Chapter 3

The number of claims

Evidence on the increase in the number of claims

3.1 According to statistics published by APRA, the number of public liability claims increased from 55,000 in 1998 to 88,000 in 2000. While most submitters agreed that there had been an increase in the number of insurance claims, several queried the accuracy of the data upon which such assertions are based. The Australian Plaintiff Lawyers Association maintained that APRA's statistics cannot be relied upon as:

> The data on claims does not identify clear parameters about how a claim should be defined for the purpose of data provision. As such, some insurers classify as claims the mere knowledge of circumstances that may result in a claim, for example, notification to the insurer that an injury has been sustained even though a damages claim may never be brought by the injured person in respect of that incident.[1]

3.2 The Association considered that, in determining whether there has been an increase in the number of claims, it is inappropriate to merely quote gross claim numbers. According to the Association what should be quoted is the ratio of claims to the number of policies. On this basis, and based on APRA's Selected Statistics on the General Insurance Industry for the years ending June 1996 and 2001, the ratio had only risen from 2.64 to 2.71 claims per 100 policies per year.

3.3 Finally, in relation to the increase in the number of claims, the Association pointed out that as Australia's population had increased by two million over the past decade one would expect an increase in litigation numbers.[2]

3.4 Trowbridge Consulting in their March 2002 report stated that the statistics collated and published by APRA on the number of new claims reported each year 'were not sufficiently reliable for inclusion in [their] report.' As for the statistics of new claims reported by members of Insurance Statistics Australia (ISA), Trowbridge Consulting said that 'changing membership of ISA and market share of insurers, together with the absence of exposure data, makes it hard to draw conclusions.

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1 Submission 61, p.15. The Association also referred to the Australian Productivity Commission, Annual Report 2000-2001, which showed that, rather than civil litigation increasing, there had been an average annual decrease of 4% between 1996-97 and 1999-2000.

2 Mr Robert Davis, *Committee Hansard*, 9 July 2002, p. 149.

Indications from this data are that the overall frequency of claims has been fairly flat, with some reduction in 1999 and 2000.' [3]

3.5 In relation to public liability claims made against local councils, Trowbridge Consulting reported that data provided to them, on a confidentiality basis, showed a sharp increase in claims in 1997. Since then, and up until 2001, there had been a continuing upward trend in the number of claims.[4]

3.6 Some submissions from particular industries have stated that their data or surveys showed no increase in the number of claims,[5] while in one submission it was claimed that there had been a reduction in claims.[6]

3.7 The Fire Protection Association of Australia and Fire Contractors Federation advised that the industry which they represent 'have a responsibility to advise insurers of incidents that could have the potential to become a claim. There is considerable evidence that reported incidents which never materialised into claims are being treated by insurers as actual claims'.[7]

3.8 In turning to court records, the same problem about the reliability of data emerged. Trowbridge Consulting, in their May 2002 Report, stated that:

> Many of the relevant Courts have now been able to provide us with the number of civil writs lodged each year sub-divided into several categories. Each court uses a different categorisation of matters and each has emphasised strong limitations as to the accuracy and consistency of the coding over time.[8]

They concluded that:

> Overall…the court statistics appear to support a view that there has been a steady increase in public liability insurance bodily injury claims over the last five to ten years. There is no evidence of an 'explosion of litigation' in recent years.[9]

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3 Trowbridge Consulting, *Public Liability Insurance, analysis for meeting of ministers 27 March 2002*, March 2002, p. 13.

4 Trowbridge Consulting, *Public Liability Insurance, analysis for meeting of ministers 27 March 2002*, March 2002, p. 14.

5 Submission 81, Institute of Engineers Australia, p. 6.

6 Submission 106, National Council of Independent Schools' Associations, pp. 5-6.

7 Submission 147, p. 7.

8 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 55.

9 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 59.

3.9 The Committee has found that the lack of reliable data, including statistics on the number of negligence claims lodged in respect of public liability and professional indemnity, has seriously hampered any detailed analysis of the underlying causes of premium increases. The problem of the availability of reliable statistics on the insurance industry is dealt with at length in chapter 5 of the report.

3.10 The difficulty in producing accurate figures about the number of claims and payments being made is complicated by the number of small claims settled out of court and which may not be recorded. According to some witnesses there has been a definite and marked increase in small claims. Although the payment in each case may be modest, the sheer volume of the claims and the costs associated with managing them could be significant.[10]

3.11 Notwithstanding the shortcomings in claims statistics, the Committee has concluded that there is enough evidence to support a finding that there has been some increase in the number of claims as well as in the ratio of claims to the number of policies and that this has contributed to increases in premiums. The Committee considers that whatever can be done to contain the number of claims, will go some way to addressing rising premiums.

Main underlying causes of the rise in the number of claims

3.12 In the following section, the report deals with the main assumptions about the underlying causes of the rise in the number of claims, which include:

- a general change in attitude toward litigation;
- circumstances that facilitate access to legal services to pursue claims such as advertising, 'no win no fee' arrangements, method of awarding costs, no disincentives to pursue unmeritorious claims; and
- a shift in defining negligence that may well encourage litigation.

General change in attitude toward litigation

3.13 Many submissions and witnesses expressed the view that there now exists in the general community a greater inclination to sue rather than accept damage or loss as a normal part of life, and this has resulted in a higher number of claims. The Committee understands the position taken by the many witnesses who hold the view that Australia is developing into a 'blame' society.

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10 The Report by Mr Dave Finnis for the Insurance Council of Australia asserts that 'it is clear that the key drivers of the growth of public liability insurance costs are an influx of smaller claims at the $20,000 to $50,000 level, combined with a doubling in the proportion of the most serious claims—i.e. those settled for more than $500,000' (Review of the Cumpston Sarjeant Report to the Law Council of Australia, Draft III, p. 2 of 9, http://www.ica.com.au/hotissues/Finnisreport.asp (July 2002); Mr Gregory Nance, Chief Executive, Surf Life Saving Australia, *Committee Hansard*, 8 July 2002, p. 1; Mr David Clark, Legal Officer, Local Government and Shires Association of NSW, *Committee Hansard*, 8 July 2002, p. 16; submission 47, Queensland Outdoor Recreation Federation, p. 7.

3.14 Rightly, the community has an expectation that those who suffer an injury as a result of someone else's negligence will be compensated for that injury. However, there must be a balance in any system of compensation.

3.15 Ensuring the right balance between protecting those who are injured and ensuring that community events and small business are not frustrated by unreasonably high insurance premiums requires that issues of negligence, personal responsibility and levels of compensation be considered. Having said that, however, the Committee at first considers the existing legal framework and whether it encourages or facilitates people taking action for loss or injury because of the negligence of another.

Incentives to litigate

3.16 It was made clear from evidence presented to the Committee that the following matters were considered to encourage people to litigate:

- legal advertising;
- 'no win no fee' arrangements;
- lack of penalties for pursuing unmeritorious claims;
- anticipation/expectation that the insurer will settle; and
- assumption that the courts will take a sympathetic attitude towards a victim—this ties in with the shift in definition of negligence.

Legal advertising including 'no win no fee' arrangements

3.17 Several submissions expressed the view that advertising by lawyers, particularly 'no win no fee' arrangements in acting for clients, has led to a substantial increase in the number of claims and, in some instances, in the number of frivolous claims.[11]

3.18 The Committee notes the comments of the Medical Indemnity Protection Society that the number of claims settled with payment to the claimant had risen from 50% to 60% between 1990 and 2000. They attributed this increase to 'no win no fee' arrangements by plaintiff lawyers. In the Society's view:

> As their own profitability is on the line, those lawyers (who accept clients on a 'no win no fee' basis) now accept only clients who have a reasonably high chance of 'winning.'[12]

3.19 The Australian Plaintiff Lawyers Association disputed the claim that links 'no win no fee' arrangements to increases in insurance claims and premiums. They maintained that if such a claim were valid then increases in the number of claims would have occurred when the arrangements were first introduced in 1994, which they

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11 For example, submission 20, Agricultural Societies Council of NSW Inc.

12 Submission 5, p. 1.

maintain was not the case. In the Association's view, if 'no win no fee' arrangements were to be banned then:

> Legal aid has effectively been removed for civil claims…. Many financially disadvantaged people will simply be unable to obtain legal advice.[13]

3.20 Notwithstanding claims that 'no win no fee' arrangements have resulted in increased numbers of public liability and professional indemnity insurance cases, there is no evidence to support these assertions. Further, there is no evidence to indicate that the majority of claims have been frivolous and without merit.

3.21 The Committee notes that some states have already taken action to restrict advertising by lawyers. While 'no win no fee' arrangements have not been abolished, restrictions have been placed on the advertising of these arrangements in respect of personal injury matters.[14]

Lack of penalties for pursuing unmeritorious claims

3.22 It was claimed that people are not dissuaded from pursuing unmeritorious claims because there are no penalties if they do so. While the Committee has been provided with some examples of unmeritorious claims, both as to the lack of merit of a claim as well as the quantum of damages sought, it is not convinced that there is a lack of penalties. [15]

3.23 The Committee is aware that in Queensland parties must, before a commercial dispute proceeds to court, attempt to resolve the matter by way of mediation. Mr Milton Cockburn, Executive Director, Shopping Centre Council of Australia, advised that the *Civil Liability Act 2002* (NSW) provides penalties for instituting unmeritorious claims. He stated that his organisation would like to see the legislation reflected in other jurisdictions. He went on to say that this legislation is already having an impact. Mr Cundall of the Property Council of Australia advised that a solicitor whose firm specialises in defending corporate occupiers had told him:

> … in the last two months they have had 110 prelitigation conferences—in other words, conferences held before it has even got to the stage of necessarily involving a statement of claim—with plaintiffs and their lawyers because of concerns that lawyers have about proceeding with a claim that might be deemed in the court to be unmeritorious. That, in itself, has been a major improvement. It has prevented the wasting of court time in a number of instances and it has meant that we have been able to achieve speedy settlement, which is what we are looking to do. Acknowledging the fact that

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13 Submission 61, p. 19.

14 For example, s.66(1) of the *Personal Injuries Proceedings Act 2002* (Queensland) prohibits advertising personal injury services on a 'no win, no fee' or other speculative basis; a similar restriction is provided for in clause 18 of the Civil Liability Bill, 2002 (WA) and clause 68B of the *Legal Profession Amendment (Advertising) Regulation 2002* (NSW).

15 For example, submission 18, Surf Life Saving Australia Limited, p. 2.

> some of the claims that we get against us are going to be genuine and that high payouts may well be justified, we want to deal with them quickly.[16]

3.24 The Committee notes that under the *Civil Liability Act* 2002 (NSW) a claimant may be ordered to meet the costs of a defendant after an offer of compromise has been made which is subsequently found to have been reasonable. Costs can also be ordered against a claimant's or defendant's solicitor or barrister where they act in a matter that is found not to have had reasonable prospects of success.[17]

3.25 While the Committee considers the main disincentive to pursuing unmeritorious claims is the award of legal costs against an unsuccessful plaintiff, it sees considerable merit in the recent New South Wales legislation which places more accountability not only on the solicitor or barrister of a claimant but also on a defendant's solicitor or barrister by requiring them to certify that a claim or defence to a claim has reasonable prospects of succeeding.

3.26 In relation to the claim that costs are not always recovered when a claim has been successfully defended, the Committee has not been provided with any data as to the level of non-recovery. It is the Committee's view that this data is something that insurance companies would have, since the amount of costs not recovered would be considered by companies to be a bad debt, to be possibly written-off.

3.27 It has been claimed that many unmeritorious claims are conceded by insurance companies or the insured themselves, because the costs involved in defending them would be greater than the damages being sought.[18] In the absence of any supporting and justifiable evidence on the question of liability in such cases, it is not possible to say if, or to what extent, unmeritorious settlements impact on claims numbers. However, the Committee believes that the approach taken by New South Wales, requiring certification by solicitor or barrister that a claim or defence has reasonable prospects of succeeding, will considerably reduce, if not eliminate, unmeritorious claims or defences.

3.28 As well as the measures taken by New South Wales to discourage unmeritorious or frivolous claims, the Committee notes that the Queensland Government has introduced legislation requiring parties to a claim to take steps to resolve the matter before court proceedings can be commenced. These steps include, among other matters, requiring a claimant to give preliminary notice of a claim before court proceedings can be commenced, requiring a respondent to take active steps to try to resolve a claim, full exchange of material and compulsory conferencing.[19]

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16 *Committee Hansard*, 9 August 2002, p. 404.

17 *Civil Liability Act 2002* (NSW), Schedule 2 Amendment of Acts, 2.2 *Legal Profession Act 1987* No 109.

18 Mr D. Clark (Local Government and Shires Association of New South Wales), *Committee Hansard*, 8 July 2002, p. 14; submission 47, Queensland Outdoor Recreation Federation, p. 7.

19 *Personal Injuries Proceedings Act 2002* (Qld).

3.29 The Committee fully supports the actions being taken by the states to put into place procedures for the speedy resolution of claims. However, it believes that a national uniform approach is required if maximum cost savings are to be achieved in the administration and processing of claims. The Committee believes that the Commonwealth should take the lead in promoting uniformity in this area.

Small claims

3.30 The Committee earlier in its report referred to the increase in the number of small claims. Some witnesses have suggested that small claims should not be allowed to proceed and that injured parties in such matters should not be compensated. While New South Wales has taken steps to restrict access to damages for non-economic loss below a certain level of incapacity, no state or territory has introduced or expressed an intention of introducing legislation to totally deny claims which might be termed ‘small claims’. (See chapter 4, paragraph 4.11 for reference to thresholds)

3.31 Some witnesses have suggested that to require a threshold to be met before a claim for damages can be commenced would merely result in the threshold amount being claimed as a minimum amount in all claims.

3.32 Several submissions and witnesses expressed the view that alternative procedures needed to be explored on better ways to deal with matters involving small claims for damages. It was suggested that such matters should be able to be dealt with quickly, without the need for them to go through normal court procedures.[20] Examples of possible alternative procedures included a claimant being required to give notice of their claim before court proceedings can be commenced. This would allow an insurer to investigate the claim and possibly settle it either through direct negotiations or through mediation. This should result in a reduction in both legal and court costs.

3.33 Although small claims are not necessarily unmeritorious or frivolous some of the measures referred to above to prevent such claims may also impact on the people pursuing small claims.

Anticipation/expectation that the insurer will settle

3.34 It was alleged that an expectation by claimants that an insurer will settle rather than defend a claim is one of the causes for the increase in claims numbers. The Committee considers that it is impossible to say whether such a expectation exists. Even if this is the case then the only party who can reverse this expectation is the insurance company.

The shift in defining negligence

3.35 Clearly, a number of witnesses held the view that, at the moment:

- undeserving cases are being settled in favour of the plaintiff; and

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20 Mr P. Cundall (Property Council of Australia), *Committee Hansard*, 9 August 2002, p. 398.

- settlements are generous.[21]

3.36 In their Report of May 2002, Trowbridge Consulting asserted that:

> We are satisfied that the evidence indicates a gradual 'drift' or 'stretching' of the interpretation of negligence over several decades so that there are cases succeeding today that would not have succeeded at times in the past. We note there is some dispute over this conclusion, and there is also evidence that recent High Court decisions may have stopped or reversed this trend.[22]

3.37 In April this year, Justice Spigelman, Chief Justice of the NSW Supreme Court, in a speech to the Judicial Conference of Australia said:

> From the 1960s to the 1990s, a long-term trend of judicial decision making can be discerned by which liability and damages expanded.
>
> However, that trend has, in recent years, been decisively stopped and reversed.[23]

3.38 In its submission the Law Council of Australia, in commenting on whether the test of negligence had become too easy, stated:

> The High Court in recent times has shown an increased willingness to deny compensation to claimants. Justice McHugh of the High Court, on 13 March 2002, said during oral argument in a recent case that: 'I thought the imperial march of negligence has just about come to an end and it was rather in retreat'.
>
> A careful review of recent cases demonstrates this trend. Australia's leading independent authority on negligence law, Professor Harold Luntz of the University of Melbourne, has surveyed the decisions of the High Court in personal injury matters from 1987 to 2000. According to this survey, in 1987, claimants won in four out of every five personal injury cases in the High Court, while in 2000, defendants won five out of every six such cases. This is a clear indication that the negligence test has moved in favour of the defendant.[24]

3.39 The Committee notes these comments. It is not concerned, however, with whether negligence is in retreat but rather with the definition of what constitutes negligence and just compensation and how it varies over time.

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21 Submission 20, Agricultural Societies Council of NSW Inc, p. 2.

22 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. iv.

23 Edited text of speech by Chief Justice Spigelman, to the Judicial Conference of Australia, 27 April 2002, in Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 114.

24 Submission 132, Law Council of Australia, pp. 26-27.

3.40 The Law Council of Australia suggests that there may be widespread misunderstanding in relation to the fault element of the tort of negligence and the basis over which damages are calculated. It argued that:

> If these principles were more widely understood, and if there was a greater understanding of the legal process in relation to legal claims, then some of the criticism of the current system may be seen in a different light.[25]

3.41 Mr Abbott from the Law Council of Australia made the sensible suggestion that the problems caused by differing interpretations could be addressed by legislative statements clarifying what the law is. He told the Committee:

> There are problems of liability and there are problems of assessment of damage. We would suggest that the liability problems could be fixed by a restatement of the practical foreseeability test and a restatement of the fact that people should not have to guard against obvious risks and put up signs to warn against obvious risks.[26]

3.42 The Committee would welcome such a measure as a first step toward attempting to reconcile public perceptions and expectations with court judgements.

3.43 Indeed, the panel of experts appointed specifically to review the law of negligence also identified the need for the fundamental principles of the law to be restated in order to make them more widely known and understood. It stated that:

> In the course of our deliberations we also formed the view that, in some areas, perceived problems are the result of the way courts apply legal rules and principles that are open to various interpretations. In such cases, we have recommended that the law be restated in such a way as to give courts more guidance about how to apply relevant rules and principles in individual cases.[27]

3.44 The panel put forward a number of recommendations that would help clarify and provide for greater consistency in interpreting matters such as foreseeability, standard of care, duty to inform, and causation. It also discussed and made recommendations for establishing a test for contributory negligence.[28]

Steps taken by governments to address increases in public liability insurance premiums

3.45 A number of states have recently introduced legislation or announced proposals to introduce reforms intended to provide a degree of certainty to court

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25 Submission 132, Law Council of Australia, attachment, letter to Treasury 20 March 2002.

26 *Committee Hansard*, 8 August 2002, p. 274.

27 *Review of the Law of Negligence: Final Report,* September 2002, pp. 27, 44.

28 *Review of the Law of Negligence: Final Report,* September 2002, for example, recommendations 4—7, 14–15, 28–32, pp. 4–14.

decisions regarding negligence and the amount of damages with the aim of containing the number and size of claims. New South Wales, Queensland and South Australia have enacted legislation while Western Australia and Victoria have introduced legislation to limit the amount of damages that can be awarded in respect of economic as well as non-economic loss. The ACT's *Civil Law (Wrongs) Act 2002* caps costs in certain personal injury claims and protects volunteers and good samaritans. The Northern Territory expects to introduce a Personal Injuries (Liabilities and Damages) Bill in October.[29]

3.46 The Committee notes the legislative steps taken by the New South Wales, Queensland and South Australian governments to limit the circumstances where negligence may be claimed as well as limiting the amount of damages that can be awarded. For example, under the *Civil Liability Act 2002* (NSW) no damages may be awarded to a claimant for non-economic loss (general damages) unless the severity of the non-economic loss is at least 15% of a most extreme case. Under the *Personal Injuries Proceedings Act 2002* (Queensland) a court is prohibited from awarding exemplary, punitive or aggravated damages. Further details of these measures are set out in Appendix 5.

3.47 The Committee suggests that the Commonwealth take a leading role in ensuring that other state and territory governments implement similar legislation to ensure uniformity throughout Australia.

3.48 The Committee notes the Commonwealth Government's actions in proposing an amendment to the *Trade Practices Act 1974* to permit self assumption of risk by individuals who choose to participate in inherently risky activities[30] and introducing legislation to exempt from income tax certain annuities and lump sums provided to an injured party under structured settlement arrangements.[31]

3.49 In addition to these initiatives, the Committee notes other Commonwealth initiatives announced by the Minister for Revenue and the Assistant Treasurer, Senator the Hon Helen Coonan, following the Ministerial Meeting on Public Liability on 30 May 2002 to address issues associated with the availability and affordability of public liability insurance. Included amongst these measures was the setting up of a panel to review the law of negligence.[32]

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29 *Civil Liability Act 2002* (NSW); *Personal Injuries Proceedings Act 2002* (Qld); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA); Civil Liability Bill 2002 (WA); Wrongs and Other Acts (Public Liability Insurance Reform) Bill (Vic); *Civil Law (Wrongs) Act 2002* (ACT). Joint Communique, Ministerial Meeting on Public Liability Insurance, 2 October 2002.

30 Trade Practices Amendment (Liability for Recreational Services) Bill 2002.

31 Taxation Laws Amendment (Structure Settlements) Bill 2002.

32 Senator the Hon Helen Coonan, Minister for Revenue and the Assistant Treasurer, press release, *Liability Meeting Makes Significant Progress,* 30 May 2002 (C64/02), http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/064.asp.

3.50 The Minister announced the composition of the panel and its terms of reference on 2 July 2002.[33]

3.51 The Law Council of Australia criticised the review of negligence process. Its President, Mr Tony Abbott, in a press release on 26 July 2002 said:

> The Law Council was sceptical that the Review Panel had been given a reporting time frame or Terms of Reference which would enable it to recommend fair and workable proposals to change the law.

He went on to say that:

> Lawyers recognise that the community requires a fair, workable and affordable way to deal with personal injuries. But governments have asked that the entire law of negligence developed over many decades be reviewed in two months under Terms of Reference which seem to pre-determine the conclusion irrespective of the facts.
>
> We strongly oppose that the rights of the injured should be stripped to prop-up the bottom line of insurance companies.[34]

3.52 The Committee welcomed the establishment of this panel of experts (the Panel). At first glance, however, the terms of reference seemed to focus on public liability. Indeed, some witnesses expressed concern that the composition of the panel suggested a leaning towards this particular aspect of liability. Although the principles underpinning tort law apply to both public liability and professional indemnity, the Committee underlines the point that professional indemnity is also of major concern in the community and should be covered by the panel.

3.53 The release of the final report by the Panel confirmed the Committee's fear that professional liability for economic loss would not receive adequate attention.

3.54 In putting forward its proposed legislation, the Panel stated that it:

> should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.[35]

3.55 The Committee notes that the term 'personal injury' includes—any disease; any impairment of a person's physical or mental condition; and pre-natal injury. Clearly the Panel, in accordance with its terms of reference, was concerned only with

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33 Senator the Hon Helen Coonan, Minister for Revenue and the Assistant Treasurer, press release, *Minister Announces Review Panel,* 2 July 2002 (C76/02), http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/076.asp.

34 Law Council of Australia, media release, *Law Council Announces its Public Liability Experts*, 26 July 2002.

35 *Review of the Law of Negligence: Final Report,* September 2002, p. 36.

physical harm as distinct from pure economic loss. This approach effectively blocked professional indemnity in relation to economic loss from the Panel's purview.

3.56 Having said that, however, the Committee sees great value in the review setting down basic principles that could have application in regard to professional indemnity. For example the following recommendations contained in the review of the law of negligence could have broader application especially in the area of professional indemnity:

- *Recommendation 4* which proposes that in cases involving an allegation of negligence on the part of a person holding himself or herself out as possessing a particular skill, the standard of reasonable care should be determined by reference to—
  - what could reasonably be expected of a person professing that skill,
  - the relevant circumstances at the date of the alleged negligence and not a later date; and
- *Recommendation 24* which proposes a statute of limitation of 3 years which commences on the date of discoverability.[36]

Joint and several liability v proportionate liability

3.57 Although this chapter is concerned primarily with the increase in litigation, a concern was raised by a number of witnesses that dealt with an issue related to tort law, namely, joint and several liability.[37] The Committee notes that while an Inquiry into the Law of Joint and Several Liability was conducted in 1994/95 nothing was resolved.

3.58 Under joint and several liability, where the acts or omissions of a number of parties have each contributed to a plaintiff's injury or loss, the plaintiff may recover the full amount of any damages that are awarded from any one party. Under proportionate liability, however, each defendant is only required to contribute to the damages awarded in proportion to his or her degree of liability as decided by the court.

3.59 While it is possible for a defendant who has been called upon to bear the full extent of a judgement to seek to recover from the other defendants who have contributed to a plaintiff's injury or loss, this is not always possible due to the insolvency or lack of assets of the other parties.

3.60 The view was expressed that defendants who have an obvious source of assets, including insurance cover, are being called upon to bear a disproportionate share of the burden of damages rather than an equitable share.

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36 *Review of the Law of Negligence: Final Report,* September 2002, pp. 93–4.

37 Submission 55, Australian Council of Professions Ltd, p. 15; submission 95, The Institute of Chartered Accountants in Australia, p. 11.

3.61 The Committee notes that the Government, in the latest paper in relation to its Corporate Law Economic Reform Program, stated that it would be seeking 'the agreement of the states to introduce proportionate liability' in relation to actions for negligence causing property damage or purely economic loss instead of the present rule of joint and several liability.[38]

3.62 The Committee is particularly disappointed that the Panel in its discussion of joint and several liability did not include economic loss. In its review, the Panel acknowledged that many law reform bodies, both in Australia and overseas, have considered the question of whether solidary liability should be replaced by a system of proportionate liability. It stated:

> Some have concluded that in cases of pure economic loss, that is loss not consequent upon personal injury or death, proportionate liability should be introduced…The Panel is not aware of any law reform report that has recommended the introduction of a system of proportionate liability in relation to claims for personal injury or death.[39]

3.63 The Panel, however, explained that in light of its terms of reference, which were limited to personal injury and death, it had decided not to consider or assess options for the introduction of a regime of proportionate liability in relation to property damage and pure economic loss, and hence made no comment or recommendation in that respect.[40]

3.64 The Committee believes this matter of joint and several liability warrants full and further investigation with a view to resolving the issue.

Waiver and disclaimer legislation

3.65 Several submissions suggested that legislation should be introduced to preclude a person from taking legal proceedings based on negligence where, after being made fully aware of the risks involved in participating in a particular activity, they sign a waiver or disclaimer in relation to liability. Other submissions suggested that where a person undertakes an activity that has an inherent risk attached to it, they should be regarded as having voluntarily accepted the risk and therefore precluded from taking legal proceedings for any injuries suffered as a result of those activities.

3.66 Under the recently introduced Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (TPA Bill) a corporation, in entering into a contract for the supply of recreational services, may contract out of the implied warranties provided for under section 74 of the *Trade Practices Act 1974*. These implied warranties provide that the services must be rendered with due care and skill and that

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38 CLERP Paper No 9: Proposals for Reform – Corporate Disclosure, p. 96 (proposal 13).

39 *Review of the Law of Negligence: Final Report,* September 2002, p. 175.

40 *Review of the Law of Negligence: Final Report,* September 2002, p. 173.

any materials supplied in connection with those services must be reasonably fit for the purpose for which they are supplied.

3.67 At this stage the Committee is not in a position to form any conclusive views about the likely impact the proposed legislation will have on insurance claims. It was introduced into the House of Representatives on 27 June 2002, is yet to be debated in the Senate, and may well be subject to amendment. The Committee, however, makes some preliminary observations and suggestions.

3.68 While the Committee supports the general policy behind the TPA Bill, it believes the fundamental principle, that people who suffer injury or damage as a result of another's negligence are entitled to be compensated for any loss suffered, should be maintained. As the Bill now stands, the Committee raises the following concerns:

(a) the focus is on surrendering a right without reference to the minimisation of risk;

(b) it provides the possibility of total immunity from liability even in circumstances of gross negligence by the supplier of recreational services; and

(c) the provisions only cover recreational services and do not cover other services that corporations may provide to consumers.

3.69 In turning to the importance of risk minimisation, the Committee notes that Trowbridge Consulting suggested that:

> A national accreditation committee could be established for the purpose (as suggested by the Law Council of Australia) which would provide accreditation to industry-specific organisations or operators on proof of appropriate, industry-specific:
>
> - Risk management framework and standards
> - Code of conduct
> - Monitoring and inspection processes
> - Disciplinary procedures for dealing with non-compliance.[41]

3.70 The Committee further notes that Trowbridge Consulting proposed that 'protection from liability should not be absolute' but that liability should still apply in cases of 'gross negligence'.[42]

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41 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 36.

42 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, pp. 4-6.

3.71 The Committee agrees with this proposal. It considers that even if risk management guidelines and standards are introduced for recreational service providers, there will still be occasions where the service provider, even if it is accredited, deliberately ignores them, resulting in a person being injured. It is the Committee's view that, in these circumstances, the protection offered by proposed section 68B of the TPA Bill should not apply.

3.72 To ensure that people who sign waivers are not subject to unacceptable risks of injury by the providers becoming careless about the level of care and safety they should be providing to consumers, the Committee considers that some form of monitoring must be established. This could be achieved by requiring a service provider to have accreditation before they can claim the protection from civil litigation under proposed section 68B of the TPA Bill. This would involve the states and territories introducing complementary legislation.

3.73 The Panel reviewing the law of negligence looked at the interaction between the TPA and the common law principles of negligence and made a number of recommendations.[43] This work provides additional material that should better inform the debate on any proposed changes to the TPA.

Recommendation 1

The Committee recommends that the Trade Practices Amendment (Liability for Recreational Services) Bill 2002 proceed through Parliament to facilitate free and open debate and to be subject to close scrutiny.

Further, that the Government consider:

- **amending proposed section 68B of the TPA Bill to make it clear that protection from liability does not apply to those service providers who are found to have been grossly negligent;**
- **establishing a national accreditation program for providers of recreational services—accreditation to be subject to a recreational service provider complying with specified risk management procedures and standards; and**
- **amending section 68B to provide that protection from civil litigation is conditional on the recreational service provider being accredited.**

3.74 The proposed amendment to the *Trade Practices Act 1974* is likely to have limited effect on public liability and professional indemnity insurance premiums unless a national approach is adopted, as most claims for damages are litigated under state and territory jurisdiction based on common law negligence rather than a breach of the Trade Practices Act. To achieve the maximum reduction in public liability and professional indemnity claims all state and territory governments would have to enact complementary legislation to deal with suppliers of these services by unincorporated

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43 *Review of the Law of Negligence, Final Report,* September 2002, pp. 71–84.

bodies, as the Commonwealth does not have the power to legislate in respect of such bodies.

3.75 The Committee notes that the governments of South Australia and Victoria have already introduced complementary legislation to the TPA Bill[44] while New South Wales and Queensland have indicated their intention to do so. However, the Committee considers that unless a national approach is adopted insurance companies are unlikely to reduce public liability insurance premiums, as the insurance industry is likely to set premiums on a whole of industry basis rather than a state or territory basis. The Committee considers that the Commonwealth needs to take the lead in ensuring that uniform waiver and disclaimer legislation is introduced nationwide.[45]

Amendment to statutes of limitations

3.76 There are numerous statutes of limitation periods that apply throughout the various jurisdictions in Australia. It is clear from the comments made in submissions and in evidence before the Committee that the matter of different limitation periods is of concern. Some professional bodies claimed that it is unclear when professional liability for a particular act or omission ceases, while for insurance companies it is claimed that they have difficulty in dealing with 'long tail' matters.

3.77 The Institution of Engineers, Australia (IEAust) claimed that, under existing law, the limitation period begins from the time the damage or fault becomes apparent or should have become apparent. This puts pressure on practitioners to adopt an unduly conservative approach to the delivery of products and services, which has an adverse impact on both the initial and life cycle costs of the product and services. They also claimed there is less innovation in product and service design in an environment where professionals are placed in high and prolonged risk situations.[46]

3.78 It has been suggested that one way of overcoming this problem is to amend the various Commonwealth, state and territory statutes of limitation to ensure a uniform time period in which civil liability proceedings must be commenced. As for when the time period should commence, IEAust advised that a survey of its members in 2001 revealed that 76% considered the defined period should start from the point at which delivery of the professional service is completed while 19% considered that it should start when the end product has been completed.

3.79 The Committee notes that in the *Review of the Law of Negligence*, the Panel of Eminent Persons (the Panel) stated that:

> 6.3 A workable limitation system needs to provide fairness to both plaintiffs and defendants. Plaintiffs need sufficient time to appreciate that

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44 Adventure Activities Protection Bill (Vic); Recreational Services (Limitation of Liability) Bill 2002 (SA).

45 *Review of the Law of Negligence: Final Report,* September 2002, Appendix A.

46 Submission 81, p. 13.

> they have claims, to investigate their claims and to commence proceedings…A limitation system must be sufficiently flexible to cope fairly, not only with patent damage that is suffered immediately or shortly after the occurrence of a wrongful act, but with latent damage that can only be detected years after the relevant event…
>
> 6.5 Limitation rules should, as far as possible, be of general application, and undue complexity should be avoided.[47]

3.80 The Panel went on to discuss the issues that should be evaluated in an appropriate limitation system.[48] The Panel considered that, subject to certain qualifications, a limitation period of three years from the time the injury or damage becomes apparent should apply to all claims.

3.81 While the Committee does not have a particular preference for a specific time period in which claims must be made, it believes that the Panel's proposal is reasonable. It further believes that it is in the interest of the community, professional practitioners and insurers that any time limit should be of general application nationwide.

Recommendation 2

The Committee recommends that the Commonwealth take the lead in ensuring nationwide uniformity in the various statutes of limitation.

Landholder protection legislation

3.82 The Queensland Outdoor Recreation Federation submitted that statutory protection from liability should be provided to landowners whose land is used specifically for recreational purposes. They advised that such legislation has already been enacted in several overseas countries, including the UK, USA, Canada, Republic of Ireland, Germany, Norway and Sweden.[49]

3.83 While it may be said that similar legislation in Australia would have an impact on certain adventure tourism operators and community organisations by reducing public liability premiums, it is not possible to say to what extent premiums would be reduced, in the absence of statistics. Any move to enact similar legislation in Australia would require Commonwealth, state and territory legislation.

3.84 In light of the Commonwealth's intention to grant protection to recreational services providers from alleged breaches of the *Trade Practices Act 1974* by the TPA Bill, the Committee considers that the landholder whose property is being used to conduct recreational activities should be similarly protected. If this does not occur

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47 *Review of the Law of Negligence: Final Report,* September 2002, p. 86.

48 *Review of the Law of Negligence: Final Report,* September 2002, p. 86ff.

49 Submission 47, p. 20.

there is the possibility that action could be taken against the landholder instead of the operator of the recreational activity.

Recommendation 3

The Committee recommends that the Commonwealth:

- **consider acting to protect landholders whose land may be used to conduct recreational services; and**
- **work with the states and territories to ensure that legislation is enacted to protect landholders.**

Immunity from claims of negligence for volunteer and not-for-profit organisations and their workers

3.85 Up to now, this chapter has dealt with measures to reduce the number of claims. It now looks at the problems facing volunteer and not-for-profit organisations, and deals not only with how to reduce the number of claims against them but also with protecting volunteers as well as their organisations from litigation.

3.86 Several submitters and witnesses advised the Committee that the level of services provided by their volunteer or not-for-profit organisations is being affected by underwriters either refusing public liability or professional indemnity insurance or restricting the level of cover they are prepared to offer. To overcome these problems, they have recommended that statutory protection against civil liability claims for negligence should be provided to volunteers of community and not-for-profit organisations.

3.87 The Committee notes that South Australia has had legislation to protect volunteers since 2001. Under the *Volunteers Protection Act 2001* volunteers are protected from personal civil liability ‘for an act or omission done or made in good faith and without recklessness in the course of carrying out community work for a community organisation’. However, the Act does not relieve the organisation from liability: the liability that would have attached to the volunteer attaches to the organisation, analogously to the vicarious liability of an employer for actions of an employee under common law.[50]

3.88 Most other states and territories have recently introduced similar legislation, or plan to.[51] The protection for volunteers has conditions, which are not worded identically in all these acts and bills, but have these common themes:

- the volunteer must be acting in good faith;
- the volunteer must being acting within the scope of the organisation’s authorised activities and not contrary to instructions; and

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50 *Volunteers Protection Act 2001* (SA), s.4,5.

51 Joint Communique, Ministerial Meeting on Public Liability Insurance, 2 October 2002.

- the volunteer must not be under the influence of alcohol or drugs.

3.89 While such legislation provides protection to volunteers against being sued, it is unlikely that this would have any impact on public liability insurance claims or premiums given that the organisation continues to be liable. Prior to the legislation, most volunteer organisations' public liability and professional indemnity insurance policies would have covered actions by their individual volunteers on the basis of vicarious liability. If insurance premiums for community and volunteer organisations are to be reduced then protection from litigation needs to be granted to both the volunteers and the organisations. Only with such protection can the number of claims against these organisations be curtailed resulting in an expected fall in insurance premiums.

3.90 The Committee considers that every effort needs to be made to ensure that the level of services that volunteer and not-for-profit organisations make to the Australian community is maintained and encouraged. If services are being affected by organisations being unable to obtain insurance cover or by underwriters restricting the level of cover they are prepared to offer, then government intervention may be required to address these issues.

3.91 The Committee notes that the Panel in their *Review of the Law of Negligence Report* recommended that liability for a not-for-profit organisation (NPO) should not be granted special protection from claims of negligence. They stated that:

> offering special protection to NPOs would not be consistent with our task of developing principled options for reform of the law. No principle has been suggested to the Panel, nor has the Panel been able to discern any principle, that could support granting to NPOs a general exemption from, or limitations of, liability. On the contrary, all the arguments that support imposing liability (notably, the value of compensating injured persons, of providing incentives to take care, and of satisfying the demands of fairness as between injured persons and injurers) apply as strongly to NPOs as to for-profit organisations.[52]

3.92 The Panel did, however, recommend that, in respect of recreational activities:

> The provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of materialisation of an obvious risk.
>
> (a) An obvious risk is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant.
>
> (b) Obvious risks include risks that are patent or matters of common knowledge.

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52 *Review of the Law of Negligence: Final Report,* September 2002, p. 60-61

(c) A risk may be obvious even though it is of low probability.[53]

3.93 The Panel went on to recommend that 'recreational activity' be defined as 'an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk'.[54]

3.94 In their report Trowbridge Consulting proposed that:

> A3.1 Eligible not-for-profit organisations (NFPs) are exempt from a common law damages claim for death or personal injury unless they have been grossly negligent.
>
> A3.2 The exemption does not extend to professional liability, such as for medical treatment or legal advice.[55]

3.95 They went on to suggest the following possible approaches to deal with the problem:

> A Government indemnity for eligible NFPs (in effect Government becoming the insurer with no premium charge); or
>
> Governments subsidising the premiums payable by NFPs.[56]

3.96 The Committee is not in a position to make an informed comment on either the recommendations of the Panel or on the suggestions of Trowbridge Consulting. The Committee considers that comprehensive research and intense consultation would have to precede any constructive debate on matters such as government indemnity or subsidisation of premiums and quite detailed schemes would have to be formulated before serious assessment of their merit could take place.

Recommendation 4

The Committee recommends that Commonwealth, state and territory governments form a working group to examine how best to give protection to volunteer and not-for-profit organisations and their workers from civil action for damages based on negligence.

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53 *Review of the Law of Negligence: Final Report,* September 2002, p. 64.

54 *Review of the Law of Negligence: Final Report,* September 2002, p. 65.

55 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 7.

56 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 9.