

**Recent Australian developments:
The replacement of s 6 of the *Law Reform
(Miscellaneous Provisions) Act 1946* (NSW)**

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Overview

- Other Australian legislation allowing third parties to access insurance monies
- Repealed *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW)
 - Problems in its application
- NSW Law Reform Commission Report 143
- *Civil Liability (Third Party Claims Against Insurers) Act* 2017 (NSW) NSW
 - The cases so far on the 2017 Act

Other Australian third party access provisions

- *Insurance Contracts Act 1984 (Cth)*
 - Since 2014 – definition of “Third Party Beneficiaries” (TPBs)
- *Insurance Contracts Act 1984 (Cth) s 48*
 - Enables TPBs to recover from insurer the amount of any loss suffered in accordance with the contract – insurer has same defences as it would to claim by insured
- *Insurance Contracts Act 1984 (Cth) s 51*
 - Enables recovery where insured or TPB (who is liable in damages to another person) has died or cannot be located
- *Corporations Act 2001 (Cth) s 601AG*
 - Enables recovery on policies of deregistered companies – which had a liability – and where insurance policy covered that liability
- *Corporations Act 2001 (Cth) s 562*
 - Application of proceeds from liability insurance by liquidator

(Repealed) *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* s 6

- Modelled on s 9 *Law Reform Act 1936 (NZ)*
- '(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 he is indemnified against liability to pay any damages or compensation, the amount of his 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'
- Also – Requirement to seek leave of court to enforce the charge: s 6(4)

(Repealed) *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* s 6

- Was a *beneficial* direct access provision
- Created a statutory charge over insurance proceeds that might be available to meet a claim → to preserve proceeds for the benefit of claimants
- Intended to prevent insureds from colluding with insurers by collecting insurance monies and disappearing with them
- Claimants had to show an arguable case against insured / insurer - and that the insured would be unable to meet judgement from its own resources
- Other Australian equivalents:
- ss 206-209 *Civil Law (Wrongs) Act 2002* (ACT)
- ss 26-29 *Law Reform (Miscellaneous Provisions) Act* (NT)

(Repealed) *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* s 6

- Did an insurance policy subject to a s 6 charge – ie when an insured “entered into a contract of insurance” - have to been in existence at the time of the event giving rise to a third party’s claim for damages / compensation?
- **Yes:** *Manettas v Underwriters at Lloyds* (1993) 7 ANZ Ins Cases 61-180 per Cole J (Supreme Court of NSW)
- **No:** *FAI General Insurance Co Ltd v McSweeney* (1997) 10 ANZ Ins Cas 61-400 per Lindgren J (Federal Court of Australia)
- The *Manettas* approach became the accepted line of authority: *Owners of Strata Plan 50530 v Walter Construction* [2007] NSWCA 124; followed in *Chubb Insurance v Moore* [2013] NSWCA 212

(Repealed) *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* s 6

- Did the s 6 charge (and the charge under s 9 of the *Law Reform Act 1936 (NZ)*) over “... all insurance moneys that are or may become payable in respect of that liability” extend to an insured’s contractual entitlements to the advancement of defence costs?
- Yes: *Steigrad v BFSL 2007 Ltd* [2011] NZHC 1037
- No: *Steigrad v BFSL 2007 Ltd* [2012] NZCA 604
- No: *Chubb Insurance v Moore* [2013] NSWCA 212 → followed NZCA
- Yes: *BFSL & Bridgecorp v Steigrad* [2013] NZSC 156 – 3:2 majority
- NSW Law Reform Commission Report 143: Third Party Claims On Insurance Money (2016) → Recommended repeal of s 6; Also suggested best approach would be to enact Commonwealth legislation

Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)

- s 3 - defines 'insured liability' as 'a liability in respect of which an insured person is entitled to be indemnified by the insurer'
- Previous LRMPA s 6(1) reference to 'any person...who entered into a contract of insurance by which the person is indemnified against liability'
- Replaced by s 3 'insured person' to include 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' → similar to previous wording of s 48 of the *Insurance Contracts Act 1984* (Cth)

Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)

- s 4 – enables a claimant to bring court proceedings to recover from insurer the amount of indemnity payable pursuant to the terms of contract of insurance in respect of the insured's liability to the claimant
- s 4(2) – insurer's 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 claimant → addresses the *Bridgecorp* uncertainty re defence costs
- s 4(3) - insurer stands in place of insured → Same rights and liabilities
- Removes the former LRMPA s 6 requirement 'on the happening of the event giving rise to the claim for damages or compensation' → so now more clear in covering pure economic loss

Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)

- s 5 – claimant must seek leave of the court to commence proceedings
 - may be refused in the court's discretion → but *must* be refused if insurer can establish it is entitled to disclaim liability under the contract of insurance or under any Act or law
- s 6 – proceedings must be commenced within **limitation periods**
- s 9 – insurer's payment to claimant discharges its liability to insured
- s 8 – if claimant first obtained judgement against insured – such judgement will not act as a bar to the claimant subsequently seeking leave to commence proceedings directly against the insurer for the same loss in circumstances where the insured is unable to meet the judgment
- s 10 – insurer's liability to a claimant is not reduced or discharged by any compromise or settlement with the insured, or any payment to the insured, unless and to the extent that the insured has paid that money to the claimant

The cases under the 2017 Act so far ...

- *Zaki v Better Building Constructions Pty Ltd [2017] NSWSC 1522*
- Leave granted to a former carpenter to claim against insurer of company – held insurer had onus of proving claims relating to limitation periods
- *Rushleigh Services Pty Ltd v Forge Group Limited (in liq) (receivers and managers appointed) [2018] FCA 26*
- Leave granted under s 5 to claim on policy of insolvent company – shareholder representative action against company and former directors
- Dismissed insurers' argument – prejudiced as a “stranger” to the proceedings – cost and forensic disadvantage of defending proceedings
- Misconstrued NSWLRC 143 Report - the 2017 Bill would “not increase the current liability of insurers”
- Emphasised the co-operation clause in the policy

The cases under the 2017 Act so far ...

- ***Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (In Liq) [2018] NSWSC 161***
 - Application to join insurer to proceedings dismissed – Insufficient evidence that the company had held a policy with the insurer covering the risk → only evidence presented was an email chain
- ***Damm v Coastwide Site Services Pty Ltd [2018] NSWSC 611***
 - Order made to join insurers of Coastwide (deregistered) – application was not resisted by the insurers - Tokio Marine Kiln Syndicates and QBE Underwriting - Also the related application to reinstate the company under s 601AH of *Corporations Act 2001* (Cth) was abandoned
- ***Murphy, McCarthy & Associates Pty Ltd v Zurich Australian Insurance [2018] NSWSC 627***
 - Leave granted to civil engineering firm to claim on a business policy held by its former sub-contractor – construction defects
 - Hammerschlag J determined insurer could not rely on the policy exclusions