75. Ireland, Law Reform Commission, *Consumer Insurance Contracts*, Report 113 (2015) [6.54].
76. *National Mutual Fire Insurance Co Ltd v Commonwealth* of Australia [1981] 1 NSWLR 400, 408.

Territorial application

2.62 The Court of Appeal has recently confirmed that s 6 applies to an action that a plaintiff brings in a NSW court,[78] however, it did not do this "without doubt", questioning, in particular, how the section might apply under cross-vesting arrangements.[79]

2.63 Recent Federal Court authority suggests that s 6 may apply to proceedings brought in the NSW registry of the Federal Court.[80]

Corporate insolvency

2.64 Subsection 6(2) deals with any claims while the insured corporation is being wound up or is deemed to be wound up. There is a question whether this subsection continues to operate since the referral of the corporations power to the Commonwealth in 2001.[81]

2.65 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.[82]

2.66 Under current constitutional arrangements, the Commonwealth would need to legislate any changes to the operation of the provision while a corporation is being wound up or is deemed to be wound up.

Workers compensation and motor accidents

2.67 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.

2.68 The *Workers Compensation Act 1987* (NSW), which is expressly not affected by s 6,[83] 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

77. *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.
78. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [197]-[206].
79. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [199].
80. By force of *Judiciary Act 1903* (Cth) s 79(1): *Hopkins v AECOM Australia Pty Ltd (No 4)* [2015] FCA 307 [41]-[43].
81. *Corporations (Commonwealth Powers) Act 2001* (NSW) s 4. See also *Corporations Act 2001* (Cth) s 3(1)(b).
82. 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.
83. *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6(8).

- the insurer is bound by any "judgment, order, decision or award ... in respect of the injury for which the compensation or amount is payable".[84]

2.69 The 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.[85] 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.[86]

2.70 Particular issues about the interaction with workers compensation legislation include:

- The application of s 6(9). This subsection was added in 1998[87] to overcome a NSW Court of Appeal decision. In that decision the Court held that s 6 does not apply to workers compensation insurance policies.[88]
- 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 employer.[89]

2.71 In assessing any workers compensation issues, particular attention may need to be given to the impact on litigation in the Dust Diseases Tribunal.[90]

84. *Workers Compensation Act 1987* (NSW) s 159(2), formerly *Workers' Compensation Act 1926* (NSW) s 18(3).
85. *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).
86. 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.
87. *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW) sch 3.
88. *GIO General Ltd* v *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.
89. See, eg, *Allianz Australia Insurance Ltd* v *Pomfret* [2015] NSWCA 4, 88 NSWLR 192 [88].
90. *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).

3. Commonwealth provisions

In brief

3.1 Three Commonwealth Acts deal with the issue of plaintiffs 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 insolvent, missing, deregistered or deceased.

3.2 Apart from the ACT and NT,[1] no other Australian jurisdiction has an equivalent of s 6. Plaintiffs in other States must, therefore, rely on these Commonwealth provisions.

3.3 The Commonwealth provisions are imperfect, in that they do not cover all circumstances of insolvency, and can require additional steps in litigation and the involvement of additional parties. One commentator has observed:

> while the Commonwealth provisions each perform an important role, together they fall short of providing third party claimants with adequate access to the proceeds of insurance.[2]

3.4 The patchy coverage of the Commonwealth provisions may be encouraging "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.

3.5 It has also been argued that the Commonwealth provisions do not prevent the insurer and the insured defendant from reducing the amount payable under an insurance contract by, for example, settling an indemnity dispute.[3] This leaves open the possibility of an outcome that the charge on insurance proceeds under s 6 was intended to avoid.

1. *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.
2. See, eg, 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, 223.
3. 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, 231-233. See *Henderson v Gray* (Unreported, Supreme Court of Victoria, Eames J, 20 October 1995) 62-63.

Insolvency provisions

3.6 The insolvency provisions are contained in s 117 of the *Bankruptcy Act 1966* (Cth) and s 562 of the *Corporations Act 2001* (Cth). They apply when the insured defendant is insolvent (either a bankrupt individual, or a company in liquidation). They ensure that any insurance money in the hands of a trustee or liquidator goes to the plaintiff.

3.7 Under each provision, the amount vests in either a trustee or a liquidator. The plaintiff cannot proceed directly against the insurer, but must rely on the trustee or liquidator to have the money already, or to act to recover it.

3.8 Generally, the insolvency provisions will require a plaintiff to undertake two successful proceedings in order to recover from an insurer. This has been criticised as leading to a messy and costly multiplicity of proceedings to the disadvantage of the plaintiff.[4] It has been noted that such processes arguably shift a risk to the plaintiff, who is often least able to bear it.[5]

3.9 However, there is some uncertainty about whether a plaintiff can seek a declaratory judgment against an insurer or join the insurer to proceedings.[6] The courts generally highlight the importance of avoiding a multiplicity of proceedings.[7] However, there are other considerations, including the potential burden of proceedings on the insurer that will outweigh the balance of convenience, especially where the issues concerning the insurance contract are not relevant to determining the defendant's liability.[8]

3.10 The High Court has recently held that a plaintiff may join an insurer to the proceedings and claim declaratory relief against the insurer in relation to the contract of insurance, in a case where:

- the defendants are insolvent or potentially bankrupt
- the defendants' insurer has declined liability under a policy of insurance, and
- the defendants are unable or unwilling to challenge the insurer's decision.[9]

3.11 It has been noted that the usefulness of each of the insolvency provisions is weakened to the extent that the courts are reluctant to grant declaratory relief or join the insurer, especially in cases where the insurer is awaiting the outcome of proceedings against the insured defendant.[10]

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4. D Willmott, "Third Party Claims Against Insurers: the Case for Uniform National Reform" (2003) 15 *Insurance Law Journal* 24, 37.
5. 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, 227.
6. 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, 227.
7. See, eg, *JN Taylor Holdings Ltd v Bond* (1993) 59 SASR 432, 443.
8. See, eg, *CE Health Casualty & General Insurance v Pyramid Building Society* [1997] 2 VR 256, 295 (Phillips JA), 258 (Tadgell JA, agreeing), and 273 (Ormiston JA, agreeing).
9. *CGU Insurance Ltd v Blakeley* [2016] HCA 2 [60]-[70].
10. 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, 228-229.

Bankruptcy Act 1966 (Cth) s 117

3.12 Section 117 applies where the insured is an individual and is bankrupt, as follows:

> **117 Policies of insurance against liabilities to third parties**
> (1) Where:
>
> (a) a bankrupt is or was insured under a contract of insurance against liabilities to third parties; and
>
> (b) a liability against which he or she is or was so insured has been incurred (whether before or after he or she became a bankrupt);
>
> the right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer under the policy in respect of the liability shall, if the liability has not already been satisfied, be paid in full forthwith to the third party to whom it has been incurred.
>
> (2) Subsection (1) does not limit the rights of the third party in respect of any balance due to him or her after the payment referred to in that subsection has been made.
>
> (3) This section applies notwithstanding any agreement to the contrary, whether entered into before or after the commencement of this Act.

3.13 It was first enacted in 1932,[11] before s 6 became law. According to the second reading speech, the provision was introduced to deal with third-party risks in motor accidents. It was considered unfair that the proceeds of such a policy should be taken into account in the general assets of a bankrupt estate and that an injured party should rank along with other creditors.[12]

3.14 This provision applies only to bankrupt defendants – that is defendants who:

- are subject to sequestration order
- have been made bankrupt by the presentation of a debtor's petition,[13] or
- who have entered into a deed of assignment.[14]

It does not apply to other arrangements that a defendant who cannot meet his or her financial obligations may enter into,[15] such as a personal insolvency agreement,[16] or a composition.[17]

11. *Bankruptcy Act 1924* (Cth) s 84(1A) inserted by *Bankruptcy Act 1932* (Cth) s 19.
12. Australia, *Parliamentary Debates*, House of Representatives, 24 May 1932, 1276.
13. *Bankruptcy Act 1966* (Cth) s 5.
14. *Bankruptcy Act 1966* (Cth) s 231(2): *Re Silverstein: Ex parte Evenage Pty Ltd* (Unreported, Federal Court of Australia, North J, 13 March 1998).
15. 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, 225.
16. Under *Bankruptcy Act 1966* (Cth) pt 10. Compare *Workers Compensation Act 1958* (Vic) s 61(1).
17. *Re Silverstein: Ex parte Evenage Pty Ltd* (Unreported, Federal Court of Australia, North J, 13 March 1998); G Reinhardt, "Entitlement of Claimant to Proceeds of Liability Policy Where Insured Bankrupt is a Party to a Deed of Arrangement" (1998) 13 *Australian Insurance Law Bulletin* 107, 108. Compare *Workers Compensation Act 1958* (Vic) s 61(1).

Corporations Act 2001 (Cth) s 562

3.15 Section 562 of the *Corporations Act 2001* (Cth) applies where the insured defendant is a company in liquidation, as follows:

> **562 Application of proceeds of contracts of insurance**
> (1) Where a company is, under a contract of insurance (not being a contract of reinsurance) entered into before the relevant date, insured against liability to third parties, then, if such a liability is incurred by the company (whether before or after the relevant date) and an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, the amount must, after deducting any expenses of or incidental to getting in that amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability, or any part of that liability remaining undischarged, in priority to all payments in respect of the debts mentioned in section 556.
>
> (2) If the liability of the insurer to the company is less than the liability of the company to the third party, subsection (1) does not limit the rights of the third party in respect of the balance.
>
> (3) This section has effect notwithstanding any agreement to the contrary.

3.16 A form of this section was first enacted in 1936,[18] before s 6 became law.

3.17 It applies only to companies that are in liquidation. It does not apply to other circumstances where a company may be in financial difficulty; for example, where:

- a receiver is appointed under a fixed or floating charge
- a provisional liquidator has been appointed
- the company has been placed in administration
- a deed of company arrangement has been entered into, or
- the company is wound up.[19]

Direct access provisions

3.18 Section 601AG of the *Corporations Act 2001* (Cth) and s 51 of the *Insurance Contracts Act 1984* (Cth) allow the plaintiff to proceed directly against the insurer when the insured defendant is absent because it is a deregistered company, or he or she is a dead or missing individual.

18. *Companies Act 1936* (NSW) s 297(5), subsequently enacted in *Companies Act 1961* (NSW) s 292(5); *Corporations Act 1989* (Cth) s 562. Drawing on 20 & 21 Geo V c 25 *Third Parties (Rights against Insurers) Act 1930* (UK) s 1.
19. D Willmott, "Third Party Claims Against Insurers: the Case for Uniform National Reform" (2003) 15 *Insurance Law Journal* 24, 38-39; C Coventry, "A Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)" (2007) 18 *Insurance Law Journal* 212, 226; S W Drummond, "Direct Claims Against Liability Insurers – Section 601AG and Ideas for Further Reform" (1999) 10 *Insurance Law Journal* 179, 185-187.

Insurance Contracts Act 1984 (Cth) s 51

3.19 Section 51 of the *Insurance Contracts Act 1984* (Cth) applies only where the insured defendant is dead or cannot be found, as follows:

> **51 Claims against insurer in respect of liability of insured or third party beneficiary**
>
> (1) If:
>
> (a) the insured or any third party beneficiary under a contract of liability insurance is liable in damages to another person; and
>
> (b) the contract provides insurance cover in respect of the liability; and
>
> (c) the insured or third party beneficiary has died or cannot, after reasonable inquiry, be found;
>
> then the other person may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the liability of the insured or third party beneficiary.
>
> (2) A payment under subsection (1) is a discharge, to the extent of the payment, in respect of:
>
> (a) the insurer's liability under the contract; and
>
> (b) the liability of the insured or third party beneficiary, or the legal personal representative of the insured or third party beneficiary, to the other person.
>
> (3) This section does not affect any right that the other person has in respect of the liability of the insured or third party beneficiary, being a right under some other law of the Commonwealth or under a law of a State or Territory.

3.20 This provision resulted from an Australian Law Reform Commission (ALRC) report on insurance contracts. The ALRC concluded:

> that justice would best be achieved if a third party had a right to proceed directly against an insurer where the insured was dead or could not be found despite reasonable inquiry. The insurer should be entitled to rely on all the insured's defences, together with any it would have had if an action had been brought against it by the insured in respect of the third party claim. These recommendations leave unaffected the third party's right to bring an action against the insured himself.[20]

3.21 Section 51(3) preserves s 6 in NSW, and its equivalents in the ACT and NT.

3.22 In 2013, the reference to an "insured" was extended to include third party beneficiaries under a contract of insurance.[21] This followed recommendations by a 2004 Review Panel in response to a judgment where it was held that the reference

20. Australian Law Reform Commission, *Insurance Contracts*, Report 20 (1982) [340].
21. *Insurance Contracts Amendment Act 2013* (Cth) pt 4.

to an "insured" did not include third party beneficiaries under an insurance contract.[22]

Types of insurance covered

3.23 The provision does not cover all types of insurance. The provisions of the *Insurance Contracts Act 1984* (Cth), for example, do not extend to:

- reinsurance contracts
- health insurance contracts (where the insurer is a registered fund)
- insurance contracts entered into by a friendly society
- certain insurance contracts entered into by the Export Finance and Insurance Corporation
- marine insurance contracts (where the ship is not a pleasure craft)
- workers compensation and compulsory third party motor vehicle insurance contracts, or
- insurance contracts entered into in the course of State insurance or Northern Territory insurance.[23]

No goods in jurisdiction

3.24 Section 51 does not cover cases where the insured can be found but the plaintiff cannot recover under a judgment against the insured defendant because the execution of judgment has been returned with a *nulla bona* endorsement. That is, because the sheriff has not found any goods of the defendant in the jurisdiction from which a judgment could be satisfied. This gap was identified by the 2004 review of the *Insurance Contracts Act 1984* (Cth).[24] Provisions to remedy this gap were proposed in an exposure bill in 2007,[25] but they were not adopted.

Need to establish liability

3.25 There is some doubt about the application of s 51, at least in cases where the insurance contract provides cover when the insured becomes legally liable to pay damages or compensation. Some courts and commentators have interpreted the expression "liable in damages" in s 51(1)(a) as requiring that the plaintiff's cause of action against the insurer can only accrue once the defendant's liability has been established. This means that a plaintiff must establish the defendant's liability by judgment or settlement before he or she can proceed against the insurer.[26]

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22. A Cameron and N Milne, *Review of the Insurance Contracts Act 1984 (Cth),* Final Report on second stage: Provisions other than section 54 (Australia, Treasury, 2004) [10.24]; *Ripper* v *Gatenby* (2002) 10 Tas R 435 [44]-[46].
23. *Insurance Contracts Act 1984* (Cth) s 9, s 9A.
24. A Cameron and N Milne, *Review of the Insurances Contracts Act 1984 (Cth),* Final Report on second stage: Provisions other than section 54 (Australia, Treasury, 2004) [10.24].
25. Exposure Draft, Insurance Contracts Amendment Bill 2007 (Cth) sch 9, cl 25.
26. *Bayswater Car Rental Pty Ltd v Hannell* [1999] WASCA 34 [19], [69]-[73]; *Australian and New Zealand Insurance Reporter* (CCH Australia, 2016) ¶27-505. See also *Post Office* v *Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, 373-375, 377-378.

3.26 The Western Australian Court of Appeal questioned such a result in 2006.[27] There would also seem to be some support for avoiding a multiplicity of proceedings by joining an insurer to seek a declaratory judgment.[28] (As is the case with the insolvency provisions, above.)

3.27 However, others have preferred an alternative, more liberal construction of the expression. They consider that it would be more in keeping with the remedial intent of the provision to read it as meaning that the amount to be recovered is equal to that for which the defendant (as having committed an act or omission that gives rise to a liability) would be liable if the defendant were found liable in damages.[29]

3.28 Kelly and Ball have observed that the former interpretation cannot be right:

> It has the effect of excluding the application of the Act in many of the cases it was designed to deal with.[30]

3.29 Their preferred view is that the "liability" referred to in s 51 is the liability of the insurer which (if it has not already been established by judgment) remains to be established in the third party action.[31]

Reasonable inquiry

3.30 There may also be some doubt as to whether the requirement to make "reasonable inquiry" extends beyond the date the action commenced to the time of recovery.[32] One commentary has observed:

> What constitutes a "reasonable enquiry" to find the insured is uncertain. Presumably the circumstances of the third party and the amount of the insured's liability are relevant; the wealthier the third party, the more extensive that person's enquiries might be, although no-one can reasonably be expected to spend an amount equal to the insured's liability in attempts to find the insured.[33]

Corporations Act 2001 (Cth) s 601AG

3.31 Section 601AG of the *Corporations Act 2001* (Cth) applies where the insured defendant is a deregistered corporation. It allows a plaintiff to proceed directly against the deregistered corporation's insurer, as follows:

> **601AG Claims against insurers of deregistered company**
> 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

27. *Webb* v *Estate of Herbert* [2006] WASCA 43, 31 WAR 492 [13]-[24].
28. *Morris v Betcke* [2005] NSWCA 308 [59]; *Webb v Estate of Herbert* [2006] WASCA 43, 31 WAR 492 [15]; *Tatterson v Wirtanen* [1998] VSC 88.
29. *Hannell v Bayswater Car Rental Pty Ltd* (1998) 10 ANZ Ins Cas 61-387, 74,089-74,090 (WA District Court) citing D K Derrington and R S Ashton, *The Law of Liability Insurance* (1990) 715. See also *Vollstedt v Calibre Enterprises Pty Ltd* [1999] VSC 128 [27]-[28].
30. D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0070].
31. D Kelly and M Ball, *Principles of Insurance Law* (LexisNexis Australia, 2016) [6.0070].
32. *Bayswater Car Rental Pty Ltd v Hannell* [1999] WASCA 34 [20], [74].
33. *Australian and New Zealand Insurance Reporter* (CCH Australia, 2016) ¶27-505.

(b) the insurance contract covered that liability immediately before deregistration.

3.32 This provision was inserted into the *Corporations Law* in 1997. The Explanatory Memorandum to the amending bill describes the rights conferred by s 601AG as "comparable" to the rights provided by s 6.[34] The aim was to provide a more efficient alternative process than the plaintiff applying to reinstate the defendant company in order to commence proceedings to which he or she could then join the insurer.[35]

3.33 This provision avoided having to take a liberal approach to s 51 of the *Insurance Contracts Act 1984* (Cth) by interpreting "cannot ... be found" as extending to deregistered corporations who "vanish by reason of deregistration; and thus not be found".[36]

3.34 The question of the application of a limitation period to the cause of action set up by s 601AG has been the subject of some debate. However, intermediate appellate courts now appear to have settled that the statutory cause of action is assimilated to the limitation period that applies to the underlying liability between the plaintiff and the insured defendant.[37] A contrary interpretation that supports a separate limitation period that runs from the date of deregistration would lead to an unwarranted expansion of an insurer's liability.

34. Explanatory Memorandum, Company Law Review Bill 1997 (Cth) [15.22]. See also *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19, 62 NSWLR 148 [39]-[43].

35. *Del Borrello v Australian Securities and Investments Commission* [2008] WASC 48 [9]-[17]; *Hutchinson v Australian Securities and Investments Commission* [2001] VSC 465 [29]-[30], [36]; *Pagnon v WorkCover Queensland* [2000] QCA 421, [2001] 2 Qd R 492 [17].

36. *Norsworthy v SGIC* [1999] SASC 496 [61].

37. *Allianz Australia Insurance Ltd v Mercer* [2014] TASFC 3 [182]; *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19, 62 NSWLR 148 [41]-[46].

4. Our recommendations for reform

In brief

We propose a new provision to replace s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The new provision should ensure that a plaintiff can recover from an insurer in appropriate cases. It should ensure that the insurer is not liable for more than the insurer would have been liable to pay under the insurance contract. It should also ensure that the insurer can rely on the same defences and reductions that the defendant could have relied on in an action brought by the plaintiff.

Our general conclusions

The need for some provision

4.1 Without a provision such as s 6, successful plaintiffs might be unable to recover from a defendant where, for example:

- the defendant does not have sufficient assets to meet a judgment but has not yet been declared bankrupt or insolvent
- the defendant is bankrupt but the trustee does not pursue the defendant's entitlement to insurance, or
- the insurer refuses to indemnify the defendant and the defendant is unwilling or unable to enforce its rights against the insurer.

4.2 The bulk of submissions to this review have supported the proposition that, in cases where a defendant has insurance that covers a relevant liability, a plaintiff should be able to access the proceeds of that insurance where it is not possible or would be fruitless to pursue the defendant.[1] Some, however, supported the entire repeal of s 6 in NSW and preferred that such a provision be enacted only at the Commonwealth level.[2]

4.3 Although s 6 has proved difficult to interpret and apply in some situations, we believe that the thrust of the section remains valid. The need for some such provision is shown by attempts to rely on s 6 and the Commonwealth provisions, as well as applications for declaratory relief to achieve the same end.[3] Section 6 is also referred to extensively in interlocutory and other proceedings short of final judgment. It is undoubtedly relied on in other matters that settle without a judgment. The Territories also have similar provisions to the current s 6, and there have already been calls by some for a provision like s 6 in Victoria.[4]

4.4 The question of access by plaintiffs to insurers and insurance money has been considered by the Australian Law Reform Commission[5] and a number of other law reform agencies, including those in Victoria,[6] the UK,[7] Ireland[8] and New Zealand.[9] Each has recommended introducing, amending, or retaining some provision to give plaintiffs that access.

4.5 We therefore support the continued availability of some provision that achieves the aims of s 6.

The need for reform

4.6 Chapters 2 and 3 have shown the inadequacies in the existing State and Commonwealth provisions that allow plaintiffs some access to the proceeds of insurance in appropriate circumstances.

4.7 The NSW provisions are at best obscure and have led to uncertainty in some cases and undesirable outcomes in others. The Commonwealth provisions are themselves

1. NSW Bar Association, *Submission TP1* [2]; M Doepel, P Stern and M Quinlan, *Submission TP2* [2.1]-[2.5]; Maurice Blackburn Lawyers, *Submission TP6* [3.7]; iCare, *Submission TP8,* 4,11; NSW Young Lawyers Civil Litigation Committee, *Submission TP11,* 5.
2. Insurance Council of Australia, *Submission TP3*, 2; Miga, *Submission TP5*, 1, 4; Australian Institute of Company Directors, *Submission TP13*, 1-2, 5.
3. See, eg, **successful:** *Bazem Pty v Bureau of Urban Architecture* [2010] NSWSC 978; *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* [2008] FCAFC 28, 166 FCR 398; *Ashmere Cove Pty Ltd v Beekink (No 2)* [2007] FCA 1421, 244 ALR 534; *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432; **unsuccessful:** *CE Heath Casualty and General Insurance Ltd v Pyramid Building Society* [1997] 2 VR 256; *Interchase Corporation Ltd (in liq) v FAI General Insurance Co Ltd* [1998] QCA 180, [2000] 2 Qd R 301.
4. See, eg, 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.
5. Australian Law Reform Commission, *Insurance Contracts*, Report 20 (1982) [338]-[340].
6. 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.
7. 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).
8. Ireland, Law Reform Commission, *Consumer Insurance Contracts*, Report 113 (2015) ch 6.
9. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) ch 5.

imperfect, in that they do not cover all circumstances of insolvency, and can require additional steps in litigation and the involvement of additional parties.

4.8 We consider that the best course would be to fix the inadequacies at the Commonwealth level. Some submissions supported such an approach.[10] This would also avoid territorial issues, including jurisdiction shopping and questions of issue estoppel where proceedings are brought in different jurisdictions under different laws. However, we cannot assume that reform will occur at the Commonwealth level. While differences in this field between the States and Territories are not desirable, our preferred solution, unless and until the Commonwealth takes the necessary steps, would be to ensure that the position in NSW is optimal, and to encourage the other States to consider themselves adopting a similar provision.

4.9 We are proposing a combination of Options 5 and 3 as raised in CP 17 – namely, retaining the thrust of s 6, but rewriting it in a contemporary drafting style, while clarifying or reforming areas where s 6 has been criticised as problematic or inadequate.

4.10 Submissions generally supported a redrafted provision that addresses the problems arising from the current wording of s 6.[11]

4.11 As we have already noted, a major cause of difficulty with s 6 has been its imposition of a special statutory charge on the proceeds of the insurance. We are proposing redrafting the section in a way that avoids using any form of charge and the framework that would go with it, but nevertheless ensures that plaintiffs can recover from the insurer up to the amount of any available insurance. This should avoid the complexity and uncertainty that arises from the current use of the "charge".[12]

Plaintiff's right to recover against the defendant's insurer

Recommendation 1: Plaintiff's right to recover against the defendant's insurer

If a defendant (being a natural person or a corporation):

(a) has a liability to a plaintiff to pay any damages or compensation

(b) was insured (directly or as a third party) by an insurance contract that would have covered that liability, and

(c) has for any reason failed or is unable to meet the liability in whole or in part

10. M Doepel, P Stern and M Quinlan, *Submission TP2* [3.17]-[4.2]; Insurance Council of Australia, *Submission TP3*, 2; Law Society of NSW, *Submission TP12*, 2.

11. NSW Bar Association, *Submission TP1* [2]; M Doepel, P Stern and M Quinlan, *Submission TP2* [2.6]; National Insurance Brokers of Australia, *Submission TP4*, 9; Maurice Blackburn Lawyers, *Submission TP6* [2.1]; Turner Freeman Lawyers, *Submission TP7*, 2; Australian Lawyers Alliance, *Submission TP9* [1], [6]-[7]; NSW Young Lawyers Civil Litigation Committee, *Submission TP11*, 5; Law Society of NSW, *Submission TP12*, 1.

12. See para [2.19]-[2.21].

> then the plaintiff should be able to recover from the insurer the amount the insurer would have paid to the defendant under the insurance contract in respect of the defendant's liability to the plaintiff.

4.12 This recommendation follows the approach in s 601AG of the *Corporations Act 2001* (Cth) and s 51 of the *Insurance Contracts Act 1984* (Cth) of allowing the plaintiff to recover directly from the insurer. However, such recovery can only take place if the conditions in paragraphs (a)-(c) are established, subject to available defences and reductions. Recommendation 2 deals with the requirements that must be met before a plaintiff can proceed against the insurer to establish the insurer's liability.

4.13 Sub-clauses 7(1) and (2) of the Draft Bill implement this recommendation. The definition of "person" in s 21(1) of the *Interpretation Act 1987* (NSW) will ensure that the defendant can be a natural person or a corporation.

4.14 This recommendation achieves the outcome intended by s 6, but without using a "charge". We do not consider that the charge is necessary for the provision to be effective.

4.15 The charge established by s 6(1) has caused too many conceptual and practical problems, in particular in relation to the payment of defence costs (for example, under directors and officers liability policies),[13] in relation to claims made policies generally and in relation to claims for pure economic loss, especially in relation to events that took place before the policy commenced.[14]

4.16 Abandoning the charge will eliminate the need for provisions that deal with the priority of charges such as s 6(3). In considering the need for such a provision where there is more than one plaintiff and the available insurance proceeds are limited, we note that there are no reported cases that deal with the priority of charges.[15] We also note that the existing s 6(3), which the NZ Law Commission suggested should apply even where claims arise on different days,[16] may have the potential to operate unfairly for a party who diligently pursues a claim and bears the financial risk of doing so.[17] We, therefore, see no reason to depart from the general rule that the earlier claim takes priority. Abandoning the charge will also render unnecessary the provisions relating to priorities in corporate insolvency in s 6(2).

4.17 This recommendation proposes that the amount the insurer would have paid to the defendant under the insurance contract be in respect of the defendant's liability to the plaintiff. This picks up the current law in NSW, as expressed in *Chubb v Moore,* that the charge is concerned with money payable in respect of the defendant's liability to pay damages to the plaintiff and that the "charge is not expressed to catch

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13. See, eg, *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [122], [124]; *BFSL 2007 Ltd (in Liq) v Steigrad* [2013] NZSC 156.
14. *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 NSW Bar Association, *Submission TP1* [3]-[19] and authorities cited in *Manettas v Underwriters at Lloyds* (1993) 7 ANZ Ins Cas 61-180; *Schipp v Cameron* [1999] NSWSC 997; *FAI General Insurance Co Ltd v McSweeney* (1997) 73 FCR 379.
15. S W Drummond and P Mann, "Abolish Section 6" (1997) 8 *Insurance Law Journal* 79, 88.
16. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [108].
17. S W Drummond and P Mann, "Abolish Section 6" (1997) 8 *Insurance Law Journal* 79, 88-89.

all moneys that might be payable under the contract of insurance".[18] This confirms that the provision is not intended to and will not impact on the insurer's liability to meet the cost of defending a claim.

4.18 Like the current s 6, the new provisions will provide an alternative to the current practice of plaintiffs seeking declaratory relief against insurers in cases where s 117 of the *Bankruptcy Act 1966* (Cth) or s 562 of the *Corporations Act 2001* (Cth) apply, in order to keep matters in the one proceeding.

4.19 The new provisions are framed to capture all possible scenarios of a defendant's inability or failure to meet the relevant liability. This includes a defendant who, as:

- a natural person:
  - is dead
  - is bankrupt or otherwise subject to any form of insolvency proceedings
  - cannot be found
  - cannot be served with process, or
  - otherwise has no ability to meet the liability in whole or in part, and
- a corporation:
  - is deregistered
  - has had a receiver or provisional liquidator appointed
  - is insolvent
  - is in liquidation
  - is in voluntary administration or subject to a deed of company arrangement, or
  - otherwise has no ability to meet the liability in whole or in part, for example, because it has transferred all assets to another company (although it has no other debts).

4.20 The reference to the defendant having insurance "directly or as a third party" is intended to overcome the problems caused by the phrase in s 6(1): "any person ... who entered into a contract of insurance by which the person is indemnified against liability".[19] This is implemented in the definition of "insured person" in cl 6 of the Draft Bill. It will ensure that plaintiffs can proceed against insurers where the insured defendant is covered by the insurance but was not the person who entered the insurance contract. This is consistent with recent amendments to s 51 of the *Insurance Contracts Act 1984* (Cth) which now also refers to "any third party beneficiary under a contract of liability insurance".[20]

18. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [120].
19. See, eg, *Morris v Betcke* [2005] NSWCA 308 [40]-[49]; *Robinson v Vogelsang (No 1)* [2015] NSWSC 1670.
20. Inserted by *Insurance Contracts Amendment Act 2013* (Cth) sch 6 cl 19.

4.21 The amount the insurer would have paid to the defendant under the insurance contract is the same as the "sum ... fixed by the contract of insurance between the insurer and the insured" referred to in the current s 6(7).

Proceedings against the insurer – leave to proceed

Recommendation 2: Proceedings against the insurer – leave to proceed

(1) Whether or not the circumstances in Recommendation 1(a)-(c) have yet been established, the plaintiff should only be able to sue the insurer with the leave of the court.

(2) Leave may be sought and granted before or after the commencement of proceedings against the insurer.

(3) Leave may not be granted if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or any relevant law.

4.22 Recommendation 2 sets out the circumstances in which the plaintiff can proceed directly against the insurer. It is based on the proviso in s 6(4), but with amendments. Clause 8 of the Draft Bill implements this recommendation.

4.23 This recommendation is intended to protect insurers from being unnecessarily or inappropriately involved in the litigation, where there is no good reason for departing from the ordinary position of the plaintiff suing the defendant, not the insurer.[21]

Discretion to grant leave

4.24 Proceedings can be instituted against the insurer before any of the matters listed at Recommendation 1(a)-(c) have been finally established, but only with leave of the court in which the proceedings are instituted. The court's discretion to grant leave remains at large, subject to Recommendation 2(3).

4.25 It is our intention that the court's general discretion to grant leave will continue to be exercised under these proposed provisions in the same way that it is exercised under the existing s 6.[22]

Prohibition on granting leave

4.26 We recommend retaining the prohibition on granting leave if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or any relevant law. It is an important protection against insurers being unnecessarily involved in litigation.

Effect of s 54 of the Insurance Contracts Act 1984 (Cth)

4.27 The High Court has endorsed the view that leave should not be granted where the insurer can disclaim the policy on the basis that the insured defendant did not

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

22. See para [2.46]-[2.51].

perform certain obligations – for example, an obligation to co-operate in the event of a claim.[23]

4.28 It is currently not clear whether s 54 of the *Insurance Contracts Act 1984* (Cth) can operate in these circumstances to prevent the insurer relying on the defendant's act to avoid liability altogether. Section 54 could rather reduce the insurer's liability by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of the insured's act.

4.29 In giving effect to Recommendation 2(3) we expect that cl 8(4) of the Draft Bill will allow s 54 and other relevant law to apply in determining whether the insurer has a right to disclaim liability under the insurance contract.[24]

Effect of failure to obtain leave

4.30 Under current law, the plaintiff's failure to obtain leave before proceeding against the insurer is fatal to the plaintiff's claim.[25] This is a needlessly strict requirement. We propose that leave may be sought and granted before or after the commencement of proceedings against the insurer. This gives the courts the discretion, having regard to the justice of the case, to determine the question of leave immediately or at some later stage. This may have a particular relevance, for example, in time-sensitive dust diseases matters.[26]

4.31 Our recommendation also ensures that limitation problems that may arise from the requirement to obtain leave before instituting the substantive proceedings are avoided.

4.32 This reflects the Northern Territory Court of Appeal's preferred approach, that failure to obtain leave before proceeding should be treated as an irregularity that can be cured by the grant of leave.[27]

The insurer stands in the place of the defendant

Recommendation 3: The insurer stands in the place of the defendant

The insurer should stand in the place of the defendant in proceedings brought by the plaintiff as if the action were an action to recover damages or compensation from the insured, so that the parties shall have the same rights and liabilities, and the court shall have the same powers, as if the action were against the defendant.

4.33 This recommendation is based on s 6(4), but without reference to the charge. It is implemented by cl 7(3) of the Draft Bill.

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23. *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.
24. See also para [4.41]-[4.43].
25. *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400, 408.
26. Turner Freeman Lawyers, *Submission TP7*, 2.
27. *Ceric v C E Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 4 NTLR 135.

4.34 Clause 10(b) of the Draft Bill further confirms that the insurer may rely on any defence or any other matter in answer to the plaintiff's claim that the defendant would have been able to rely on against the plaintiff.

Judgment against defendant no bar to proceedings against insurer

Recommendation 4: Judgment against defendant no bar to proceedings against insurer

The plaintiff should be able to proceed against the insurer even though judgment has already been obtained against the defendant for damages or compensation in respect of the same matter, except to the extent that any judgment against the defendant has been satisfied.

4.35 This recommendation reflects s 6(5). It is implemented by cl 11 of the Draft Bill.

4.36 Our intention is that the plaintiff should still be able to sue the insurer if the plaintiff finds, after successful proceedings against the defendant, that the defendant is unable to pay all or part of the liability. The addition of the phrase "except to the extent that any judgment against the defendant has been satisfied" is intended to avoid double recovery if there is part satisfaction, which may well be the case in an insolvency.

Limits on insurer's liability to the defendant preserved

Recommendation 5: Limits on insurer's liability to the defendant preserved

(1) The insurer should not be liable for any greater sum than the insurer is liable to pay the defendant under the relevant insurance contract.

(2) The insurer may raise against the plaintiff any matter in answer to or in reduction of its liability that it could have raised against the defendant.

4.37 Paragraph (1) of this recommendation draws from s 6(7), but has been adjusted to take account of the possibility that the defendant is covered by the insurance but did not "enter into" the contract. It has been suggested that a provision to this effect is undesirably absent from s 601AG of the *Corporations Act 2001* (Cth).[28]

4.38 Paragraph (1) of this recommendation is implemented by cl 7(2) of the Draft Bill which states that the amount of the insured liability (referred to in cl 7(1)) is "the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant". This wording, combined with cl 7(1), ensures that the insurer will not be liable for any amount other than that payable under the insurance contract in respect of the defendant's liability to the claimant. The amount, therefore, cannot be greater than that payable under the contract of insurance. This drafting, by the inclusion of "if any", also

28. S Drummond, "Direct Claims Against Liability Insurers – Section 601AG and Ideas for Further Reform" (1999) 10 *Insurance Law Journal* 179, 185.

effectively removes any doubt as to whether s 6(7) acknowledges the possibility that the amount could be reduced by other payments under the insurance contract, for example, by the insurer paying the defence costs of directors and officers.

4.39 Paragraph (2) is intended to confirm that the insurer can continue to rely on the defences that would have been available to it against the insured defendant. It is implemented by cl 10(a) of the Draft Bill.

4.40 Under these proposals, an insurer can still assert it is not liable; and any defence it would have had to a claim for indemnity by the insured would be preserved, as it is now.

4.41 Paragraph (2) should also remove any doubt that the insurer, for example, may raise s 54 of the *Insurance Contracts Act 1984* (Cth) to reduce the insurer's liability.

4.42 However, it is presently not clear whether this would deal, for example, with the problem of the malevolent or lax defendant who, for whatever reason, may fail to take action to satisfy a precondition for the insurer's liability under the insurance contract.[29] In relation to s 601AG of the *Corporations Act 2001* (Cth), Kelly and Ball have observed that it is "unclear … how the section operates in relation to obligations placed on the insured in relation to the claim itself". They consider that:

> the better view is that the insurer should not be entitled to deny liability because the insured has not complied with an obligation in relation to the claim. To permit the insurer to do so would defeat the whole purpose of direct recourse provisions.[30]

4.43 We prefer this interpretation, but note that NSW cannot alter the operation of s 54. Any changes would need to be made by the Commonwealth parliament.

Discharge of insurer's obligations

Recommendation 6: Discharge of insurer's obligations

Any payment by the insurer to the plaintiff, to the extent of the payment, should discharge any obligation the insurer has to the defendant under the insurance contract.

4.44 It is the normal practice for the insurer to pay the plaintiff directly, rather than for the defendant to pay the plaintiff and then seek reimbursement from the insurer. This recommendation supports this normal practice. It is implemented by cl 12 of the Draft Bill.

4.45 This recommendation replaces s 6(6), which deals with the discharge of the insurer if the insurer has made payments under the insurance contract without notice of the claim giving rise to the charge. Since, under our proposals, the concept of the charge is abolished, it is not clear what work s 6(6) would do in the new framework. In particular, it is not clear how the insurer would not be aware of a plaintiff's rights

29. *Gorczynski 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 – Section 601AG and Ideas for Further Reform" (1999) 10 *Insurance Law Journal* 179.

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

in a situation where it pays a defendant directly. As mentioned, it would be unusual for an insurer to pay a defendant directly. The recommendation to prevent collusion (Recommendation 7) reinforces this.

Preventing collusion between the parties

Recommendation 7: Preventing collusion between the parties

Any payment the insurer makes to the defendant, or any compromise agreed between the insurer and the defendant in respect to a liability referred to in Recommendation 1, does not discharge the insurer's liability to the plaintiff under this provision, unless and to the extent that the defendant pays the money to the plaintiff.

4.46 This recommendation seeks to prevent collusion between the insurer and the defendant. It is necessary because we have proposed abolishing the charge. In seeking to prevent collusion, it aims to preserve one of the original objects of s 6. It is implemented by cl 13 of the Draft Bill.

4.47 It is not necessary to deal specifically with the payment of defence costs – the issue raised by decisions such as *Chubb v Moore* – because the insurer's liability to the plaintiff under cl 13 is limited to amounts payable in respect of the insured liability.

4.48 In some cases, paying defence costs under directors and officers policies and other similar policies which do not separately cover defence costs and damages, may ultimately reduce the amount available under the contract to meet the defendant's liability to the plaintiff. A similar issue would arise where one insured incident occurs and exhausts the sum insured under the insurance policy before claims are made in relation to subsequent insured incidents. In such cases, our proposal will not affect the fact that no further recovery is possible under the insurance contract. This is consistent with the requirement that insurers cannot be worse off.

4.49 In making this recommendation we note also the provisions that already deal with fraudulent claims potentially agreed between the plaintiff and the defendant to the detriment of the insurer in s 17A of the *Insurance Act 1902* (NSW) and s 66A of the *Motor Accidents Act 1988* (NSW).

Discovery to find the defendant's insurer

Recommendation 8: Discovery to find the defendant's insurer

The provision should not prevent plaintiffs obtaining information about the identity and whereabouts of a defendant's insurer under r 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW).

4.50 A plaintiff cannot proceed against an insurer if the plaintiff does not know who the insurer is. Several submissions referred to the difficulties that plaintiffs encounter in attempting to identify and obtain a response from relevant insurers.[31]

4.51 One submission highlighted the need to provide a mechanism for discovering the identity of the insurer, as this is "usually the first challenge a claimant faces".[32]

4.52 In NSW, the UCPR provides for preliminary discovery in circumstances where:

- the applicant having made reasonable inquiries cannot sufficiently identify or locate a person for the purpose of commencing proceedings against the person, and
- some other person may have information that would tend to assist.[33]

4.53 In light of this, we do not see the need for a separate provision, as is the case, or has been proposed, in some other jurisdictions.[34] The Draft Bill, therefore, makes no express provision.

Limitation periods

Recommendation 9: Limitation periods

For the bringing of proceedings against an insurer under this provision, time should:

(a) commence running against the plaintiff at the same time as the cause of action accrues to the plaintiff against the defendant, and

(b) stop running against a plaintiff when the plaintiff commences proceedings against the defendant or the insurer, whichever is earlier.

4.54 This recommendation clarifies the application of limitation periods. It is implemented by cl 9 of the Draft Bill.

4.55 It follows the view of the Court of Appeal 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".[35] It is also consistent with a recommendation of the NZ Law Commission.[36]

31. M Doepel, P Stern and M Quinlan, *Submission TP2* [3.12]-[3.16]; Maurice Blackburn Lawyers, *Submission TP6* [7.1].
32. Maurice Blackburn Lawyers, *Submission TP6* [1.4].
33. *Uniform Civil Procedure Rules 2005* (NSW) r 5.2(1).
34. *Third Parties (Rights against Insurers) Act 2010* (UK) sch 1; Ireland, Law Reform Commission, *Consumer Insurance Contracts*, Report 113 (2015) [6.46]-[6.53]; New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [111].
35. *Kinzett v McCourt* [1999] NSWCA 7, 46 NSWLR 32 [107]-[110], overruling earlier conflicting authorities in *New South Wales Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469, 490, 503-504; *Grimson v Aviation and General (Underwriting) Agents Pty Ltd* (1991) 25 NSWLR 422, 428-429 (Meagher JA).
36. New Zealand, Law Commission, *Some Insurance Law Problems*, Report 46 (1998) [101].

Effect on workers compensation and other provisions

Recommendation 10: Effect on workers compensation and other provisions

The new provision should:

(a) not affect the operation of any of the provisions of workers compensation or any other legislation to the extent that they allow plaintiffs to access insurance money, and

(b) be in addition to rights conferred under workers compensation or any other legislation.

4.56 This recommendation deals with subsections 6(8) and (9) which provide for the operation of the provisions of the motor accidents and workers compensation legislation that already allow access to insurance money. It is implemented by cl 14 of the Draft Bill.

4.57 The effect of s 6(8) is that s 6 does not affect the rights conferred under the provisions of the *Workers Compensation Act 1987* (NSW) or the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW). The effect of s 6(9) is that a plaintiff may access insurance money in cases where the operation of the workers compensation provisions (which are expressly not affected by s 6) has prevented that from occurring.[37]

4.58 This recommendation retains the effect of the two provisions but applies generally to rights conferred by any other legislation. We expect that courts may refuse leave under the new provision if a provision under any of the other acts can achieve an appropriate outcome, including considerations of procedural efficiency.

Territorial application

Recommendation 11: Territorial application

The new provision should apply to an action that a plaintiff brings in a New South Wales court.

4.59 The NSW Court of Appeal has recently expressed the view that s 6 applies to an action that a plaintiff brings in a NSW court;[38] however, it did not do so "without doubt", questioning, in particular, how the section might apply under cross-vesting arrangements.[39] Recommendation 11 confirms the Court of Appeal's position. It is implemented by the definition of "court" in cl 6 of the Draft Bill.

37. See iCare, *Submission TP8*.
38. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [197]-[206].
39. *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [199].

4.60 Recent Federal Court authority suggests that s 6 may apply to proceedings brought in the NSW registry of the Federal Court.[40] The application of s 6 to federal proceedings brought in NSW is a matter for the Commonwealth Parliament.

Reinsurance

Recommendation 12: Reinsurance

The new provision should expressly not extend to reinsurers under contracts of reinsurance.

4.61 This recommendation puts beyond doubt that the new provision should not extend to contracts of reinsurance. It is implemented by cl 7(4) of the Draft Bill.

4.62 Contracts of reinsurance are expressly excluded from the *Insurance Contracts Act 1984* (Cth)[41] and from s 562 of the *Corporations Act 2001* (Cth). Special provision is made about reinsurance in s 562A of the *Corporations Act 2001* (Cth).

4.63 Submissions to this review are divided over whether reinsurance should be covered by the provision or not.

4.64 In our view, it is unlikely that "liability to pay any damages or compensation" could extend to a liability to provide indemnity under an insurance policy. In cases where an insurer becomes insolvent, it is difficult to envisage circumstances in which the special provision made in s 562A of the *Corporations Act 2001* (Cth) would not apply.

Transitional provisions

Recommendation 13: Transitional provisions

Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) should continue to apply to and in respect of proceedings commenced against insurers before the commencement of the new provisions.

4.65 The enactment of new provisions raises the question of whether s 6 charges which have already attached to insurance moneys should be lifted, and in particular what should be done in circumstances where a plaintiff has already been granted leave and commenced proceedings against an insurer.[42]

4.66 It would seem desirable that charges created by s 6 not continue, to avoid, for example, issues of the sort discussed in *Chubb v Moore*. However, there is a potential to cause undesirable confusion and further litigation in cases where proceedings have already been commenced against insurers under s 6 but not yet finalised when the new provisions come into effect. We therefore propose that the

40. By operation of *Judiciary Act 1903* (Cth) s 79(1): *Hopkins v AECOM Australia Pty Ltd (No 4)* [2015] FCA 307 [41]-[43].

41. *Insurance Contracts Act 1984* (Cth) s 9(1)(a).

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

new provisions should not apply in relation to claims that are the subject of proceedings instituted against insurers before the new provisions commence.

4.67 Clause 15 of the Draft Bill implements this recommendation.

Appendix A:
Law Reform (Miscellaneous Provisions) Amendment (Third Party Claims Against Insurers) Bill 2016

NEW SOUTH WALES

DRAFT BILL

Law Reform (Miscellaneous Provisions) Amendment (Third Party Claims Against Insurers) Bill 2016

No , 2016

A Bill for

An Act to amend the *Law Reform (Miscellaneous Provisions) Act 1946* with respect to claims against insurers by third parties.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Law Reform (Miscellaneous Provisions) Amendment (Third Party Claims Against Insurers) Act 2016*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Law Reform (Miscellaneous Provisions) Act 1946 No 33

[1] Long title

Omit "charges upon". Insert instead "claims by third parties against insurers to recover".

[2] Part 4

Omit the Part. Insert instead:

Part 4 Third party claims against insurers

6 Definitions

In this Part:

claimant—see section 7.

court means a court or tribunal of New South Wales.

insured liability means a liability in respect of which an insured person is entitled to be indemnified by the insurer.

insured person means a person who is, in respect of a liability to a third party, entitled to indemnity pursuant to the terms of a contract of insurance, and includes a person who is not a party to the contract of insurance but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

liability means a liability to pay damages, compensation or costs.

7 Claimant may recover from insurer in certain circumstances

(1) If an insured person has an insured liability to a person (the ***claimant***), the claimant may, subject to this Part, recover the amount of the insured liability from the insurer in proceedings before a court.

(2) The amount of the insured liability is the amount of indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insured person's liability to the claimant.

(3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Part), the parties have the same rights and liabilities, and the court has the same powers, as if the proceedings were proceedings brought against the insured person.

(4) This section does not entitle a claimant to recover any amount from a re-insurer under a contract or arrangement for re-insurance.

8 Leave to proceed

(1) Proceedings may not be brought, or continued, against an insurer under section 7 except by leave of the court in which the proceedings are to be, or have been, commenced.

(2) An application for leave may be made before or after proceedings under section 7 have been commenced.

(3) Subject to subsection (4), the court may grant or refuse the claimant's application for leave.

(4) Leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

9 Time for commencing proceedings

(1) Proceedings to recover an amount from the insurer under section 7 must be commenced within the same limitation period that applies under the *Limitation Act 1969* or other Act to the claimant's cause of action against the insured person in respect of the insured liability.

(2) Subsection (1) does not apply if the claimant has brought proceedings against the insured person in respect of the insured liability before the expiry of the limitation period applying to those proceedings, including any extension of the limitation period granted under the *Limitation Act 1969* or other Act by a court.

10 Matters on which insurer may rely

In proceedings brought under section 7, the insurer is entitled to rely on any defence or any other matter in answer to the claim or in reduction of its liability to the claimant:

(a) that the insurer would have been entitled to rely on in a claim made by the insured person under the contract of insurance, or

(b) that the insured person would have been entitled to rely on in proceedings brought by the claimant against the insured person in respect of the insured liability.

11 Judgment against insured person no bar to claim against insurer

A judgment or order for damages, compensation or costs in favour of the claimant against the insured person in respect of an insured liability does not prevent the claimant from recovering an amount for the damages, compensation or costs under section 7, except to the extent that the judgment or order has been satisfied.

12 Discharge of insurer's liability

Any payment made by the insurer to the claimant under this Part in respect of an insured liability discharges, to the extent of the payment, the liability of the insurer to make a payment to the insured person under the contract of insurance in respect of the insured liability.

13 Effect of payments made by insurer to insured person

An insurer's liability to a claimant under this Part is not reduced, discharged or otherwise affected by:

(a) any compromise or settlement between the insurer and the insured person in respect of the insured liability, or

(b) any payment by the insurer to the insured person in respect of the insured liability unless and to the extent that the amount of the payment is or has been paid by the insured person to the claimant in respect of the insured liability.

14 Application of Part

The rights conferred on claimants under this Part do not affect, and are in addition to, the rights conferred under the *Workers Compensation Act 1987* or any other legislation on a person who is not a party to a contract of insurance to make a claim against an insurer in respect of an insured liability.

15 Transitional provision

Section 6 (as in force immediately before its repeal by the *Law Reform (Miscellaneous Provisions) Amendment (Third Party Claims Against Insurers) Act 2016*) continues to apply to actions brought against insurers under that section before the commencement of that amending Act as if it had not been repealed.

Appendix B: Submissions

TP01 NSW Bar Association, 18 May 2016

TP02 Mark Doepel , Philip Stern & Michael Quinlan – University of Notre Dame, 19 May 2016

TP03 Insurance Council of Australia, 19 May 2016

TP04 National Insurance Brokers Association of Australia, 20 May 2016

TP05 Miga, 20 May 2016

TP06 Maurice Blackburn Lawyers, 20 May 2016

TP07 Turner Freeman Lawyers, 20 May 2016

TP08 Insurance and Care NSW, 23 May 2016

TP09 Australian Lawyers Alliance, 25 May 2016

TP10 Withdrawn

TP11 NSW Young Lawyers Civil Litigation Committee, 27 May 2016

TP12 Law Society of NSW, 31 May 2016

TP13 Australian Institute of Company Directors, 1 June 2016

Appendix C: Consultation

Round table

12 July 2016

John Anning, Insurance Council of Australia
Renée Bianchi, NSW Young Lawyers Civil Litigation Committee
Dallas Booth, National Insurance Brokers Association
Timothy Bowen, Miga
Sebastian Brodowski, Law Society of NSW
Joshua Dale, Australian Lawyers Alliance
David Edney, NSW Young Lawyers Civil Litigation Committee
Bethan Lewis, Insurance and Care Australia
Peter Mann, New South Wales Bar Association
Ashley Matthews, Maurice Blackburn Lawyers
Josh Mennen, Maurice Blackburn Lawyers
Lysarne Pelling, Australian Institute of Company Directors
Fiona Seaton, Turner Freeman Lawyers
Travis Toemoe, King and Wood Mallesons

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