INSURANCE COUNCIL OF AUSTRALIA

The Hon. Gabrielle Upton MP
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14 August 2015

Dear Attorney General

SECTION 6 OF LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1946

The Insurance Council of Australia[1] (Insurance Council) would like to raise the need to repeal section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (the "Act"). The Insurance Council wrote to the former Attorney General and Minister for Justice, Hon. Greg Smith MP about this matter on 7 August 2013 (please see attached). However, we have not received a response. We have followed up with your Department several times but were advised that the issue is still under consideration.

It remains uncertain whether section 6 of the Act operates so that parties making a claim can assert a statutory charge over the proceeds which would prevent directors and officers from accessing the policy to fund their defence costs before judgment is handed down. In light of recent case law, the Insurance Council remains firmly of the view that repeal of section 6 is required to remove this uncertainty.

As the Insurance Council has explained in previous submissions, 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 (ACT) and the Northern Territory (NT), no other Australian jurisdiction has enacted an equivalent to section 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.

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[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).

Account also needs to be taken of recent reforms under the Insurance Contracts Amendment Act 2013. These amendments, 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.

Since the Insurance Council's last submission, the Supreme Court of New Zealand's judgment on 23 December 2013 set aside the Court of Appeal's *Bridgecorp* decision. As a result of the judgment, there now appears to be a divergence between the position in Australia and New Zealand in relation to whether the statutory charge can override directors' and officers' rights to indemnity for defence costs.

The Supreme Court of New Zealand (SCNZ) concluded that where there was insufficient insurance cover to meet both third party claims and a director's or officer's defence costs, an insurer could only meet the latter at the 'peril' of falling foul of the statutory charge created pursuant to the Law Reform Act 1936 (NZ) s9. Defence costs did not fall within the scope of the charge, and the existence of the charge could significantly impact upon the contractual right of a director or officer to be advanced or reimbursed for those costs. While the SCNZ did not decide whether an insurer could refuse to pay defence costs (as that question was not directly before it), it suggested that an insurer was entitled to be 'cautious' about payment of defence costs when faced with a claim subject to the charge.

In NSW, *Chubb Insurance Company of Australia Limited v Moore* [2013] NSW CA 212 (*Chubb v Moore*) considered issues similar to those in *Bridgecorp*. The Insurance Council notes that a conditional settlement was reached between the Chubb v Moore parties, eliminating the possibility of a consideration of the issues by the Australian High Court. We understand that, rather than the approach taken in New Zealand, the Australian position on section 6 of the Act and equivalent ACT and NT law provisions would remain as determined by the New South Wales Court of Appeal, enabling directors to use D&O policies to fund defences.

The 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 New South Wales Court of Appeal's criticism of section 6 in *Chubb v Moore*[2], the need to provide enduring certainty for insureds, and insurers and the strong protections

[2] The Court observed that: "*Section 6 should be repealed altogether or completely redrafted in an intelligible form, so as to achieve the objects for which it was enacted.*"

available for insureds at a Federal level, we request that the Government seriously considers repealing section 6 of the Act in this current Parliamentary session.

We look forward to receiving your views and are available to discuss the issue at your convenience. 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 and CEO

INSURANCE COUNCIL OF AUSTRALIA

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7 August 2013

Dear Attorney General

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

The Insurance Council of Australia[1] (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

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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