

CIVIL LIABILITY (THIRD PARTY CLAIMS AGAINST INSURERS) BILL 2017

First Reading

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. David Clarke, on behalf of the Hon. Don Harwin.

Second Reading

The Hon. DAVID CLARKE (12:18): On behalf of the Hon. Don Harwin: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Civil Liability (Third Party Claims Against Insurers) Bill 2017. The bill implements all recommendations from the NSW Law Reform Commission's report 143 on third party claims on insurance money. The bill introduces a new Civil Liability (Third Party Claims Against Insurers) Act to replace section 6 of the Law Reform (Miscellaneous Provisions) Act 1946. This will ensure that there is a clear legislative framework governing third party insurance claims. Section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 allows a plaintiff to recover damages or compensation from a defendant's insurance proceeds. It allows a plaintiff to do so from the insurer where proceedings against the defendant, who is the insured, are not possible or would be pointless because, for example, the defendant is missing or insolvent.

Section 6 was enacted to prevent insured persons forming collusive arrangements with their insurers to avoid paying third party claimants and to prevent insured persons "running away with" insurance money. It does this by creating the concept of a statutory charge, which can be asserted and enforced by a plaintiff directly against the insurer over all insurance money that may become payable under a contract of insurance in respect of the insured defendant's liability. The charge is created "on the happening of the event giving rise to the claim for damages or compensation" against the insured defendant.

There has been general dissatisfaction with the complexity and uncertainty of this concept of the charge. It has been stated that, first, section 6 "is undoubtedly opaque and ambiguous": *NSW Medical Defence Union v Crawford* (1993) 31 NSWLR 469 at 479 per Kirby P; second, "the interpretation of section 6 of the Act is problematical ... ambiguity may be its only clear feature": *McMillan v Mannix* (1993) 31 NSWLR 538 at 542 per Kirby P; and, third, "Section 6 should be repealed altogether or completely redrafted in an intelligible form, so as to achieve the objects for which it was enacted": *Chubb Insurance Australia v Moore* (2013) 302 ALR 101 at 113 per Emmett JA and Ball J.

Section 6 has also been criticised by the insurance industry. There is uncertainty about how this 70-year-old provision applies to new types of insurance policies and in particular the complex modern insurance policies of directors and officers. The Insurance Council of Australia is concerned that the uncertainty created by section 6 may prevent insurers paying defence costs, especially 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. On 22 February 2016 the former Attorney General asked the NSW Law Reform Commission to review section 6 to consider whether the section should be repealed or amended and whether the policy objectives remain valid and could be better achieved.

The NSW Law Reform Commission completed report 143, titled "Third party claims on insurance money" on 22 November 2016. In preparing the report the commission released a consultation paper, sought public submissions to the review and convened a roundtable with relevant stakeholders. The commission found that the aims of section 6 remain valid. However, the commission made 13 recommendations to provide a clearer, more effective provision than section 6. The commission worked closely with the Parliamentary Counsel's Office to draft specific clauses for a bill to give effect to the commission's recommendations. Given the extensive and thorough work of the commission, the Government is pleased to adopt, unamended, the clauses drafted by the commission.

I will now outline the details of the bill. The bill repeals section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 and replaces it with a new standalone Act—the Civil Liability

Third Party Claims Against Insurers) Act. It is proposed to create a new Act, as section 6 has no relationship with any other provisions in the Law Reform (Miscellaneous Provisions) Act 1946. The bill retains the original intent of section 6 by ensuring that a plaintiff can recover compensation or damages directly from the insurer in respect of the insured defendant's liability to the plaintiff. The bill removes the problematic concept of the "charge" currently provided for in section 6. Importantly, clause 4 ensures that a plaintiff can recover compensation or damages directly from the insurer in respect of the insured defendant's liability to the plaintiff.

Clauses 5 to 9 make procedural and technical amendments, including to preserve the leave requirements in section 6 to make it clear that a plaintiff's failure to seek leave before proceeding against an insurer is not fatal to the plaintiff's claim, to clarify the operation of limitation periods and give effect to the New South Wales Court of Appeal's view in *Chubb Insurance v Moore* (2013) 302 ALR 101, to clarify the territorial application of the right to claim, and to confirm that the insurer can rely on the operation of the insurance contract to reduce its liability to the plaintiff.

Clause 10 retains the original primary object of section 6; that is, to prevent collusion between the insurer and the defendant. It provides that any payment the insurer makes to the defendant, or any compromise agreed between them in respect of the insured liability, does not discharge the insurer's liability to the plaintiff. This is so unless and to the extent that the defendant pays the money to the plaintiff. Clause 11 makes it clear that any rights conferred by any other legislation are not affected, such as rights conferred under the provisions of the Workers Compensation Act 1987 or the Motor Vehicles (Third Party Insurance) Act 1942. Clause 12 preserves existing proceedings, ensuring that section 6 continues to apply to actions brought under that section before the commencement of the new Act.

I thank the NSW Law Reform Commission for its work on report 143. The resultant bill resolves the complexity and uncertainty associated with the current operation of section 6. It will protect the existing access of the plaintiff to insurance proceeds from the insurer, especially in circumstances where it would be pointless to pursue the defendant who is the insured. It will not increase the current liability of insurers. The bill will modernise the law governing third party insurance claims and ensure that the law adapts to the changes in the insurance market since it was enacted 70 years ago. The bill will commence on the date of assent. I commend the bill to the House. It addresses significant problems that are identified with section 6, including complex drafting and uncertain application in the modern insurance context. The introduction of a standalone Civil Liability (Third Party Claims Against Insurers) Act will promote clarity in relation to the law governing third party insurance claims.

Debate adjourned.