

The Hon. Mark Speakman, SC MP
Attorney General
52 Martin Place
SYDNEY NSW 2000

20 March 2017

Dear Attorney General

THIRD PARTY CLAIMS ON INSURANCE MONEY

The Insurance Council of Australia¹ (the Insurance Council) would like to raise the need to implement the recommendations of the New South Wales Law Reform Commission's (the Commission) December 2016 report² '*Third party claims on insurance money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946*' (the Act).

It remains unclear whether section 6 of the Act (section 6) operates so that a plaintiff making a claim can assert a statutory charge over insurance proceeds, which would prevent directors and officers from accessing their insurance policy to fund their defence costs before judgment is handed down.

As you would be aware, the New Zealand High Court's (NZHC) 2012 decision in the *Bridgecorp*³ case reignited debate in Australia about the relevance of section 6 and created significant uncertainty about the operation of liability insurance policies; particularly Directors' and Officers' (D&O) liability policies.

The NZHC (confirmed by the Supreme Court of New Zealand's decision⁴ in 2013) concluded that section 9 of the *Law Reform Act 1936* (NZ), upon which section 6 was modelled, prevents directors and officers from accessing an insurance policy to fund their defence costs.

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. December 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$44.6 billion per annum and has total assets of \$121.1 billion. The industry employs approximately 60,000 people and on average pays out about \$124.2 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 NSW Law Reform Commission [Report 143](#). Released 19 December 2016.

³ *Steigrad & Ors v BFSL 2007 Ltd & Ors* [2011] NZHC 1037, Justice Lang.

⁴ *BFSL 2007 Ltd v Steigrad* [2013] NZSC 156.

In New South Wales however, in *Chubb v Moore*⁵, the New South Wales Court of Appeal (NSWCA) arrived at the opposite conclusion. While clearly the NSWCA decision has greater value as precedent in Australia, in the absence of a decision by the High Court of Australia, the consequences of section 6 have not been definitively settled.

One of the core value propositions of D&O liability policies, and similar professional liability insurance policies, is that they provide protection for companies and individuals in meeting the costs of investigations and defending claims. The uncertainty created by the reasoning in the New Zealand *Bridgecorp* case is of major concern to insureds and insurers, as it unnecessarily questions the operation of those insurance policies.

If the *Bridgecorp* interpretation were adopted in Australia, there would potentially be serious implications for all parties. For instance, an insured may well, depending of the specifics of the case, be obliged to fund their own defence which could lead to serious financial hardship and/or an inability to defend a claim. Claimants may also be severely impacted in the event of competing statutory charges from multiple claims, as these charges may effectively 'freeze' the policy (possibly over many years) pending the resolution of competing claims.

The Commission explicitly identified uncertainty as a chief concern in its report. It found that the charge established by section 6 has "*caused too many conceptual and practical problems, in particular in relation to the payment of defence costs*"⁶. It noted in its report that section 6 has been generally criticised for its obscure drafting and the problems it presents for interpretation. It went further to explain that changes to the insurance market since it was enacted 70 years ago have also made the effect of section 6 unclear, and that there are many areas of uncertainty and inadequacy in its application⁷.

On the basis of its findings, the Commission has proposed a new provision to replace the current section 6, which would clarify areas of uncertainty, including resolving the issue of payment of defence costs while ensuring that a plaintiff can recover from an insurer in appropriate cases.

The Insurance Council supports the Commission's proposed draft bill. We note that the Commission consulted widely in developing its recommendations and proposed draft bill, and sought views from key stakeholders⁸, such as the Australian Institute of Company Directors, Australian Lawyers Alliance, Insurance and Care Australia, Insurance Council, Law Society of NSW, National Insurance Brokers Association, New South Wales Bar Association and the NSW Young Lawyers Civil Litigation Committee. The Insurance Council provided a submission⁹ to the Commission's April 2016 Consultation Paper and participated at the July 2016 Industry Roundtable that was led by the Commission.

The Insurance Council has long advocated for legislative reform to address the inherent uncertainty created by section 6. Prior to the Commission's review of section 6 of the Act, the Insurance Council wrote to the former Attorneys General, the Hon. Gabrielle Upton MP in

⁵ *Chubb Insurance Company of Australia Limited v Moore* [2013] NSW CA 212.

⁶ NSW Law Reform Commission [Report 143](#). Page 34 refers. Also emphasised at the Executive Summary and page 1.

⁷ NSW Law Reform Commission [Report 143](#). Page 10 refers.

⁸ New South Wales Law Reform Commission [Report 143](#). Page 4 and Appendix C, refer.

⁹ Insurance Council [submission](#) to the New South Wales Law Reform Commission [Consultation Paper 17](#), refers.

2015 and the Hon. Greg Smith MP in 2013, to raise our concerns¹⁰. The Insurance Council is therefore pleased that the Commission has comprehensively reviewed section 6, given the potentially serious implications of its current form for all parties. We would welcome any opportunity to work with the Government to expedite the implementation of the Commission's recommendations.

If you have any questions or comments in relation to this letter, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: (02) 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO

¹⁰ Insurance Council submissions of [14 August 2015](#) and [7 August 2013](#), refer.