



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LitigationLaw:GULw:1153288

30 May 2016

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

Dear Sir/Madam,

Third party claims on insurance money - review of the *Law Reform (Miscellaneous Provisions) Act 1946*

The Law Society welcomes the opportunity to provide a submission to the NSW Law Reform Commission ("Commission") in relation to the review of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* and provides the following comments.

Preferred Model

The Law Society's preferred option is Option 5 as set out in the Consultation Paper. However, if the requirement for uniformity and consistent national legislation is considered of paramount importance, then the Law Society would recommend and support Option 4.

Support for Option 5

If it is accepted that NSW should keep an additional statutory remedy similar to s 6, then the Law Society supports Option 5, namely retaining the thrust of s 6 but rewriting it in a contemporary drafting style. It is clear that the current wording of s 6 has caused significant issues with respect to its application and interpretation. There are practical issues that ought to be considered for clarification or reframing and the judicially referenced shortcomings in its drafting remain.

In addition, the Law Society submits that the leave requirement should be replaced with a legislative equivalent that provides for a remedy or cause of action as of right subject to express limitations/requirements. While the test for leave is clear, we submit that the leave requirement places additional unnecessary costs on the parties, along with additional court processes that are not required under the equivalent provisions in similar legislation. Further, there will be cases where there is an inconsistent exercise of discretion in circumstances where the factual circumstances may be similar. Any redrafted legislation should expressly state the conditions that ought to exist before proceedings can be instituted directly against the insurer.

We suggest that the text of s 601AG of the *Corporations Act 2001* (Cth) would provide a useful template or starting point for any such redrafting. Alternatively, s 51 of the *Insurance Contracts Act 1984* (Cth) should be used as a basis for any redrafting. A suggested or possible wording is included at Annexure A.

In addition to modernising the remedy, redrafting using s 601AG or s 51 as the basis of a statutory remedy would also remove any difficulties that arise with respect to the operation of the statutory charge that currently exists in s 6. It would also provide a consistent approach to the availability of statutory remedies against insurers which is consistent with federal legislation.

Support for Option 4

As is clear in the Commission's Consultation Paper, a substantially equivalent statutory remedy to that provided by s 6 is only available in the Australian Capital Territory and New Zealand. The Consultation Paper also notes that there are statutory provisions in various federal statutes that provide similar statutory remedies, although it is acknowledged that these remedies may not cover all circumstances.

As is evident from the judgment in *Chubb Insurance Company of Australia Limited v Moore* ("*Chubb v Moore*"),¹ the business of insurance is not limited to specific state jurisdictions. Insurance arrangements may be organised across state boundaries and the business of insurance, along with the provision of indemnity, is unlikely to be limited by state boundaries. In such circumstances, the Law Society submits that the first issue to be considered is whether New South Wales should remain one of the few jurisdictions to provide this remedy.

The Law Society notes that since the introduction of s 6, new contemporary legislative remedies have been created in various statutes which provide recourse directly against an insurer. The two often cited provisions are s 601AG of the *Corporations Act 2001* (Cth) and s 51 of the *Insurance Contracts Act 1984* (Cth). The Law Society accepts that these remedies are not comprehensive and that they may not cover all the circumstances covered by s 6.²

Despite these shortcomings, the Law Society accepts the practical realities of modern commerce and the arrangement of insurance, and considers that there would be benefit from the following action:

1. repeal s 6 in its entirety; and
2. focus on the amendment of existing, or implementation of new, federal legislation to cover any shortcomings that may exist.

For example, the Law Society would support the amendment of s 601AG of the *Corporations Act* to expand its application beyond companies that are merely deregistered to include companies that are in administration, have a liquidator appointed, have been wound up, or have ceased to exist (for any other legal reason).

It is the Law Society's position that this would help provide a consistent national approach which:

- addresses the practicalities of modern insurance practice;
- provides certainty to both insurers and their clients with respect to risk and litigation; and
- would prevent "forum shopping" or attempts to try and create a nexus between the NSW jurisdiction and the insurance dispute, such as that described in *Chubb v Moore*.

¹ [2013] NSWCA 21; 302 ALR 101.

² For example, neither section expressly covers a situation where an insured company is in the process of liquidation or has been wound up, notwithstanding the comments of Olssen J in *Norsworthy v SGIC* [1999] SASC 496.

Summary

In summary, if consistency between jurisdictions is not given primacy, then the Law Society supports Option 5, which allows for a contemporary redrafting of the provision.

Alternatively, Option 4 is the preferred option if primacy is given to the need for a consistent approach in NSW with the rest of the country. In supporting this position, the Law Society is aware that some individuals that may have had a remedy under s 6 may lose that remedy under this option.

The Law Society thanks you for the opportunity to provide comments. Should you have any queries arising out of this submission, please contact Leonora Wilson, Policy Lawyer, on 9926 0323 or leonora.wilson@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer

Annexure A

Claims Against Insurers

- (1) [Where the insured is a corporation] A person, including a third party beneficiary, may recover from an insurer of a corporation that is:
 - (a) in administration,
 - (b) in liquidation,
 - (c) deregistered,
 - (d) in receivership,
 - (e) or no longer exists as a legal entityany amount that was payable to the corporation under an insurance contract if:
 - (f) the corporation had a liability to the person; and
 - (g) the insurance contract covered that liability immediately before any of the events described in (1)(a) through (1)(e) occurred or came into existence.
- (2) [Where the insured is an individual] A person, including a third party beneficiary, may recover from an insurer of an individual that:
 - (a) has died;
 - (b) is bankrupt;
 - (c) has entered into a personal insolvency agreement pursuant to either Part IX or Part X of the *Bankruptcy Act 1966* (Cth); or
 - (d) cannot, after reasonable inquiry, be found,any amount that was payable to the individual under an insurance contract if:
 - (e) the individual had a liability to the person; and
 - (f) the insurance contract covered that liability immediately before any of the events described in (2)(a) through (2)(d) occurred or came into existence.
- (3) Any payment under subsection (1) or (2) 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 person.
- (4) This section does not affect any right that the person has in respect of a liability of the insurer, insured or third party beneficiary, being a right under some other law of the Commonwealth or under a law of a State or Territory.
- (5) The insurer has the same defences to an action under this section as they would have in an action by the insured.
- (6) For the purposes of this section:
 - (a) Third Party Beneficiary, under a contract of insurance, means a person who is not a party to the contract 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.
 - (b) Insured means the named insured under a contract of insurance.
 - (c) Person has the same meaning as the term in the *Interpretation Act 1987* (NSW).