Colin Biggers & Paisley

Insurance Seminar Series.

Joinder of insurers

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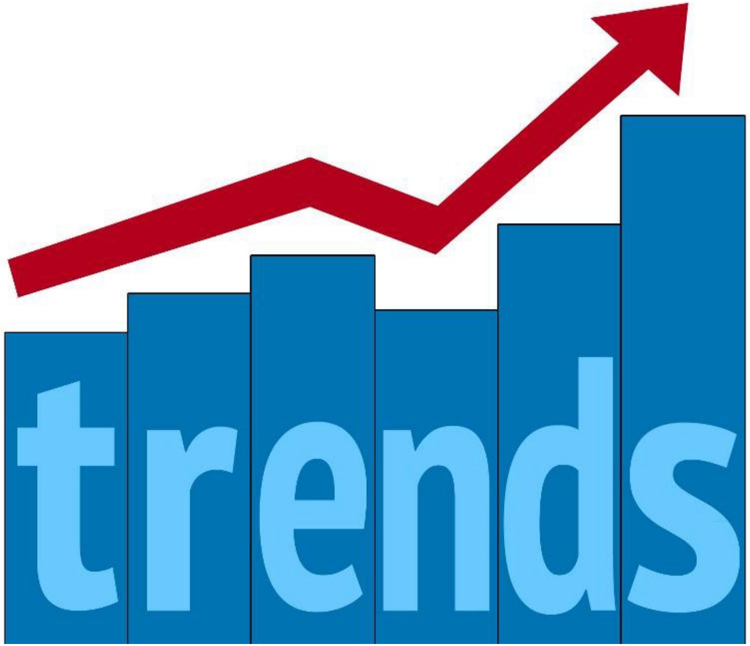
Thursday 19 February 2026

Joinder of Insurers - A trend?

A growing trend in the insurance construction risk space is the joinder of insurers to proceedings directly as defendants (as opposed to being joined via a cross claim).

Why?



Avenues to join insurers

<u>Federal jurisdiction</u>

Rule 9.05(1) of the *Federal Court Rules* 2011 (**Cth**)

<u>NSW only</u>

Section 4 of the *Civil Liability (Third Party Claims Against Insurers) Act* 2017 (**NSW**) (**TPCA**)

<u>State specific</u>

- Rules 6.24(1) and 6.19 of the *Uniform Civil Procedure Rules* 2005 (**NSW**)
- Rule 9.06(b)(ii) of the *Supreme Court (General Civil Procedure) Rules 2015* (**Vic**)
- Rule 69 of the *Uniform Civil Procedure Rules 1999* (**QLD**)
- Rule 220 of the *Court Procedure Rules 2006* (**ACT**)
- Order 18, Rule of the *Rules of the Supreme Court 1971* (**WA**)
- Rule 74 of the *Supreme Court Civil Rules 2006* (**SA**)
- Order 9, Rule 9.06 of the *Supreme Court Rules 1987 (**NT**)*
- Rule 184 of the *Supreme Court Rules 2000* (**TAS**)

Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)

Seeking an order under section 4 of the TPCA is the most common mechanism we see applicants elect in construction related matters in the NSW Supreme Court.

It requires an applicant to establish three elements:

1. that it has an arguable case of liability against the insured;
2. there is an arguable case that the policy will respond to that liability; and
3. there is a real possibility that the insured would not be able to meet any judgment against it.

Resisting joinder under the TPCA

Examples:

- No "claim" made under claims made policy
- Limitation period arguments
- Exclusion clauses
- Poor pleadings

Practical considerations under the TPCA

- What do insurers need to do?
- What defences are available?
- Costs - are they defence costs or coverage costs?

Practical considerations under the TPCA cont.

- Strategy
  - coverage issues
  - cost management strategies
  - experts
  - settlement dynamics

A "justiciable controversy"

- The common law position - *CGU Insurance Ltd v Blakeley* [2016] HCA 2
- Are we seeing a move away from this?
- Are the new lines of authority lowering the practical and legal barriers to insurer joinder?

Alternative means of joinder - The Courts' Broad Discretion

Rule 9.05(1) of the *Federal Court Rules* 2011 (**Cth**)

(1) A party may apply to the Court for an order **that a person be joined as a party** to the proceeding if the person:

…

(b) **is a person**:

…

(ii) whose joinder is necessary to ensure that **each issue in dispute in the proceeding is able to be heard and finally determined**; or

(iii) who **should be joined** as a party in order **to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings**.

Rule 6.24 of the Unform Civil Procedure Rules (NSW)

6.24 Court may join party if joinder proper or necessary(cf SCR Part 8, rule 8(1); DCR Part 7, rule 8(1); LCR Part 6, rule 8(1))

(1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.

Case examples

- *R&B Investments Pty Ltd (Trustee) v* ***Blue Sky*** *Alternative Investments Limited (Administrators Appointed) (in liq)* [2023] FCA 703

- *Matheson Property Group Pty Ltd (Trustee) v* ***Virgin Australia*** *Holdings Limited (No 2)* [2023] FCA 899

- *Wadren Pty Ltd v* ***Probuild*** *Constructions (Aust) Pty Ltd* [2025] VSC 747

Blue Sky

R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) [2023] FCA 703

- **Facts** - securities class action against investment manager. Allegedly overstated fee earning assets under management
- Emphasis on controversy
- Insurers did not oppose
- Alternative orders made:

> *Pursuant to FCR 1.32, unless the Insurer Respondents elect, the obligation of the Insurer Respondents to take any step in the proceedings, including pleading or responding to a pleading, **is suspended** until the conclusion of the initial trial or further order of the Court.*

Virgin

Matheson Property Group Pty Ltd (Trustee) v Virgin Australia Holdings Limited (No 2) [2023] FCA 899

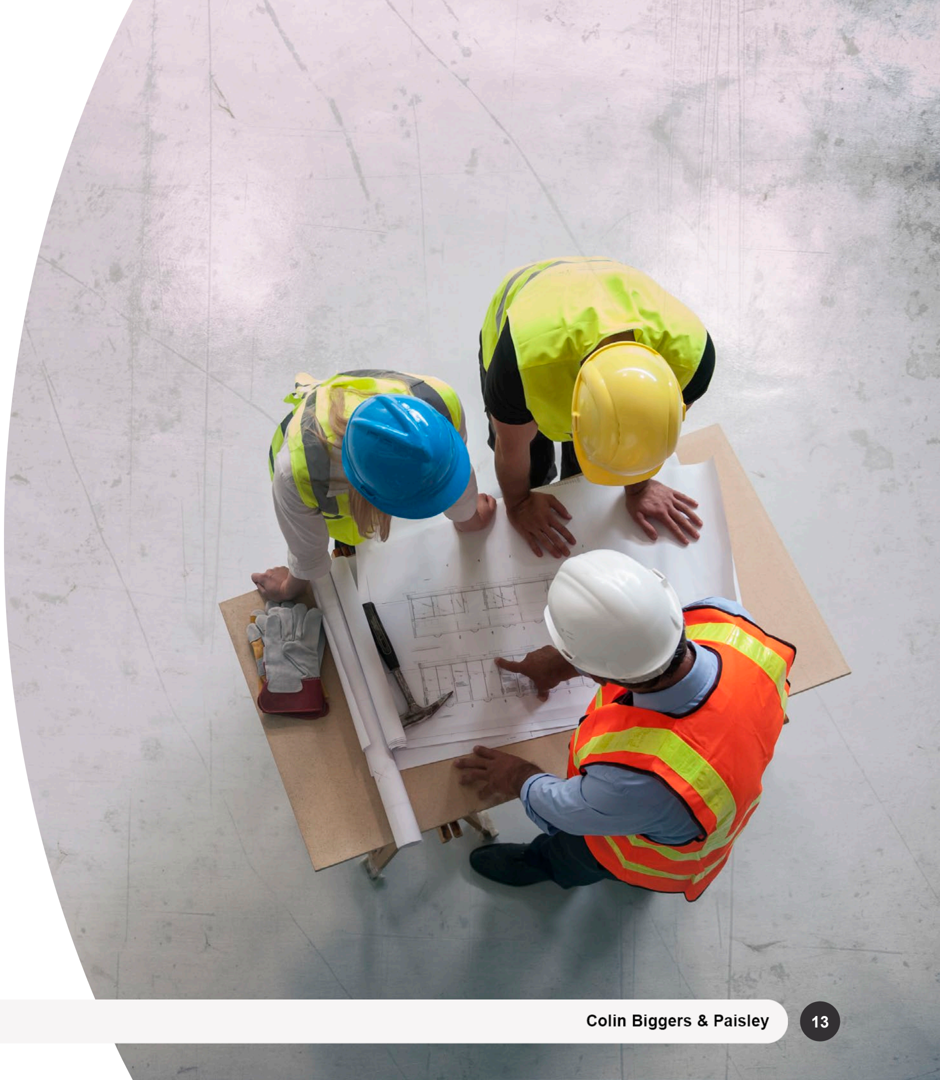
- **Facts** - Virgin Australia issued notes to raise capital to acquire Velocity rewards program. $325m of notes, at $100 each with a fixed term of 5 years at 8% pa
- Important - Virgin Airlines subject to a DOCA which extinguished uninsured claims
- Insurers did not oppose
- Blue Sky orders made

Probuild

Wadren Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2025] VSC 747

- **Facts** - Infrastructure dispute regarding the Pacific Werribee Shopping Centre. Damages claimed exceed $330m

- Focus on discretionary matters:
  - Primary insurers agreed to indemnify Probuild
  - Reservations ≠ denial of liability
  - Primary insurers advancing defence costs and funding the defence
  - Coverage issues resolved in hearing between plaintiffs and excess layer insurers



Impact of increased joinder

- Commercial relevance is elevated
- Resistance based on “prematurity” carries less weight
- Increased litigation
- Increased costs (even with Bluesky/Virgin joinder)
- Increased demand on policies = increased premiums and greater scrutiny of insured contractors
- Pressure to grant cover early
- Lower threshold for “sufficient interest”
- Increased costs (esven with Bluesky/Virgin joinder)
- Coverage costs, not defence costs
- Improper joinder as negotiating tactic

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Questions

Presenters.

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Thank you.

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