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20 May 2016

NSW Law Reform Commission
DX 1227 SYDNEY

Only by email: nsw_lrc@agd.nsw.gov.au

Dear Sir/Madam

**RE: REVIEW OF S 6 OF THE LAW REFORM (MISCELLANEOUS PROVISIONS)
ACT 1946 - THIRD PARTY CLAIMS ON INSURANCE MONEY**

Thank you for the opportunity to respond to Consultation Paper 17: Third party claims on insurance money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946.

This firm practices extensively in claims for asbestos and silica related diseases brought in the Dust Diseases Tribunal of New South Wales.

The policy objectives of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* remain valid.

The nature of dust diseases where decades pass between exposure to the offending dust and the onset of disease makes this provision critical for these claimants.

With the passage of time former employers may be deregistered companies or otherwise unable to satisfy judgments.

There would be great injustice to this category of claimants should they be deprived of the ability to assert and enforce a statutory charge over insurance monies payable to an insured former employer where an insured no longer exists as a legal entity.

Where there is an arguable case of liability against the insured employer, they are not able to satisfy any judgment and there is an arguable case that an insurer has issued a policy that responds to that liability, leave is usually granted by the Court to these claimants to proceed directly against an insurer.

The combined effect of section 6(4) and section 151AB of the *Workers Compensation Act 1987* for diseases of gradual onset results in sufficient practical certainty for claimants where an insured employer is unable to answer a claim for damages resulting from their negligence.

The New South Wales Court of Appeal held in *Allianz Australia Insurance Ltd v Pomfret* [2015] NSWCA 4 that a claimant is able to bring a claim for damages for the period where an insurer was on risk notwithstanding any

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further period of employment in which the relevant insurer is unable to be identified.

The provision allows justice to be served including in these circumstances.

It is our experience however that in matters where proceedings must be commenced urgently as a result of the short life expectancy of a plaintiff, the delay that results from the requirement to first seek leave to commence proceedings directly against an insurer can be critical.

It is also our experience that insurers in this jurisdiction rarely if ever object to a plaintiff's application seeking leave, and it is difficult to envisage grounds on which a successful objection might be made.

We therefore request that consideration be given to removing the requirement that leave first be obtained before a plaintiff can proceed directly against the relevant insurer.

This would save time when time may be of critical importance as well as legal costs.

It is our view therefore that section 6(4) of this Act operates effectively for the claimants we represent except in some circumstances and the requirement to seek leave could be dispensed with.

We therefore oppose any proposal to repeal this provision but ask that consideration be given to removing the requirement for a plaintiff to seek leave before proceeding directly against the insurer.

We would be pleased to discuss this proposal further with you.

We otherwise support the first option proposed of doing nothing on the basis that the section, and in particular section 6(4), continues to be useful and that relevant Court decisions sufficiently clarify the operation of the section for the claimants for whom we act.

In relation to the second option, a redrafted provision may benefit from clarification that the section applies to contracts of reinsurance.

We do not support reliance being placed on Commonwealth provisions in place of the New South Wales provision.

Should the outcome of the Review include recommendations for reform of the provision, in general we support that it be rewritten in a contemporary drafting style however only on the basis that the effect of section 6(4) is not altered.

We do not believe that any changes made to the provision should be retrospective.

We ask that consideration be given to removing the requirement that a plaintiff first seek leave before proceeding directly against an insurer.

We also ask that we be afforded the opportunity to respond to any proposal made by the Law Reform Commission to amend section 6 following this Review.

Yours faithfully

TURNER FREEMAN



Per: Fiona Seaton

Partner

Accredited Specialist - Personal Injury Law