

The Hon. Greg Smith MP
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Dear Attorney General

**IMPLICATIONS OF CHUBB V MOORE [2013] FOR
SECTION 6 OF LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1946**

The Insurance Council of Australia¹ (Insurance Council) has had valuable discussions with your Department and provided submissions to it (5 March 2012 and 21 February 2013) outlining our concerns with the provisions of section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 following the NZ *Bridgecorp*² case.

Since those two submissions, on 11 July 2013 a five judge bench of the New South Wales Court of Appeal (NSWCA) in *Chubb Insurance Company of Australia Limited v Moore* [2013] NSW CA 212 (*Chubb v Moore*) considered issues similar to those in *Bridgecorp*.

The decision is useful in that it clarifies that an insurer is not prevented from advancing defence costs to an insured. The decision states (paragraph 124):

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.

However, in line with the Insurance Council's own view, the NSWCA observed in relation to section 6 (paragraph 55):

Section 6 should be repealed altogether or completely redrafted in an intelligible form, so as to achieve the objects for which it was enacted.

After consultation with its Professional Indemnity Insurance Committee on the NSWCA decision, the Insurance Council remains firmly of the view that repeal of section 6 is required

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. March 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$39.2 billion per annum and has total assets of \$116.1 billion. The industry employs approximately 60,000 people and on average pays out about \$101 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

² *Steigrad v BFSL 2007 & Others* [2011] NZHC 1037

to remove uncertainty. Apart from the jurisdictional issue which was the subject of the decision, other issues previously raised by the Insurance Council in submissions remain alive. Although helpful, many of the NSWCA findings are observations and do not provide binding precedent.

Furthermore, the *Chubb v Moore* judgment may be subject to appeal, with the NSWCA noting itself that its answer on the question of jurisdiction is “certainly not without doubt” (paragraph 205).

It needs to be recognised that, since section 6 was enacted in 1946, the Commonwealth Government has established a strong and comprehensive regime of insurance regulation. Apart from the Australian Capital Territory and the Northern Territory, no other Australian jurisdiction has enacted an equivalent to sections 6, relying on the robust Federal legislative framework to meet consumer protection objectives. The Insurance Council is unaware of any concerns or detriment identified in these states from the absence of a state based law dealing with a charge on insurance moneys under a liability policy.

Account also needs to be taken of recent reforms under the Insurance Contracts Amendment Act 2013. These amendments, which commence in 12 months time, provide explicit rights to consumers who are third party beneficiaries. The Act provides, for example, that:

- individuals who have rights under a contract of insurance (‘third party beneficiaries’) but who are not the insured, have access to particular rights and obligations currently held by insureds;
- third parties with damages claims against an insured or third party beneficiary who has died or cannot be found may recover directly against the insurer;
- ASIC will have powers to bring representative actions on behalf of third party beneficiaries.

The very fact that *Chubb v Moore* was brought in NSW demonstrates that the uncertainty inherent in section 6 encourages ‘forum shopping’ in order to assert a charge unavailable in other jurisdictions. Repeal would remove the possibility of this inefficient use of court resources. It would not prejudice the outcomes for consumers given that protection is provided by a different mechanism at the Federal level.

In light of the NSWCA’s criticism of section 6 in *Chubb v Moore*, the need to provide enduring certainty for insureds, and insurers and the strong protections available for insureds at a Federal level, we request that the government seriously considers repealing section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 in this current Parliamentary session.

We look forward to receiving your views and are available to discuss the issue. Should you require any further information, please contact Mr John Anning on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

cc. Mr David Mitchell, NSW Attorney-General's Department