By Greg Pynt

INSURANCE CONTRACTS taken out by SOMEONE ELSE

Who can sue and who can access?

'The declaration by the Court of Appeal that policies of liability insurance are a common law exception to the doctrine of privity of contract and that the exception has existed for some time may come as a surprise to those who have seen no reference to such an exception in the books.'[1]

This article concerns the circumstances in which the common law and legislation extend the benefits of an insurance contract to someone who is not a party to it. It is divided into Parts A and B.

Part A covers the common law and statutory provisions that give a person direct access to insurance taken out by someone else.

Part B covers the statutory provisions that give a third party with a claim for damages against an insured the direct benefit of the insured's entitlement to be indemnified by its liability insurer against that claim.

First, however, it is worth noting briefly the difference between first-party and liability (third party) insurance, because Part A relates to both, but Part B relates only to the latter.

First-party insurance protects an insured against the risk of their own loss. It involves a transfer to an insurer of the risk that an insured might be injured or might suffer loss of, or damage to, property in which they have a financial interest. The part of a house and contents policy that covers an insured for damage to, or destruction of, the house or its contents is an example of first-party insurance.

On the other hand, liability insurance protects an insured against the risk of incurring a legal liability to a third party. It involves the transfer to an insurer of the risk that the insured might be held legally liable to a third party for personal injury, property damage or pure economic loss suffered by the third party.

PART A: THE COMMON LAW AND STATUTORY PROVISIONS GIVING A PERSON DIRECT ACCESS TO INSURANCE TAKEN OUT BY SOMEONE ELSE

Until the High Court decided *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* in 1988,[2] the privity rule, with some exceptions, allowed only a party to a contract to sue on it. Generally speaking, a non-party could not sue on a contract, even if the parties to the contract expressly intended the non-party to benefit by it.[3]

If a party to a contract did not deliver on a promised benefit to a non-party, the non-party was dependent on another party to the contract suing on the broken promise. That would sufficiently protect the non-party if a court ordered the defaulting party to specifically perform its promise, but probably not if the remedy was damages, because the innocent party's damages is calculated by reference to its loss, not the loss of the non-party.[4]

In *Trident*, the High Court allowed a non-party to sue on a liability insurance contract, on the basis that the parties to the contract expressly intended the non-party to benefit by it. By then, the inequity of the privity rule had prompted various Australian parliaments to promulgate legislation that limited its impact, including the *Insurance Contracts Act* 1984 (Cth) (ICA).[5]

This Part A addresses that part of the common law and those statutory provisions that allow a non-party to sue on an insurance contract if the parties to the contract expressly intended the non-party to benefit by it. It also addresses those statutory provisions that give a 'stranger'[6] direct access to a first-party insurance contract that covers property in which they have a direct financial interest.

The position at common law

The privity rule

If an insurance contract names only one insurer and one insured, they are the parties to the contract.

An insurance contract can, and often does:

(a) name two or more insurers as agreeing to provide the relevant cover, either jointly or, if severally, for their respective proportions. All of the insurers named in an insurance contract are parties to the contract;

(b) identify two or more insureds as being entitled to the relevant cover. For example, your motor vehicle third party property damage policy will indemnify you (the person who took out the policy) and anyone who drives your vehicle with your consent, for legal liability for damage done to someone else's property caused by the negligent driving of your vehicle. Accordingly, a reference to an '*insured*' in your policy can refer to:
- you (a party to the contract); or
- a person who drives your vehicle with your consent (not a party to the contract).[7]

In the case of an insurance contract that identifies two or more insureds, a particular insured is a party to the contract if it:

(a) expressly describes that insured as a party to the contract or, if it does not, the objective intention of the parties to the contract is that that insured be a party to it;[8] or

(b) was '*taken out*' by[9] or for[10] that insured.

An insured that is a party to an insurance contract not under seal[11] can sue on it, as long as:
- it has paid or agreed to pay some or all of the premium for the insurance[12]; or
- one or more of the other parties to the contract has paid or agreed to pay the premium for the insurance for or on its behalf.[13]

An exception to the privity rule

A person named in an insurance contract as an insured, or identified as a person or class of persons intended to benefit by the contract, can sue on it to the extent of their interest in the subject matter of the insurance, even if they are not a party to, and have given no consideration for, the contract.[14]

Statutory provisions enabling a non-party to sue on an insurance contract if the parties to the contract expressly intended the non-party to benefit by it

Generally speaking, the following statutory provisions simply anticipated the common law exception to the privity rule articulated in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.[15]

Section 11 of the *Property Law Act* 1969 (WA) relaxes the privity rule for contracts in general.[16] >>

In *Trident*, the High Court allowed a non-party to sue on a liability insurance contract, because the contract's parties expressly intended the non-party to benefit from it.

Section 11(2) allows a non-party to sue on a contract in writing[17] if it:

- *'expressly in its terms purports to confer a benefit directly on'* the non-party.[18] The benefit must be conferred expressly, not by implication;[19] and
- identifies the non-party by name or *'by reference to an existing and identifiable class or by answering a particular description'* as the person intended to benefit by the contract.[20]

Sections 55 of the *Property Law Act* 1974 (Qld) and 56 of the *Law of Property Act* (NT) also relax the privity rule.[21]

Section 48 of the ICA enables a non-party to sue on a general insurance contract if it is specified or referred to in the contract (by name or otherwise) as someone entitled to benefit by it, in these terms:

'(1) Where a person who is not a party to a contract of general insurance is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends, that person has a right to recover the amount of the person's loss from the insurer in accordance with the contract notwithstanding that the person is not a party to the contract. ...

(3) The insurer has the same defences to an action under this section as the insurer would have in an action by the insured.'

Sub-section 48(1) does not alter rights or obligations under an insurance contract or extend the scope of cover; it simply gives standing to certain non-parties to sue on it.[22]

Although unresolved, it is suggested that sub-section 48(3) cryptically but effectively limits a non-party's rights to those of a co-insured. Accordingly, a non-party's s48 claim is adversely affected by an insured party's:

(a) pre-contractual non-disclosure or misrepresentation;[23]

(b) post-contractual acts or omissions, unless the insurance is composite (as opposed to joint) and the relevant act or omission (for example, arson) would not normally affect an innocent co-insured's claim on the contract;[24]

(c) post-contractual breach of, or non-compliance with, a term of the contract (for example, breach of a term requiring prompt notification of a claim), unless the breach or non-compliance can be characterised as a composite breach or non-compliance, or the term breached or not complied with can be characterised as a composite term.

Section 20 of the ICA prevents an insurer from denying a claim by a person who is a member of a group (for example, a group of partners, employees or contractors) just because the contract does not specifically name that person.[25]

Statutory provisions enabling a 'stranger'[26] to sue on a first-party insurance contract

Section 49 of the ICA

At common law, a 'stranger' is not entitled to the benefit of a first party policy taken out by someone else over property in which the 'stranger' has an interest. If the property is damaged or destroyed, only the parties to the policy or its intended beneficiaries can claim on it.[27]

Section 49 extends the benefit of a first-party policy to such a 'stranger', unless before the contract was made, the insurer clearly informed the insured in writing that the contract does not cover the 'stranger's' interest in the property.

The operation of the section hinges on the insurer's *'notional liability'*, which is the amount for which the insurer would have been liable to the insured for a claim if the insured had the only interest in the property: s49(2).

If the *'notional liability'* exceeds the amount of the insurer's liability to an insured in respect of a loss, and within three months of the loss occurring a 'stranger' with an interest in the property gives written notice to the insurer of their interest, the insurer is liable to pay the 'stranger' for its loss, up to the amount of the difference between the *'notional liability'* and the amount of the insurer's liability to the insured: s49(3).

Sections 50 of the ICA, 35 of the Sale of Land Act 1962 (Vic) and 63 of the Property Law Act 1974 (Qld)

In the briefest of judgments, the High Court, in the pre-ICA case *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd*,[28] concluded that the vendor of a property had no claim on its first-party insurer when improvements on its property were substantially destroyed by fire between signing the contract for the sale of the property and completion. That was because the purchaser was obliged to pay the agreed price notwithstanding destruction of the improvements before completion. As the policy was one of indemnity, the vendor had no claim on it because it had suffered no loss. The purchaser had no claim on the policy because it was not a party to, or mentioned by, the policy.

Section 50 gets around this problem in relation to a sale or assignment, which will give the purchaser or assignee a right to occupy or use a building, by deeming the purchaser to be an insured under the vendor's first party policy over the building from the time when the risk of loss or damage to the building passes to the purchaser, until the earliest of the times mentioned in s50.

Similar protection is afforded to a purchaser by ss35 of the *Sale of Land Act* 1962 (Vic) and 63 of the *Property Law Act* 1974 (Qld).

Statutory provisions requiring the proceeds of a first-party insurance contract to be expended for the benefit of a 'stranger'

Many statutory provisions around Australia fit into this category; for example, sub-section 64(3) of the *Property Law Act* 1969 (WA), s58 of the *Property Law Act* 1974 (Qld) and s90E of the *Conveyancing and Law of Property Act* 1884 (Tas). They generally relate to circumstances in which an insurer is bound to reinstate a damaged or destroyed building for the benefit of a 'stranger' with a direct financial interest in the building, rather than make a cash settlement to the insured.

PART B: STATUTORY PROVISIONS GIVING A THIRD PARTY WITH A CLAIM FOR DAMAGES AGAINST AN INSURED THE DIRECT BENEFIT OF THE INSURED'S ENTITLEMENT TO BE INDEMNIFIED BY ITS LIABILITY INSURER AGAINST THAT CLAIM

Unlike Part A, the statutory provisions discussed in Part B are not about a third party's insurance cover. They concern a third party with a claim for damages against an insured being given the direct benefit of the insured's entitlement to be indemnified by its liability insurer against that claim, in circumstances where the insured cannot be identified or located, or has died, become insolvent or been deregistered.

Statutory provisions enabling a third party to sue a liability insurer directly

Section 51 of the ICA

Section 51 enables a third party with a claim against an insured who has died or cannot be found to sue the insured's liability insurer directly. Section 51(1) is in these terms:

'Where:

(a) the insured under a contract of liability insurance is liable in damages to a person (in this section called the third party);

(b) the insured has died or cannot, after reasonable enquiry, be found; and

(c) the contract provides insurance cover in respect of the liability;

the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages. ...'

Section 51 creates a new cause of action in a third party against a liability insurer, not for damages, but for payment of the amount payable by the liability insurer in respect of the insured's liability to the third party.[29]

Does '*the insured*' in s51 refer only to a party to the contract, or does it include a non-party?

Although there are two 'light aircraft crash' first-instance decisions[30] and the views of a number of academics to the contrary, the argument that '*the insured*' in s51 includes >>

A liquidator must generally hold the proceeds of an insolvent company's liability insurance contract for the benefit of those to whom the insolvent company is liable.

a non-party has merit.[31] That is because, among other things:

- the word '*insured*' in an insurance contract or a statutory provision can be a reference to a party or a non-party, depending on the context;[32]
- of the contrast with s45 of the ICA, in which the phrase '*has entered into*' limits the meaning of '*insured*' in that section to a party to the contract.[33] In s51, the phrase '*under a contract of liability insurance*' instead of the phrase '*has entered into*' qualifies the meaning of '*insured*', strongly suggesting that '*insured*' in s51 is intended to apply to anyone described as an insured in the contract, whether or not they are a party to the contract.

The requirement indicated by the words '*is liable in damages to a person*' in s51(1)(a) is not straightforward, because '*liable*' might refer to a fully formed cause of action, or alternatively the subsequent crystallisation of a cause of action in a judgment, arbitration award or settlement. The better view is that the requirement is satisfied if the third party proves in a recovery action against an insurer that it has a judgment or arbitration award on the merits against the insured, or that it would have obtained a judgment on the merits if it sued the insured.[34]

The effect of the section is that, on being sued by the third party, '*the insurer "stands in the shoes of" the insured*'.[35] Accordingly, the insurer can raise any defences the insured could have raised to defeat the claim, including a limitation defence.[36]

Section 601AG of the Corporations Act 2001 (Cth)

Section 601AG enables a third party with a claim against a deregistered company to sue the company's liability insurer directly.

The alternative to suing the insurer directly is for the third party to apply to the court under s601AH(2) to exercise its discretion to reinstate the company,[37] and then sue the reinstated company,[38] leaving it to the company to sort out issues with its liability insurer.

Section 601AG is in these terms:

> '*A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:*
> *(a) the company had a liability to the person; and*
> *(b) the insurance contract covered that liability immediately before deregistration.*'

Like s51(1) of the ICA (see above):

- it creates a new cause of action in the third party against a liability insurer for payment of the amount payable by the liability insurer in respect of the insured's liability to the third party;[39] and
- its effect is that the insurer '*stands in the shoes of*' the deregistered company in its defence of the third party's action, so that the insurer can raise any defences the deregistered company could have raised against the third party, including any limitation defence.[40]

The section is written in the past tense (unlike s51(1) of the ICA, which is written in the present tense). Accordingly, it refers to circumstances that existed immediately before the company was deregistered, both as to the liability the company had to the third party, and to the liability the insurer had to the company.[41]

Like s51(1) of the ICA, the requirement indicated by the words '*had a liability*' in s601AG is not straightforward. The better view is that the requirement is satisfied if the third party proves in the recovery action against the insurer that it:

- has a judgment or arbitration award on the merits against the company; or
- would have obtained a judgment on the merits if it sued the company,

in respect of a cause of action that arose before the company was deregistered.[42]

As to s601AG(b), the third party only has to prove the insurance policy covered the liability immediately before the insured was deregistered, not that the insurer was obliged to indemnify the insured *at that time*.[43]

Compulsory workers' compensation and motor vehicle third party personal injury insurance

Some of the workers' compensation schemes around Australia give workers the right to sue their employer's indemnity insurer directly; for example, s159(2) of the *Workers Compensation Act* 1987 (NSW).

It is a feature of some of the compulsory motor vehicle third party personal injury schemes around Australia that an injured person can sue the motor vehicle owner's or driver's insurer directly in certain circumstances; for example, sub-sections 7(2) and (3) of the *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) (where the driver is dead or the identity of the vehicle cannot be ascertained).

Statutory provisions creating a charge over the proceeds of a liability insurance contract

Section 6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW)[44] creates a statutory charge in favour of a third party with a claim for damages against an insured over monies that are, or might become, payable by a liability insurer to the insured under a liability insurance contract in respect of that claim. It is intended to protect third parties, by preventing an insured from:

> '*collecting his insurance money and just disappearing … [or] going to his insurance company and releasing it from its liability to him on payment to him of a lump sum which he immediately dissipates or makes away with. …*'[45]

A pre-condition for the application of s6, is that the insured against whom the claim is made '*has … entered into a contract of insurance*'. Only the parties to an insurance contract '*enter into it*'.[46] Accordingly, (arguably) unlike s51 of the ICA, a third party cannot avail itself of s6 if the insured is a non-party.

To apply successfully for leave to sue a liability insurer directly, a third party must persuade the court that they have '*an arguable case against the insured, an arguable case against the insurer and that there was reason to believe that the insured would be unable to meet any judgment from his or its own resources, ie there was no "perfectly good common law defendant available"*'.[47]

Leave will normally be refused if the insurer persuades the court that it is entitled to decline liability to indemnify.[48] The operation of s54 is relevant to the grant of leave.[49]

Section 26 of the *Law Reform (Miscellaneous Provisions) Act* (NT) and the combination of ss206 and 207 of the *Civil Law (Wrongs) Act* 2002 (ACT) are similar to s6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW).

Statutory provisions requiring the proceeds of a liability insurance contract to be paid to a third party

Sections 108 and 117 of the *Bankruptcy Act* 1966 (Cth) appear in 'Part VI Administration of Property', 'Division 2 Order of payment of debts'.

Unless the Act otherwise provides, s108 ranks '*all debts proved in a bankruptcy*' equally and provides that '*if the proceeds of the property of the bankrupt are insufficient to meet them in full, they shall be paid proportionately*'.

Section 117 '*otherwise provides*'. In general terms, it:

- vests an insured bankrupt's right to indemnity under a liability insurance contract in the Official Trustee in Bankruptcy;
- requires the Official Trustee in Bankruptcy to hold the proceeds of an insured bankrupt's liability insurance contract for the benefit of a person to whom the insured bankrupt is liable.

Sections 555 and 562 of the *Corporations Act* 2001 (Cth)[50] appear in the Act in 'Part 5.6 Winding up generally', 'Division 6 Proof and ranking of claims', 'Subdivision D Priorities'. Among other things, Subdivision D addresses ranking of claims in a winding up.

Unless the Act otherwise provides, s555 ranks '*all debts and claims proved in a winding up*' equally and provides that '*if the property of the company is insufficient to meet them in full, they must be paid proportionately*'.

Section 562 '*otherwise provides*'. In general terms, it requires a liquidator to hold the proceeds of an insolvent company's liability insurance contract for the benefit of a person to whom the insolvent company is liable.

CONCLUSION

Lord Justice Steyn was not the only one on the Clapham >>

Apply *Trident* and keep track of the legislation that extends the benefit of a contract to third parties, rather than trying to avoid the privity rule.

omnibus to complain about the operation of the privity rule in England when His Honour said in the Court of Appeal in 1995:[51]

> 'The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract. I will not struggle with the point further since nobody seriously asserts the contrary.'

By virtue of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[52] and various statutory assaults on the privity rule at Commonwealth and state (territory) level, Australia was well ahead of England in acting on the injustice of the rule by the time Steyn LJ made that observation.

The tasks for an Australian lawyer today are to apply *Trident* and keep track of the plethora of legislation that extend the benefit of a contract to third parties, rather than spend time thinking about how to circumvent the privity rule. ■

Notes: **1** *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44; (1988) 165 CLR 107, [3] (Brennan J). **2** [1988] HCA 44; (1988) 165 CLR 107. **3** Windeyer J in *Coulls v Bagot's Executor & Trustee Co Ltd* [1967] HCA 3; (1967) 119 CLR 460, [16] and *Olsson v Dyson* [1969] HCA 3; (1969) 120 CLR 365, [21]. **4** *Coulls*, see Note 3, [29]-[34]. In that case, Windeyer J suggested that the party suing should often be awarded specific performance of the promise, because damages would usually be an inadequate remedy. **5** Although the High Court decided *Trident* after the ICA came into effect, it addressed facts that pre-dated the ICA. **6** In this context, a '*stranger*' is someone not a party to a first-party insurance contract, and not intended by the parties to the contract to benefit by it. **7** *New Hampshire Insurance Co v MGN Ltd; Maxwell Communications plc v New Hampshire Insurance Co* [1996] EWCA Civ 838; [1997] LRLR 24; [1996] CLC 1692, 1735. **8** *Barroora Pty Ltd v Provincial Insurance Ltd* (1992) 26 NSWLR 170, 174 (Brownie J). **9** *Morris v Betcke* [2005] NSWCA 308; (2005) 13 ANZ Insurance Cases 61-665, [45] (Hoeben J). **10** *Nicholas v Wesfarmers Curragh Pty Ltd* [2010] QSC 447, [27]-[29] (McMeekin J). **11** As almost all insurance contracts are not under seal, this article makes this assumption. **12** *Dunlop Pneumatic Tyre Company, Ltd v Selfridge and Company, Ltd* [1915] UKHL 1; (1915) AC 847, 853 (Viscount Haldane LC); *Hollis v Vabu Pty Ltd t/as Crisis Couriers* [1999] NSWCA 334, [15] (Sheller JA). Privity and consideration are distinct concepts. **13** *Coulls*, see Note 3, [32] (Barwick CJ); [14] (Windeyer J). **14** *Trident*, see Note 1. **15** *Ibid.* **16** *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No. 9)* [2008] WASC 239; (2008) 225 FLR 1, [3350] (Owen J). **17** *Ibid*, at [3371]. **18** *Jones v Bartlett* [2000] HCA 56; (2000) 205 CLR 166, [146] (Gummow and Hayne JJ). **19** See Note 16 at [3351] – [3361]. **20** *Ibid*, at [3365]. **21** *HL (Qld) Nominees Pty Ltd v Jobera Pty Ltd* [2009] SASC 165, [293] (Layton J). **22** *General Motors Acceptance Corporation Australia v RACQ Insurance Ltd* [2003] QSC 80, [26] (Muir J); *GIO Australia Ltd v P Ward Civil Engineering Pty Ltd* [2000] NSWSC 371, [10]–[11] (Simpson J). **23** *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* [1989] HCA 22; (1989) 166 CLR 606, [25] and [28] (Mason, Dawson, Toohey and Gaudron JJ); *Commonwealth Bank of Australia v Baltica General Insurance Co Ltd* (1992) 28 NSWLR 579; 7 ANZ Insurance Cases 61-133; *CE Health Casualty & General Insurance Ltd v Grey* (1993) 32 NSWLR 25; 7 ANZ Insurance Cases 61-199, 78-276-78,280 (Mahoney JA), 78,283-4 (Clarke JA). **24** *VL Credits Pty Ltd v Switzerland General Insurance Co* [1990] VR 938; (1989) 5 ANZ Insurance Cases 60-936. **25** *Hunt v Watkins; Watkins v GRE (UK) Ltd* [2003] NSWCA 155, [49] (Handley JA); *Quinlan v Safe International Forsakrings AB* [2005] FCA 1362, [32] (Nicholson J). **26** See Note 6. **27** *British Traders' Insurance Co Ltd v Monson* [1964] HCA 24; (1964) 111 CLR 86, [8] (Kitto, Taylor and Owen JJ). **28** [1975] HCA 40; (1994) 180 CLR 173. See also, *Rayner v Preston* (1881) 18 ChD 1. **29** *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19; (2005) 62 NSWLR 148, [19] (Ipp JA). **30** *Ripper v Gatenby* [2002] TASSC 45; (2002) 12 ANZIC 61-532, [22] (Blow J); *Aspioti v Leigh* [2003] NSWSC 1224, [35] (Hulme J). **31** *Morris v Betcke x 2* [2005] NSWCA 308, [58]-[59] (Hoeben J). **32** *New Hampshire Insurance Co v MGN Ltd; Maxwell Communications plc v New Hampshire Insurance Co* [1996] EWCA Civ 838; [1997] LRLR 24; [1996] CLC 1692, 1735; *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd* [2009] HCA 50; (2009) 240 CLR 391. **33** *Zurich*, see Note 32. **34** *Vollstedt v Calibre Enterprises Pty Ltd* (1999) 10 ANZ Ins Cas 61-440; *Webb v Estate of Darryl Arthur Herbert* [2006] WASCA 43, [13] (Wheeler JA); *The New South Wales Solicitors Mutual Indemnity Fund v The Hancock Family Memorial Foundation Ltd [No 2]* [2009] WASCA 146, [23] (McLure JA); *Hutchinson v ASIC* [2001] VSC 465, [25] (Senior Master Mahony). **35** *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19; (2005) 62 NSWLR 148, [34] (Ipp JA). **36** *Ibid.* **37** The discretion is a wide one: *ACCC v ASIC* [2000] NSWSC 316; (2000) 174 ALR 688, [27]-[28] (Austin J). **38** *Pagnon v WorkCover Queensland* [2000] QCA 421, [17] (McPherson JA). **39** See Note 35, at [19]. **40** See Notes 27 to 30. **41** See Note 35, at [20]. **42** See Note 28. **43** *Tzaidas v Child* [2009] NSWSC 465, [44] and [45] (McCallum J). **44** Section 42 of the *Workers' Compensation Act* 1908 (NZ) appears to be the inspiration for s6: *Bailey v New South Wales Medical Defence Union Ltd* [1995] HCA 28; (1995) 184 CLR 399, [83] (Gummow and Haynes JJ). **45** The attorney-general's first reading speech of the *Law Reform (Miscellaneous Provisions) Bill*, NSW, Legislative Assembly, Parliamentary Debates, 5 March 1946, 2nd series, vol. 179 at 2456. **46** *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* [2009] HCA 50, [26] (French CJ, Gummow and Crennan JJ); [39] (Hayne and Heydon JJ); *Morris v Betcke* [2005] NSWCA 308; (2005) 13 ANZ Insurance Cases 61-665, [42] (Hoeben J). **47** *Morris v Betcke* [2005] NSWCA 308; (2005) 13 ANZ Insurance Cases 61-665, [15] (Hoeben J). **48** *Tzaidas v Child* [2004] NSWCA 252; (2004) 208 ALR 651, [23] (Giles JA). **49** See Note 47, at [31]. **50** As do related ss562A (application of proceeds of contracts of reinsurance) and 563 (provisions relating to injury compensation). **51** *Darlington Borough Council v Wiltshier Northern Ltd* [1994] EWCA Civ 6; [1995] 1 WLR 68, 76. Although Steyn LJ did not mention the High Court's decision in *Trident*, its importance was duly acknowledged by Lord Goff in the subsequent judgment of the Privy Council in *The Mahkutai* [1996] AC 650, 664-5. **52** See Note 1.

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