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"Out with the old, in with the insurer" – *Implications of the Civil Liability (Third Party Claims Against Insurers) Act 2017*

Insurers will achieve much needed clarity and certainty around third party claims against them, in a modernisation of a decades-old Act.

The New South Wales Parliament has passed the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**"the Third Party Claims Act"**), which repeals section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (**"LRMP Act"**) and replaces it with a new mechanism for claiming against insurers in certain circumstances.

The focus of change

In 2016, the NSW Law Reform Commission was asked to review and report on section 6 of the LRMP Act. In particular, the Commission considered the previous section's reliance on a "charge" mechanism on insurance moneys, which would typically be utilised to enable plaintiffs to proceed against the insurer behind an otherwise missing or insolvent defendant insured.

The Commission's inquiry came in the context of continuously evolving, modern insurance policies, and particularly claims-made and notified policies. The somewhat stale, 71-year old LRMP Act made the provision increasingly complex for practical use. The New South Wales judiciary commented that the LRMP Act began to be seen as "*undoubtedly opaque and ambiguous*" with judges being among the first to call for the provision to be "*completely redrafted in an intelligible form*"[1]. The Commission found the relevant provisions needed to be streamlined to provide plaintiffs with more direct access to the insurer, but to do so without the contrivance of charge. Further clarity was also required on legal costs and whether such costs were captured by the LRMP Act.

One view was that the previous section 6 captured any and all payments made pursuant to a contract of insurance, including legal defence costs. The issue was ultimately addressed by the NSW Court of Appeal in *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212, where it was held that the previous section 6 did not impede an insurer's ability to provide defence costs under a policy and that the charge imposed did not attach to such amounts. Prior to this decision, there were significant concerns that directors and officers would not be permitted to access insurance moneys to fund their defence if these amounts were subject to the charge. Consequently, there was concern that company directors and officers would need to personally fund their defence costs.

[1] *New South Wales Medical Defence Union v Crawford* (1993) 31 NSWLR 469, at 479 per Kirby P.

Key features of the new legislation

The new Third Party Claims Act adopts the recommendations of the NSW Law Reform Commission:

(a) Plaintiffs, and other third parties to the insurance contract, are conferred a right to directly recover from the insurer an insured liability amount (owed by the insured) in certain circumstances, without the need to resort to a "charge" over the insurance proceeds.

(b) A plaintiff can issue proceedings to recover an amount from an insurer, however any such action must be commenced within the same limitation period that applies to the plaintiff's cause of action against the insured person;

(c) The insurer is not liable to the plaintiff for more than the insurer would have been liable to pay under the insurance contract in respect of the insured person's liability to the plaintiff. This effectively avoids the possibility that defence costs will be caught within the scope of the section;

(d) The insurer can rely on the same defences and reductions that the insured could have relied on in a direct action by the plaintiff; and

(e) The regime will not allow a plaintiff to recover any amount from a re-insurer.

Several procedural aspects of section 6 of the LRMP Act are retained in the new legislation, including the requirement to seek leave prior to proceeding against an insurer, and that a claim may only be brought in a court or tribunal of New South Wales. Where an action has already been brought against insurers under section 6 of the LRMP Act, before the commencement of the new Act, the previous section 6 will continue to apply.

What does this mean for insurers and insureds?

The Third Party Claims Act modernises the law governing third party claims on insurers, in keeping up with claims, and the policies behind them, which have evolved independently of the law, becoming more complex and bespoke.

On one hand, the reforms should be welcomed as an example of the law changing with the times, perhaps not as common an occurrence as it should be. To insurers, the changes should provide clarity and certainty to claims premised against them in line with the previous section 6 of the LRMP Act.

On the other hand, the new Act enshrines the right of third parties / plaintiffs to bring fresh proceedings directly against an insurer that they would otherwise have against the insured, without needing to enforce an artificial, statutory charge. In line with the trend of case law,[2] the new Act also clarifies the rights of other third parties who are

[2] *CGU Insurance Limited v Blakeley* [2016] HCA 2.

not plaintiffs, such as liquidators and administrators, vis-à-vis direct claims against the insurer.

However, the Third Party Claims Act is unlikely to significantly increase the current exposure of insurers. This is because the new Act essentially streamlines the *mechanism* through which third party claims against insurers may be brought, without necessarily affecting the rights of third parties, insureds and their insurers. Procedural hurdles, such as the limitation period and the need to seek the Court's leave, also remain.

A common scenario, for example, is where the insurer has declined indemnity to the insured on the basis of an exclusion clause in the policy. Although the new Act makes clear that the onus of proof falls on the insurer, if it can show that the declinature of indemnity was reasonable and correct in the circumstances, this may be the end of the line for hopeful third parties seeking to claim against a behind-the-scenes insurer.

To that end, we anticipate that initial leave applications will be hard fought and tested in Court by both plaintiffs and insurers during the infancy of this new legislation.

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