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THIRD PARTY CLAIMS AGAINST INSURERS: THE CHARGE IS OVER

Ivan Griscti

This seminar explores the change in the law that occurred on 1 June 2017 in relation to the rights of third parties to claim directly against insurers

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➤ **Overview:**

- On 1 June 2017 the Civil Liability (Third Party Claims Against Insurers) Act 2017 commenced operation.
- This Act repealed section 6 of the Law Reform (Miscellaneous Provisions) Act 1946

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- **Accessing Insurance Funds:**
- **Insurance Contracts Act: s 51**
- Insured/beneficiary under policy dead or cannot be found
- **Corporations Act: s 601 AG**
- Deregistered company

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➤ **Insolvency Provisions**

➤ Section 117 of the Bankruptcy Act 1966

➤ Section 562 of the *Corporations Act* 2001

➤ Amounts paid by an insurer to a trustee/liquidator in respect of insured liability to be paid to claimant: protects claimants from other creditors claiming priority.

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- **S 6 Law Reform (Miscellaneous Provisions) Act 1946**
- “somewhat enigmatic”
- “undoubtedly opaque and ambiguous”
- “ambiguity may be its only clear feature”
- “Section 6 should be repealed altogether or completely redrafted in an intelligible form so as to achieve the objects for which it was enacted”

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➤ **Section 6 LR (MP) Act**

- S 6(1): if an insured entered into a policy of liability insurance, the amount of the insured's liability would, on the happening of the event giving rise to the claim for damages or compensation, be a charge on all insurance moneys that are or may become payable in respect of that liability.



➤ **S 6(4):**

- Charge enforceable by direct action against insurer
- Parties have same rights and liabilities as if action brought against insured
- Leave required to commence action and no leave if insurer entitled to deny indemnity.

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➔ Section 6 problems



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- Claims made policies
- Pure economic loss
- Multiple claimants - priority
- Reinsurance
- Limited to “insureds” who were party to contract of insurance

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- **Civil Liability (Third Party Claims Against Insurers) Act 2017**
- Commenced operation 1 June 2017
- Based on NSW Law Reform Commission Report 34 published November 2016
- Sections 4 and 5 the heart of the Act

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➤ Section 4

- *(1) If an insured person has an insured liability to a person (the claimant), the claimant may, subject to this Act, 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...[and], 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.*

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- **Definitions (s 3)**
- “*Insured person*” includes person who is entitled to indemnity under a policy despite not being a party to it
- “*insured liability*” “*means a liability in respect of which an insured person is entitled to be indemnified by the insurer.*”
- “*Liability*” means a “*liability to pay damages, compensation or costs*”.

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➤ Section 5

- *(1) Proceedings may not be brought, or continued, against an insurer under section 4 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 4 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.*

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- Other provisions:
- S 6: same limitation period as underlying claim
- S 7: insurer entitled to rely on any defence in respect of its liability to indemnify under the policy or that the insured person would have been able to rely on in defence of the action
- S 8: judgment or order against an insured person does not prevent a claimant from proceeding against an insurer under s 4, save to the extent that the judgment or order has been satisfied

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➤ And more provisions of note...

- S 9: payment made by the insurer to a claimant under the Act discharges, to the extent of the payment, the liability of the insurer to indemnify the insured party pursuant to the policy
- S 10: claimant's rights to recover from an insurer under the Act not affected by any arrangement entered into by insurer and insured
- S 12: transitional - s 6 LR(MP) Act continues to apply (as if it had not been repealed) to actions brought against insurers under that section prior to the commencement of the Act

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- When will orders under sections 4 and 5 of the Act be made?
- No specified criteria
- Sections 4 and 5 in broad terms

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- Aids to interpretation:
- Explanatory note to Bill
- Second reading speech
- NSW LRC report 34

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- **NSW LRC 34: recommendation 1**
- *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.*

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➤ Discretion

- S 5: the Court “**may** grant or refuse the claimant’s application for leave”
- NSW LRC: discretion, subject to ss(4), is “at large”, however
- “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 s6.”

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➤ Discretionary Factors

- An arguable case on liability against the insured party,
- An arguable case that the insurer's policy will respond to the claim, and
- A real possibility that the claimant will be unable to enforce any judgment obtained against the insured party.

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➤ Consideration so far...

- *Mohamad Alameddine v Nizar Alameddine t/as On Call Tree Services and Gardening Maintenance*
- *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited*



➤ Summary: Problems (mostly) solved

- The Act applies to all liability policies including claims made,
- There is no difficulty with claims for pure economic loss,
- The Act expressly does not apply to reinsurance contracts,
- There is no ambiguity as regards an insured's entitlement to defence costs in advance of resolution of claim,
- Limitation period of underlying claim applies,
- The Act applies where the insured is not a party to the policy of insurance.

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- But what of multiple plaintiffs?
- No charge so no priority issue
- NSW LRC: *“no reason to depart from the general rule that the earlier claim takes priority”*
- Still potential for ambiguity and difficulty

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➤ Conclusion

- New Act commenced operation on 1.6.17 and applies in tandem with other provisions such as s 51 ICA and s 601AG of the Corporations Act
- Leave is discretionary and it is likely that the discretionary considerations will be the same as those that applied in respect of s 6 LR (MP) Act
- The new Act successfully deals with the principal ambiguities and problems that were caused by s 6 of the LR (MP) Act
- The new Act is user friendly giving rise to the prospect of forum shopping

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Do you have any questions for me?