

COMITÉ MARITIME INTERNATIONAL

Standing Committee on Marine Insurance

MLAANZ Response to Questionnaire for National MLA's on Rights of Direct Action Against Insurers

Note: This response is based upon Australian law only. New Zealand will submit a separate response in due course.

1. Direct action against liability insurer by third party claimants

1.1 Does your national law provide for a right of direct action against liability insurers by third party claimants?

There are a number of statutory mechanisms which provide for a right of direct action against insurers, as follows:

Commonwealth / federal laws

(a) Insurance Contracts Act – death or disappearance of insured

Section 51 of the *Insurance Contracts Act 1984* (Cth) (**ICA**) allows a person to claim against an insurer in circumstances where: the insured (or a beneficiary) under a policy would be liable to the person; the policy would respond; and the insured (or beneficiary) has died or cannot, after reasonable enquiry, be found.

It is important to note that no such equivalent section appears in the *Marine Insurance Act 1909* (Cth) (**MIA**) and the ICA only applies to contracts of insurance to which the MIA does not apply (see section 9(1)(d)). Accordingly, the section 51 mechanism will not be available to a third party where the policy is one to which the MIA, and not the ICA, applies.

The MIA applies to “marine insurance”, which is defined as a contract of insurance which insures “against marine losses, that is to say, the losses incident to marine adventure” (see section 7). This can be extended, by its express terms, to losses on inland waters or any land risk incidental to any sea voyage (see section 8(1)).

Marine insurers may, however, be subject to direct actions through other statutory mechanisms, as set out below.

(b) Deregistration of a company

Section 601AG of the *Corporations Act 2001* (Cth) (**Corps Act**) allows a person to recover from an insurer of a company, an amount payable to that company under the insurance contract where:

- the insured company had a liability to that person; and
- the insurance covered the liability immediately prior to the insured company's deregistration.

(c) Winding up of a company or bankruptcy

Whilst not strictly speaking, a claim directly against an insurer, section 562 of the Corps Act requires a liquidator to pay any proceeds received from an insurer, in payment of a company's third party liability under a third party liability policy, directly to the third party claimant in respect of

whom the liability was incurred in priority to other payments that are listed in section 556 (which includes expenses relating to the winding up proceeding and administrative costs).

The only costs which can be deducted prior to the proceeds being allocated to the third party claimant are those expenses “incidental to getting in that amount”.

Similarly, where an individual becomes bankrupt, section 117 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) provides that any insurance proceeds issued to a bankrupt in respect of a liability to a third party that are vested in the trustee, are to be paid out in full to the third party to whom the liability was incurred.

(d) Bunker Convention /CLC Convention

For completeness, we note that paragraph 10 of Article 7 of the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001* (**Bunker Convention**) has been given the force of law in Australia through the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) (see section 11). Accordingly, a claim for pollution damage can be brought directly against the insurer of a registered shipowner.

The Bunker Convention followed in the footsteps of paragraph 8 of Article VII of the *International Convention on Civil Liability for Oil Pollution Damage 1969* (**CLC Convention**), which was given the force of law in Australia through the *Protection of the Sea (Civil Liability) Act 1981* (Cth) (see section 8). That article provides a mechanism for a claim for pollution damage to be brought directly against an insurer or other person providing financial security for the owner’s liability for pollution damage.

State/Territory laws

(a) New South Wales

In New South Wales (**NSW**), the *Civil Liability (Third Party Claims Against Insurers) Act 2017 No 19* (NSW) (**NSW CLA**) allows any claimant, provided an insured person has an insured liability to the claimant, to seek leave to bring a proceeding in a “court” against the insurer of that insured person directly. A court is defined under the NSW CLA as “a court or tribunal of NSW”. The Federal Court has a discretion to grant leave and apply the NSW CLA in the exercise of its federal jurisdiction pursuant to s 79 of the *Judiciary Act 1903* (Cth). An application for leave may be made before or after the proceedings have been commenced: see *Rushleigh Services Pty Ltd v Forge Group Limited (in liquidation)(receivers and manager appointed)* [2018] FCA 26 at [39].

Pursuant to the NSW CLA, the insurer stands in the shoes of the insured person. The insurer can rely upon any exclusions or defences which would otherwise be available to the insurer as if it were defending a claim from the insured.

(b) Australian Capital Territory

The Australian Capital Territory (**ACT**) has laws whereby third parties can access funds that an insurer would ordinarily be liable to pay an insured by attaching a charge over those funds (see *Civil Law (Wrongs) Act 2002* (ACT) sections 206-209, formerly *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) sections 25-28).

(c) Northern Territory

The Northern Territory (**NT**) also has laws whereby third parties can access funds that an insurer would ordinarily be liable to pay an insured by attaching a charge over those funds (see *Law Reform (Miscellaneous Provisions) Act 1956* (NT) sections 26-29).

There are also statutory mechanisms for direct claims against insurers which relate to specific categories of claims in various States and Territories within Australia that relate to victims of motor vehicle accidents and workplace incidents.

1.2 Does such right of direct action apply to any claim, either in tort or in contract?

Other than where identified above, the statutory mechanisms do not limit recovery to specific causes of action or categories of claim. It is sufficient that the claim be covered by insurance and that the liability of the insured to the third party claimant is established.

Therefore, claims in tort and contract would be allowed provided they are covered by the relevant insurance policy. As a general rule, to claim against the insurer, the usual pre-conditions to cover, exclusions and terms of the policy will need to be considered in order to establish liability.

1.3 Is there a right of direct action granted to specific categories of claimants?

No, there are no relevant specific categories of claimants identified (other than for the specific regimes in the various States and Territories relevant to motor vehicle accidents and workplace incidents).

2. Jurisdiction

2.1 Does your national law contain provisions on the jurisdiction of courts for direct claims against Insurers?

Whether a court in a particular State/Territory has jurisdiction to hear a claim for direct action against an insurer will depend upon:

- (a) which State/Territory or Federal statutory mechanism the claimant is relying upon to bring the claim; and
- (b) the nature of the claim.

Ordinarily claimants who properly bring a claim in a NSW court would be able to avail themselves of the NSW CLA (see *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [197]-[206]).

2.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause stipulated into the contract of insurance?

As noted above, there is no Australian law specifically deals with direct claims against an insurer where the claim is subject to arbitration clause within the contract of insurance.

A claim under the NSW CLA can only be brought in a "court", which is defined as a "court or tribunal of New South Wales" and this may include a Federal Court of Australia (see section 3 definitions and section 4(1)).

3. Applicable law

3.1 Does your national law contain special conflict of laws provisions on the applicable law governing the right of direct action against Insurers?

In Australia, the right to commence direct action against insurers is a creature of statute and will accordingly only arise in the relevant jurisdiction. However, there are few statutory provisions which allow a claimant to argue that the application of the relevant statute is mandatory.

Section 8(2) of the ICA provides that where the proper law of the insurance contract would be a law of a State or Territory where the ICA applies, any express provision in the insurance contract to the contrary would be of no effect. In addition, section 52 of the ICA has the effect of prohibiting contracting out of the ICA “to the prejudice of a person other than the insurer”.

The High Court of Australia, in *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 141 ALR 374, found that the combined effect of the above provisions is that both a choice of law and choice of jurisdiction clause naming English law and the Courts of England (although not exclusively), respectively, is of no effect in circumstances where recourse to the English courts could deprive the insured of a juridical advantage and the ability to rely upon the ICA.

The conflict of law rules used to establish what is the proper law of the contract for the purposes of the ICA, are, however, the same as the general conflict of law rules in Australia.

It is important to note:

- (a) The right of direct action against insurers under the ICA only applies where the insured is deceased or cannot be located after reasonable inquiry. The ICA does not apply to marine insurance unless the risks covered are not “losses incident to marine adventure” (see above).
- (b) *Akai’s* case deals with a claim by an insured and not a third party direct claim against an insurer.
- (c) An Australian court has yet to decide specifically whether an insurer could rely on a choice of law clause to prevent a third party relying upon section 51 of the ICA or the NSW CLA.

1.2 Is the proper law governing such direct action established on the basis of the general conflict of laws rules applicable to the insurance contract stipulated with the liability insurers, or to the claim in tort or in contract brought by the third party claimant, or on the basis of other general rules?

As stated above, in Australia, the right to commence direct action against insurers is a creature of statute and will only arise in the relevant jurisdiction. The conflict of laws rules will be determined by courts taking into account the relevant statutory provision in question and applying the principles in *Akai’s case*.

4. Procedure

4.1 Under your national law, can the claimant sue the person liable and the insurer in the same proceedings?

Yes. However, there is no automatic right to a joinder; it remains at the discretion of the courts.

(a) Insolvency

In circumstances of insolvency, Australian courts will allow a claimant to seek leave to join an insured in order to obtain a declaration that the insurer is liable to indemnify the insured (see: *CGU Insurance Ltd v Blakeley* [2016] HCA 2; *Owners-Strata Plan 62658 v Mestrez Pty Ltd* [2012] NSW 1259; *QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd* [2012] WASC 186; *Anjin No 13 Pty Ltd v Allianz Australia Insurance Ltd* (2009) 26 VR 148; *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432).

(b) NSW CLA

Joinder proceedings may not be brought under the NSW CLA except by leave of the court (see section 5(1)). The court's power to refuse or grant leave is discretionary (see section 5(3)). However, leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or otherwise at law (see section 5(4)).

In *Bede Polding College v Limit (No 3) Limited & Anor* [2008] NSWSC 887, Justice Markovic identified three relevant factors which a claimant must show for leave to be granted under the NSW CLA. They are that:

- (a) the claimant has an arguable case against the insured;
- (b) there is an arguable case that the policy responds to the applicant's claim; and
- (c) there is a real possibility that, if judgment were obtained, the insured would not be able to meet it.

4.2 Can the third party sue directly the insurer only?

Pursuant to section 601AG of the Corps Act a claimant can proceed directly against an insurer without joining the insured defendant. As discussed above, this provision enables joinder of the insurer in circumstances where the insured is a deregistered company,

Further, pursuant to section 51 of the ICA a claimant can proceed directly against an insurer without joining the insurer where the insured is deceased or cannot be located despite reasonable enquiry.

In addition, the NSW CLA enables a claimant to bring proceedings against the insurer without first joining the insured.

4.3 Can the liable party, as a respondent, ask that the insurer is joined as a further defendant and ask that the decision be issued directly against the insurer?

Yes, the liable third party can seek to join an insurer seek orders from the court that the insurer be liable to pay any judgment up to the limit of the policy.

4.4 Can the insurer, as a respondent, ask that the party liable is joined as a further defendant?

Yes, the insurer will have the same rights as the insured would have had, to defend the matter. There is no prohibition to an insurer (as a respondent) seeking to reduce its liability, by joining other parties.

4.5 In case the liable party and the insurer are joined as respondents in the same proceedings, can the insurer file in the same proceedings an action seeking recovery from the insured under the terms of the contract of insurance for the indemnity to be paid by the insurers to the third party?

The insurer is entitled to deny liability and rely on the defences available to it under the contract of insurance.

4.6 What are the rules for jurisdiction for joining the third party and/or filing action between the respondents in the above cases?

The rules for joining parties will vary depending upon the court that the action is brought in and the legislation the claimant is relying upon. In some courts leave may be required.

5. Defences

5.1 Under your national law, in case the insurer is directly sued by the third party:

5.1.1 Can the insurer raise any defence which would be available to the liable party as regards the merits and quantum, whether or not the latter is joined in the proceedings as a defendant?

Generally, the insurer is entitled to rely on all the insured's defences, together with any it would have had if an action had been brought against it by the insured in respect of the third party claim but any claim brought under the ICA will remain limited by other provisions of the ICA (see *Gorzynski v W&FT Osmo Pty Ltd* [2010] NSWCA 163).

Under the NSW CLA, section 7 expressly provides that in proceedings brought under section 4, an insurer is entitled to rely on any defence or any other matter in answer to the claim or in reduction of its liability to the claimant:

- (a) that the insurer would have been entitled to rely on in a claim made by the insured person under the contract of insurance, or
- (b) that the insured person would have been entitled to rely on in proceedings brought by the claimant against the insured person in respect of the insured liability.

Further, section 11 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) applies Article 7 of the Bunker Oil Convention, which includes rule 10.

5.2 Can the insurer benefit of the global limitation of liability – if any – available to the liable party, whether or not the latter is joined in the proceedings as a defendant?

The insurer is liable in the same capacity as the liable party in respect of each cause of action. Therefore, an insurer can benefit from the global limitation of liability.

In particular, pursuant to section 11 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth), liability for oil pollution damage is limited by the liability of shipowners for pollution damage and the making of claims against insurers or persons providing financial security for ships in accordance with the Bunker Oil Convention, specifically, section 11 applies Article 6.

5.3 Can the insurer raise defences based on the terms of the insurance contract stipulated with the liable party against the action filed by the third party?

See above – question 5.1.1

5.4 Does a separate judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum?

Section 8 of the NSW CLA allows a plaintiff to proceed against an insurer even after a successful judgment or order for damages, compensation or costs has been obtained if the defendant is unable to pay all or part of the liability, except to the extent that the judgment or order has been satisfied. This is to avoid double recovery.

If so,

5.4.1 does this also apply to judgements in default?

Yes.

5.4.2 does this also apply to foreign judgements?

Yes, provided the foreign judgment has been recognised under Australian law pursuant to the relevant foreign judgments recognition statute applicable in each state, territory or Commonwealth jurisdiction and/or common law principles.

6. Time limits

6.1. Under your national law, are there any time limits for a direct action against an insurer?

For the NSW CLA, the limitation period for an action against an insurer will be the same as the limitation period which applies to the underlying claim between the claimant and insured defendant.

Under the direct action provision of section 601AG of the Corps Act, an insurer may raise an argument in its defence that the time bar to the underlying claim against the company should stand (see *Almario v Allianz Australia Works Compensation (NSW) Insurance Ltd* (2005) 62 NSWLR 148).

6.1.1 How can they be protected?

Time limitations in relation to a claim against an insurer can be protected by commencing within the relevant limitation period that applies to the underlying claim.

6.2 Is it possible for the third party to sue directly the insurer even if the time limit of the action against the liable party has not been protected?

Courts have discretion to grant extensions of time. A claimant would have to seek leave of the court and explain the reasons for the delay, demonstrate that it had an arguable case and, in the context of a direct claim against an insurer, that it had at least reasonable prospects of showing the liability the subject of the claim is covered by the relevant insurance contract.