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SENATE ECONOMICS REFERENCES COMMITTEE

SUPPLEMENTARY REPORT INTO THE NATIONAL INSURANCE CRISIS

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THE NATIONAL INSURANCE CRISIS

Causes, Effects and Possible Solutions regarding Public Liability Insurance and Professional Indemnity

AUSTRALIAN DEMOCRATS EXECUTIVE SUMMARY

The following paper outlines what I see as the real causes of the current "insurance crisis", what have been some of the state and federal government solutions so far and what reforms might bring about genuine outcomes for the community.

While state and federal governments have focused on tort law reform in their responses to rising insurance premiums, other cost drivers such as September 11, the HIH collapse, the cyclical nature of the industry, the cost of reinsurance, poor management and prudential monitoring have not been addressed.

State governments across the country have enacted or are in the process of enacting legislation that severely limits an individuals right to sue as well as limit their entitlement to damages. This assumption that there is a correlation between tort reform and the cost of insurance was proved incorrect in a recent study conducted in the United States and in fact, the USA experience showed that in states that had little or no tort reform and states where large-scale tort law reform took place, there was no difference in the cost of insurance.

A solution to the present and very public concern about the affordability and availability of public liability and professional indemnity insurance requires a holistic approach and a national approach. While state and federal governments have tended to focus on tort law, this approach creates more problems and questions than it answers.

For example, what answers does tort law reform provide for those who are seriously injured as a result of another's negligence? How does tort law reform ensure that the sick and injured will be cared for in the long term and appropriately compensated? How does tort law reform encourage individuals, businesses and service providers to take greater care in preventing accidents? How does tort law reform ensure that businesses and organisations can get insurance cover when no insurer will provide a policy? And how does tort law reform help prevent corporate collapse of insurance providers?

Notwithstanding that a swing to the 'soft cycle' of the insurance market might bring about favourable insurance outcomes, the following measures would provide for greater care and confidence being to given those who are sick or injured, providers of recreational or professional services and the community at large.

- State and federal governments should provide emergency funding for providers of essential services to help them meet their insurance needs in the short term.

- Sporting groups, community organisations et cetera should be encouraged to undertake group buying arrangements so that cost savings can be made through bulk purchasing of insurance policies.
- An extensive risk management campaign must be an integral part of any solution to the insurance crisis to not only minimise the occurrence of accidents and injuries but to also control the type of risk for which insurance cover is being sought.
- Encouraging individuals to take responsibility for their actions by expanding the use of waiver clauses is desirable to an extent. However, any proposal to amend section 68 of the *Trade Practices Act 1974* will need to provide sufficient safeguards for consumers to ensure that their welfare is not being compromised and that recreational service providers are encouraged to maintain safety standards.
- Requirements of greater independence in auditing and accounting functions performed for the insurance industry and improved monitoring by APRA would be beneficial to provide greater transparency and confidence in insurance industry practices. Reform in this area would include restrictions on the length of time a single auditor could provide services to an insurer without rotation, requiring that accountants and auditors for the one insurer are from different firms and extending APRA's monitoring powers to include professional indemnity organisations.
- An effective insurance industry complaints mechanism would ensure that consumers are given the best available opportunity to have their grievances resolved. Unlike the banking industry where the banking ombudsman is used to provide independent inquiry into complaints, the insurance industry is characterised by a number of different industry funded dispute resolution schemes whose role is unclear to consumers. A review into its effectiveness that recommends changes would be beneficial for consumers.
- A more stringent insurance industry code of practice should be considered in order to either a) ensure that its application is equal to the code applying to the banking industry (i.e. adoption of the Code contractually binds the bank and the consumer) or b) the Insurance Code of Practice should be included in the Trade Practices regulations as a mandatory code which will give the Code the force of law. This will allow individual consumers and the ACCC (on behalf of a class of consumers) to take action against the insurer for breach of the Code.
- The establishment of a national compensation scheme should be investigated to ensure that the sick and injured are appropriately cared for in the long-term. The caps and limits currently being placed on negligence actions do not guarantee that the injured will be appropriately compensated and able to support essential care and medical treatment. The benefits of such a scheme is that it encourages the injured to rehabilitate as quickly as possible since they will be assured of appropriate medical treatment, while in some ways, awaiting costly and time consuming legal proceedings encourages the injured to remain unwell so as to prove to the court their case for seeking compensation is legitimate. Recommendation 5 put forward in the Senate Economics References Committee

Report suggests a working group be established to examine how best to provide for the catastrophically injured. This group should extend its examination to a no-fault compensation scheme such as the scheme administered in New Zealand.

AUSTRALIAN DEMOCRATS RECOMMENDATIONS

The following recommendations are designed to restore balance to solutions that so far have been devoid of any industry involvement. The vast majority of solutions that have been implemented thus far (or are in the process of being implemented) centre on tort law reform and limiting the individual's ability to take action against those whom they have been wronged by. These so called solutions rest on the assumption that the increasing cost of claims is the primary driver for increases in insurance premiums. As this paper highlights, and as the reports of the law of negligence acknowledges, there is no empirical evidence that can be relied upon to support this proposition. Despite this, State and Federal Governments have used this opportunity to substantially erode individual rights.

While claims cost is a factor that is taken into account in an insurers decision to price insurance policies, there are other factors that have contributed to this crisis. These include, September 11, the HIH collapse, the cyclical nature of the industry, the cost of reinsurance, poor management and poor prudential monitoring. For example, the industry is characterised by 'soft cycles' and 'hard cycles'. In a 'soft cycle as it was a few years ago, insurance companies focus on increasing market share rather than on premium incomes. In these times, policies are cheap and readily available as insurers compete with one another in order to increase their market share. Therefore, a swing to the 'soft-cycle' of the insurance market has just as much chance of generating favourable insurance outcomes as any of the solutions put forward.

Underlying Principles

Before discussing what the possible solutions might be, we need to consider what the desirable outcomes are:

- A society where people are deterred from causing accidents and where more care is taken in reducing accidents;
- A society where individuals acknowledge their own responsibility to take care of themselves;
- Individuals are discouraged from bringing unmeritorious claims to the court system;
- A society where those who are injured as a result of accidents or illness are able and encouraged to recover and rehabilitate as much and as quickly as possible;
- A society where professions are able to undertake their roles without fear of retribution for unintended accidents that occur in the course of their work; and
- A society where community organisations, sporting groups, businesses, local government have certainty as to the cost and availability of insurance.

The following points highlight changes that aim to give surety to the community, the injured and policyholders as well as ensuring that the insurance industry undertakes its activities transparently and in the interests of upholding their social obligations to the community.

1. Emergency funding:

First, in the immediate future, emergency supplementary state or federal funding should be provided to non-profit organisations to help meet the increased cost of insurance for essential community activities and services.

2. Pooling/group buying arrangements:

Many of the submissions into the Senate Inquiry have highlighted the savings that can be made with group buying arrangements. For example, Surf Life Saving Australia has highlighted that it secured savings on insurance when it was bought on behalf of surf life saving associations across the nation. This protects the smaller clubs through sharing risks across the entire organisation.

Volunteering NSW has also had successful bulk purchasing arrangements already in existence. Meals on Wheels and the Country Women's Association have already developed highly successful models that have the capacity to either be expanded or launched in other areas. The CEO of Volunteering NSW has said "There are already a number bulk purchasing arrangements that have had great success in providing affordable cover to community organisations. With the Government's support and promotion, we feel confident that those arrangements could be extended to include a number of needy organisations".

3. Extensive risk management campaign:

Given the extent to which it is likely that individuals will be restricted from obtaining damages when they are injured as a result of another person’s negligence, it should be a priority for the federal government to ensure that there are in place adequate safeguards to ensure that individuals, businesses and service providers have appropriate safeguards in place to minimise the number of accidents that occur. A comprehensive risk management campaign must be an integral part of any solution to the current situation concerning insurance. As far as possible, all businesses and organisations should be encouraged to minimise risks and injuries. Ideally the level of risk that is assessed in any insurance policy should be controlled as much as possible in order to help policy holders get the most cost effective insurance cover.

In addition, establishing a Non-Profit Risk Management Centre based on the US model with a brief to assist and train the office holder of charities on how to reduce and manage risk would also be beneficial in controlling risk.

4. Waiver clauses for high-risk activities:

Amendment of s68 of the *Trade Practices Act* 1974 in preventing otherwise valid "waiver" clauses operating in high risk activities. Unless there are circumstances of obvious negligence, misconduct, misrepresentation, recklessness, fraud and the like, individuals should take responsibility for themselves when participating in dangerous or high-risk activities.

However, the current *Trade Practice Amendment (Liability for Recreational Services) Bill 2002* would need to provide for far greater safeguards to be put in place before consumers can be assured that their safety will not be compromised by introducing such legislation. While the Law of Negligence Panel said that the terms of the government's current Bill were consistent with its recommendations, Recommendation 11 provides for recreational service providers not to be liable in respect of obvious risk, while the Bill provides that waivers would have exempt service providers from any type of risk.

Apart from the safety issue, some of the issues that remain unresolved with this particular Bill include the definition of 'inherently risky activity', the application of waiver to minors[1] and people, who for one reason or another do not fully understand what rights they will be waiving eg people from non-English speaking backgrounds, mentally impaired and so on[2]. The Bill also raises concerns about the conduct that will be protected by waiver and whether injury that occurs only through the normal course of the activity should be protected. In some respects, protection from liability for injury that occurs in the course of the activity would mirror the current common law position.

Arguably, the issues highlighted above, coupled with the major restrictions placed on an individual's right to sue also make recreational services a very attractive market. This may have the unintended effect of encouraging more recreational service providers to enter the market and undercut the most safe and legitimate service providers by offering low cost services with less than adequate safety standards. Again, this highlights the need for comprehensive risk management practices and standards.

5. Requirements of greater independence in auditing and accounting functions for the insurance industry and improved monitoring by APRA:

Reform in this area is twofold. First, as mentioned previously, there are no restrictions that prevent insurance companies from engaging the services of different firms for providing auditing and accounting services. Second, in order to ensure even greater independence between auditing/accounting functions of insurance companies, there should be a restriction on the amount of services one company could provide at the one time.

What should be considered is the introduction of a restriction of either 3, 4 or 5 years for the provision of services from the one accounting firm so that there is a 12 month break before that same firm can be engaged to provide its services to the same

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1 In NSW a statutory regime applies under the *Minors (Property and Contracts) Act 1970*. Under this Act contracts are presumed to be binding if they are for the minors benefit. It is unlikely that contracts that waive a minor's right to sure for negligence fall into this category.

2 Signing a document under a mistake gives rise to a special defence referred to as *non est factum*. The circumstances where it can be revoked are very rare as per the High Court case of *Petelin v Cullen* (1975) 132 CLR 355. Non est factum is only available for people who must rely on others for advice through no fault of their own, for example, the blind and the illiterate.

insurance company again. While it is not reasonable to accuse insurance companies of being managed like Enron and Anderson it would be naïve to think that the sort of problems experienced in the United States cannot arise in Australia in the future. By introducing these measures, this might be a positive step towards alleviating that type of danger locally.

Also, insurance companies should be required to report to APRA where the one provider is carrying out accounting and auditing functions. The requirement that an APRA approved actuary be appointed will not provide the assurance that is necessary to protect the rights of policyholders. To provide further assurances of independence, it is advisable that insurance companies be required to get APRA approval where it seeks to use the same provider for accounting and auditing services.

Another issue to be addressed is the coverage that APRA has with respect to the insurance industry. APRA does not have the authority to monitor all insurance companies and UMP for example, was excluded from its coverage.

In order to be an effective authority, APRA should have the power to monitor medical indemnity organisations.

6. <u>An effective insurance industry complaints mechanism</u>

While it might be generally understood that APRA has the responsibility of monitoring the industry, the role of handling consumer complaints is less clear to consumers[3]. The means by which consumers can have their complaints addressed should be promoted[4]. There is no insurance industry ombudsman as such but there are a number of dispute resolution schemes. Different complaints resolution schemes apply depending on the type of insurance – the Insurance Enquiries and Complaints Ltd (IEC) deals with complaints about general insurers; the Insurance Brokers Dispute Facility handles disputes concerning general insurance brokers; the Financial Industry Complaints Service amongst other matters deals with complaints about life insurance and the Superannuation Complaints Tribunal (a government body) has responsibility where an insurance policy is provided through a superannuation fund.

An independent review, such as the one established to report on Industry Self-Regulation in August 2000, should be undertaken to examine the means by which disputes are settled, the transparency of the complaint processes, the way in which consumer complaints are dealt with and whether consumer's needs are adequately addressed by the existence of a multitude of industry funded dispute resolution services.

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[3] ACCC Media Release, "Consumers Need Clear Insurance Information: ACCC" dated 26 March 2002 also highlights this point.

[4] In June 2002, the ABIO, IEC and FICS announced the establishment of a common toll free number through which consumers would be directed to the appropriate complaint resolution service. While this signifies a significant shift in operations, very little media attention was available to promote the change. The full integration of these 3 services into one body is at least 12 months away.

7. An effective insurance industry code of practice

The insurance industry does have a code of practice[5], however, the code appears far weaker than the code of conduct administered by the banking industry[6]. Notwithstanding that the effectiveness of such codes and self-regulation generally is questionable, the bank's code is at least backed up by the Ombudsman. The Ombudsman is in a position to enforce the code as an independent person with the power to investigate and resolve disputes. By contrast, the insurance code merely says that insurers are "to have fair procedures for resolution of disputes between consumers and insurers or consumers and agents." In practice there is no obligation on an insurance company to follow the insurance code. Nor is there any specific consumer redress. In the case of banks, there are also provisions for the reporting to the Treasurer on compliance with the code. These reports are to be based on reports the Reserve Bank of Australia may require from the individual banks.

The Insurance industry code of practice is a voluntary code, that is, it is not mandatory to agree to abide by the code. Part IVB of the *Trade Practices Act 1974* was amended in 1998 to introduce industry codes. However, unless voluntary codes are contained in the regulations, they are not enforceable under the Trade Practices Act. Therefore, where breaches of the code do occur, the ACCC (in a representative action) or individual consumers cannot seek redress under the Act.

At the very least, the insurance industry should be required uphold the terms of the insurance code of practice[7] and make it available to consumers to the same degree as the banking code of practice. While it is well known that the banking code contractually binds customers and banks that have adopted the code, arguably, this is not the case for the insurance industry.

For the insurance code of practice to be truly effective, it should be included in the regulations as required by Part IVB of the *Trade Practices Act 1974*. By doing so, this would give the code of practice the force of law. However, in order to ensure that insurance companies abide by the code, its application would have to be mandatory (since insurers would be less willing to volunteer their acceptance of the code if it were enshrined in legislation).

8. A national compensation scheme for non-work related injuries:

Recently, Premier Carr has said that the NSW government would be implementing a no-fault compensation scheme in NSW for those who are "catastrophically injured" in motor vehicle, workplace and public place accidents. While the particulars of this scheme are not yet known, it is possible that similar schemes could be implemented in

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5 See www.ica.com.au/codepractice.

6 See www.bankers.asn.au/ABA/Online/default.asp

7 ASIC approved the insurance code of practice in August 2000. Visit the following site for details http://fido.asic.gov.au/fido/fido.nsf/byheadline/General+Insurance+Code+of+Practice+fido+page?opendocument

other states and territories as we have seen so far with tort reform across the country. Before a variety of different schemes are established around the nation, the federal government should assess the viability of establishing a national scheme so that all Australians, no matter where they are located, are able to benefit from the knowledge that if they suffer injury as a result of an accident, they will be able to get adequate medical provisions and compensation for their incapacity depending on the level of injury and any length of time they are unable to work. The Whitlam government tried to introduce a similar scheme back in 1974 just prior to the dismissal. A parliamentary inquiry examined this issue and Bills were introduced but not passed.

The New Zealand experience has showed that a scheme such as this does have its pitfalls and has been criticised for inadequate compensation payments and the high cost of administering[8]. However, if such a scheme was implemented, Australia is in a good position to ensure that the scheme was effective, in terms of costs and outcomes, and that problems experienced in other countries were not replicated in the Australian context. In New Zealand all citizens pay a premium to the federal government. In order to fund such a scheme in Australia, the federal government might consider imposing a Medicare style levy. Organisations (not already contributing to workers compensation schemes) would pay a small premium (rather than taking out costly public liability insurance) based on a percentage of annual turnover and organisations are assessed and rated in terms of particular risks. For example, there might be Low Risk, Medium/Low Risk, Medium Risk, Medium/High Risk and High Risk and organisations would pay premiums according to which category they belonged to. In addition, organisations would be required to undertake risk management strategies and at the end of 12 months, they might be entitled to a rebate or similar "no claim bonus" where they have been successful in preventing accidents, injuries or damage. Such a scheme is designed to encourage greater care being taken and the prevention of accidents. A Statutory Authority similar to the Accident Compensation Commission in New Zealand would undertake assessment and administration of the scheme where the focus is on minimising accidents and caring for the sick and injured.

The benefits of such a scheme are that it encourages the injured to rehabilitate and recover as quickly as possible so that they are able to resume their lives and careers as much as they are able to following an accident. Such a scheme might also include those who are chronically ill as a result of disease that are unable to obtain compensation where no negligence was involved. The knowledge that medical expenses would be covered relieves people from the pressure of having to go through costly litigation in order to fund expensive medical treatment and obtain financial security for the future.

Such a scheme should not advocate the demise of responsibility being taken in preventing accidents and, like the New Zealand model, there should be provision for recourse to the court system where the act causing injury is sustained by gross negligence or some other established standard. To ensure the rights of the injured were not further eroded in NSW, the awarding of exemplary damages should be

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[8] According to SMH 31.7.02 unfunded liability to June 2001 was $NZ3.9 billion

maintained and not abolished as it is in the Carr Government's plans for reform. While state governments around the country have begun to implement tort reform aimed at limiting the cost of insurance, by capping claims and so on, these initiatives only serve to limit the ability of individuals to get adequate financial support for their injuries and as mentioned previously, the Insurance Council of Australia has said that it is unlikely that the current tort reforms would reduce premiums unless consistent reforms were in place throughout Australia.

9. National insurance fund for not-for-profit organisations:

Where a no-fault compensation scheme was not in place, not-for-profit groups should be afforded a level of protection by the federal government. Charitable organisations, not-for profit groups, sporting clubs and volunteers have not been immune from the rising cost of insurance. In order to protect the special circumstances of these groups, there should be the establishment of a specialist insurance fund for charities and sporting groups underwritten by all Australian Governments. Reviewing requirements under State law and in Government funding contracts for non-profits to carry certain levels of insurance to ensure that such coverage is the minimum prudent level necessary for an organisation's size and risk profile.

The Queensland and Victorian Governments are both investigating the establishment of an insurance pool for non-profits. By pooling the risk across all states and with Commonwealth Government financial backing, such a fund could be up and running quickly. Rather than each state government devising their own plans for the same issue, it would make more sense for such a scheme to be implemented nationwide to avoid discrepancies.

It would also be beneficial for state and commonwealth governments to review their requirements for funding contracts for not-for-profit groups. A review of these contracts may offer relief where it can be established that a lower level of insurance is required as a minimum prudent level to cover an organisation given its size and risk profile.

10. Comments on recommendations in the Senate Report into the National Insurance Crisis

Recommendation 1: establishing a national accreditation program for providers of recreational services is an excellent idea in theory however the administration of such a program might be problematic, given the wide range of services that could be potentially captured by the TPA Bill if it is passed unamended.

Recommendation 5: Working group to examine how best to provide for the long term care of the catastrophically injured should be expanded to look into the viability of a no-fault compensation scheme for all injured, not just catastrophically injured.

Recommendation 7 and 8: detailed data on claims made and the insurance industry has the potential to provide clarity on the actual cost of claims and the pricing of risk in insurance policies.

Recommendation 12: more active monitoring by APRA of the insurance industry is vital.

Recommendation 13: greater clarity in the roles of the various statutory bodies should be encouraged to identify any overlap and identify any gaps in monitoring that need to be remedied.

Recommendation 15: Insurance Code of Practice should not only be revised, but should also be given greater promotion or legal effect.

The National Insurance Crisis

Current problems and causes

Public liability insurance provides protection for the insured against the consequences of being legally liable against damages or injury to third parties. In recent times, many individuals and organisations have experienced rapid increases in public liability and professional indemnity costs. In some cases, policies are not being renewed or insurance cover simply isn't available. It makes good prudential sense to take out insurance (and in some professions insurance is compulsory) so it is important that it is available and affordable in both the short and long term. For example, when professionals such as midwives are unable to get adequate cover they are reluctant to provide their services for fear of being sued. When midwives are unable to get insurance cover for home births this means that they will refuse to do so for fear of legal action or are forced into a situation where they are performing their duties without adequate cover.

While the media have tended to focus on the rising cost in insurance claims as the main cause of the situation, in fact this does not address all of the issues at the heart of the current crisis. The causes relate to claims to an extent, but can also be attributed to such things as the nature of the insurance industry, reinsurance costs before and after September 11, poor assessment of risk by insurance companies in the past and the collapse of one of Australia's largest insurers.

Insurance Industry: Like any business, the insurance industry goes through cycles. Back in the early 1990's when the industry was in its 'soft' cycle, insurance was cheap (possibly too cheap), abundant and easily accessible. What insurance companies have done in these times is focus not on profits, but on increasing market share. In these times, insurance companies compete with each other by offering low cost insurance to attract more business and certain companies in the market who can't survive in this environment are squeezed out. In this environment, greater emphasis is placed on investments profits rather than underwriting profits. However, over the last few years the cycle has begun to swing in the opposite direction and into the 'hard' part of the cycle. Insurance companies, for a variety of reasons that will be explained later, have begun to focus more on profitability and minimising underwriting losses that were made in the past. Insurance companies have been arguing that public liability policy underwriting has been the least profitable area[9]. This has lead to increased premiums and stricter scrutiny over whom and what gets insurance cover. However, public liability underwriting only accounts for around 5% of total underwriting[10], so arguably insurance companies have used this opportunity to flaunt

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9 Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review*, March 2002.

10 APRA statistics from 1 January 2001-31 December 2001 show that the total number of public and product liability policies was 2,438 (product and public could not be separated in the statistics) and the total number of policies for general insurance was 41,033. Therefore, public and product liability policies account for 5.94% of the total number of policies.

their bargaining power to the detriment of the provision of essential services and community events[11]. This kind of behaviour is not surprising; in fact, this cycle is going to continue as long as there is an insurance industry. Part of the difference that we are seeing in this particular 'hard' cycle is exacerbated by the events of September 11 coupled with poor management practises and prudential monitoring. Australia is a very minor player and comprises only 2% of the global insurance market. The insurance industry in Australia is part of a global industry so is affected by what ever is happening worldwide.

Reinsurance: When insurance companies agree to provide insurance, they are agreeing to insure against a particular risk, and if this risk is high, uncertain or uncontrollable, insurance companies might decide to reinsure themselves. Reinsurance is an important way for insurance companies to cover themselves against any claims. The reinsurance market is a global one, and while it too was entering a hard cycle in 2000-1, it has been hugely affected by the events of September 11. In fact reinsurance worldwide suffered losses in excess of $50 billion (US) as a result of September 11. This is a huge loss for the industry. Therefore, not only is the domestic insurance getting more costly, insurance companies are also having to pay more for reinsurance which drives up domestic insurance prices.

September 11: No insurance company or reinsurer could have predicted the terrorist attacks in the United States in any assessment of risk in an insurance policy. This event has made insurance companies rethink the way that they price risk and while in the past they may have underestimated and underpriced particular risks, this may not happen to the same extent in the future. Public liability is an uncertain and uncontrollable type of risk and insurance companies now appear to be more reluctant to carry that risk unless they are duly remunerated. That partly explains why organisations have been experiencing rapid increases in this type of insurance cover.

HIH Collapse: HIH Insurance was a major player in the Australian insurance industry. HIH was Australia's second largest insurance company with gross premium revenue of $2.8 billion. The collapse of HIH removed a large amount of capital and supply from the industry. HIH comprised several authorised insurers that wrote many types of insurance including compulsory insurance. It held a large share of the market for certain types of liability insurance, particularly public liability. HIH adopted the practice of underpricing insurance to beat competitors and once it was out of the industry, other companies were reluctant to continue selling at these rates, hence the price of premiums increased.

Poor management and prudential monitoring: As discussed previously, during the 'soft' part of the insurance cycle, there has been a lot of cheap, accessible insurance cover available e.g. policies written by HIH. In these times, insurance companies

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[11] According to the Financial Services Consumer Policy Centre, the ACCC Pricing Review highlights that public liability is a less regulated class of insurance and this has enabled insurance companies to compete on the terms and conditions of the premiums, as well as the price of premiums.

focus on market share rather than profits and instead rely on investment income to offset underwriting losses. Unfortunately for consumers, these decisions have not been the most prudent and in recent years investment income has not made expected gains. As a result, insurance companies have been experiencing some losses. Therefore, in order to minimise these losses in the future, insurance companies have had to rely more on premiums income. While there is no evidence, it has been suggested that insurance companies have attempted to recoup past losses through increasing premiums at a rapid rate. If this is the case, then it appears that not only do company shareholders pay the price for poor investment choices, but current and future policyholders also have to pay via premium hikes.

Insurance companies are not required to provide a breakdown of insurance costs to policyholders when providing premium advice except to point out taxes incurred. The Australian Prudential Regulation Authority (APRA), the authority responsible for monitoring the industry has only a limited role and capability in supervising the insurance industry. APRA has coverage of most, but not all insurance companies and mutuals, medical indemnity organisations and state compulsory third party motor vehicle insurance schemes are not included in APRA's monitoring. APRA's primary focus is on the solvency of insurance companies, that is, their ability to pay claims. APRA does not monitor insurance prices. In July 2002, reforms commenced where capital requirements were increased from $2 million to $5 million for insurance companies with the view that this would help prevent further collapses such as HIH. However, this may have no effect at all or the unintended effect of forcing insurers to sacrifice taking out reinsurance (in order to minimise the risk) so as to meet APRA's new capital requirements, cease operations, or merge[12].

In addition, the accounting and auditing requirements supervised by APRA do not prevent questionable accounting practices from taking place, as there is no requirement for independence between these functions. Insurance companies, like other companies, can have bogus accounts too. If for example, a company had employed the services of Company X to provide accounting advice, there is no requirement that the insurance company cannot obtain Company X's advice in relation to auditing. It should be made clear that this is only a problem where there is dishonesty. That is, dishonesty either by the company (in providing auditors and APRA with false information) or auditors (turning a blind eye). As the HIH Royal Commission has uncovered, HIH deliberately failed to disclose $40 million in its report to APRA in the 1999/2000 year[13].

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[12] Prior to 1 July 2002 there was a requirement that where an insurer takes out reinsurance, it must be APRA approved. However, since the reforms s34 of the Insurance Act no longer applies to reinsurance.

[13] A collapse like the one experienced by HIH is rare. Most insolvencies have been due to fraud involving directors or CEO's absconding with the company's money (in the case of the Bishopsgate fraud the CEO took the money with himself to Greece in 1983) or a con man buying the insurance company with the company's money (in the case of Occidental Insurance and Regal Insurance, a fraudulent purchase of an insurance company from Richard Pratt in 1990).

APRA now requires that insurance companies have APRA approved actuaries and that accountants and actuaries advise APRA if there is a belief that the company may be in financial difficulty. However, in the unlikely event that it is brought to APRA's attention, there is no guarantee that APRA will in fact act on this information. APRA has a poor track record in relation to monitoring the insurance industry, in fact, as the HIH Royal Commission has revealed, APRA was aware that HIH was possibly insolvent before it purchased FAI yet it failed to investigate the allegation when it had always had the power to do so. Clearly, APRA have not been committed to using their enforcement powers against insurance companies.

Insurance companies are subject to far less scrutiny than say, the banking sector. As APRA noted in its 2001 Annual Report[14] that prior to APRA's establishment in 1998, general insurance companies were not subject to intensive on-site reviews. By contrast, banks had always been subject to fairly tight regulation.

Claims increases: Without doubt, claims costs is an element that any insurance company must take into consideration when deciding where to set premiums. As mentioned previously, there has been a lot of media hype that suggests that the legal profession and an increasingly litigious society are solely to blame for the increases in insurance premiums. While it is not desirable to have a society where someone else is always to blame, it would be wrong to think that this was the only contributor to the current situation, this is because it is primarily an insurance issue.

Obtaining accurate statistics in relation to claims is difficult and there are a variety of competing authorities on the area. However, according to Insurance Statistics Australia, the overall frequency of claims has been fairly flat and there have been some reductions in 1999 and 2000. According to ISA, there have been no overall increase in claim numbers and perhaps some reduction in recent years. For instance, in 1996 there were approximately 10 claims per $100,000 premium and in 2000, approximately 8 claims per $100,000 premium. Australian Prudential Regulation Authority (APRA) reports outstanding claims for public liability and product liability claims in June 2001 had slumped to the same level of four years ago, and that claims paid in 2000/01 were lower in real terms than three years previously. However, APRA statistics also highlight that the number of claims against public liability policies (including product liability) increased from 55,000 in 1998 to 88,000 in 2000, that is, a 60% increase.

While statistics in this area might not be the most transparent, it is clear that before any decision is taken to erode individuals' common law rights it is necessary to look at the alternatives. The Insurance Council of Australia has even stated in the recent Senate inquiry into the impact of the rising cost of public liability insurance that there is no guarantee that major tort law reform will reduce premium increases, especially if insurers had not been pricing policies appropriately in the first place or if the reforms were not uniform throughout the country[15]. As the United States experience shows,

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14 See www.apra.gov.au/AboutAPRA/Annual-Report-2001.cfm

15 Senate Economics Committee Hansard 8 July 2002, p59.

tort reform has done little to effect the level of insurance premiums payable by policyholders[16]. This study found there to be no correlation between the enactment of tort restrictions and rates of insurance. States with little or no tort law restrictions experienced the same level of insurance rate increases as those states that enacted severe restrictions on victim's rights. If for example, the NSW law reforms have any affect at all, it is not likely to be seen at the rapid rate at which proponents of the reform would assert. Also, it is unlikely that consumers would see any real advantages unless there changes were uniform across the country. In addition, it should also be kept in mind that 98% of claims are settled out of court and so only a relatively small number of claims are decided by the courts system.

Groups most affected

Tourism

In particular, adventure tourism has been greatly affected by rising insurance costs. In its submission to the Senate Inquiry into the impact of public liability insurance, Outdoors Western Australia provided the following examples of operators who, in the first half of 2002, were forced to cease operations as a result of spiralling insurance prices: Adventure Plus, Adventure Craft Enterprises, Roping Adventures and Boranup Eco-Tours.

Six of the remaining 15 operators have suggested they will need to find a solution to this crisis within the next twelve months or they will need to considering closing their doors. They include:

Wilderness Playgrounds - For the past five years their policy has been between $2500 - $3000. This year's renewal was for $9400 with no claims ever made. That represented a 423% increase on the previous year's underwriters quote and 11.6% of turnover.

Shaw Horizons - The insurance policy, which was renewed, recently has gone up from $2500 to $8400. Shaw Horizons has a turnover of approximately $50,000 per year so this policy represents approximately 16.8% of total turnover.

Adventure Out - has been experiencing progressive increases over the past four years. Their premium has increased from $2800 in 1998 to $17000 in 2002.

Dwellingup Bunkhouses - In order to continue operating, DB has had to search for an insurer since being given 14 days notice that the current insurer was not going to renew their policy. Not only are policies becoming unrealistically expensive, some brokers are withdrawing from this area of the market completely.

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16 Doroshow J, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices*, study conducted by the Centre for Justice & Democracy, 25 March 2002

Sport

According to Sports Industry Australia in its submission to the Senate Inquiry, if insurance premiums continue to rise at the rapid rate that is currently being experienced, a number of outcomes are likely to eventuate.

First, the organisations will find the funds to pay the premiums, either by imposing substantial increases in membership fees or by diverting funds from other activities within the organisation, resulting in a reduction in the services offered, or potentially losing members unable to bear the increased costs of participating.

Second, organisations will seek to reduce the premiums by reducing the level of public liability cover, thus exposing the organisation and its workers to the risk of litigation. Third, the organisations will simply close down, or the event concerned will be cancelled.

Cancellations are already occurring. Many events, particularly at community level, are being cancelled, and an increasing number of clubs are closing down. In Victoria alone, at least 13 gymnastics clubs have shut their doors, and in South Australia several equestrian clubs were told that no insurance could be found for them after 30 September 2002, and inevitably they have been forced to cease operating.

Community groups / Not-for-profit organisations/Councils

According to the Australian Local Government Association's submission to the Senate Inquiry into the impact of Public Liability Insurance, local authorities are concerned about the loss of cover for many community activities and the decreasing affordability of those activities than can be insured. For example, in New South Wales as at July 2002, 27 events had been reported as cancelled or closed directly as a result of public liability insurance issues and 28 venues, events and activities were experiencing difficulties due to rising premiums and will now have to assess ongoing viability.

For 2003, South Australia is anticipating a premium increase of approximately 10%, NSW, VIC, TAS and WA are anticipating an increase of between 25-30% and QLD is expecting a 50% increase. A Council in Queensland is facing an increase of 700%. Many councils are picking up threatened events or activities and either insuring them through Local Government insurance pools, or paying the additional cost out of council funds. According to ALGA these are average figures while some change occurs between States and between metropolitan, regional and urban councils. However 50% reflects the situation for most councils.

Professionals

In relation to general practitioners, the 2001 Interpractice Comparison Survey claims that medical indemnity costs were 4.14% of overhead costs. This was 33.08% higher than they were in 1996. These results are based on 77 practices (343 individual doctors). While these statistics may not be representative of all general practices the cumulative increases must ultimately be passed onto patients and will inevitably place further pressure on the ability of GPs to bulk bill.

Furthermore, according to the Royal Australian College of General Practitioners (in its Senate Inquiry submission) GPs continue to face increasing pressure and stress, in fear of being sued for non-negligent adverse events. It is thought then that as a consequence of fear of litigation, the numbers of tests and procedures done for defensive purposes have increased. It is claimed that this is an indirect but real cost associated with increased litigation.

Research commissioned by the ADGP revealed that GPs are stopping procedural work because of the rise in indemnity premiums. This leaves their patients with no option but to travel long distances, away from their communities to have babies delivered or access other routine medical services.

Those who are injured as a result of accidents

In the media recently, there have been a few landmark cases emerging from the courts that have provided state and federal governments with the fuel for implementing their changes to the law of negligence. However, by focusing too much attention on these few cases, the response to reform the law of negligence so severely has been to the detriment of the rights of the majority of the community and those who are the victims of others negligence.

The few landmark cases that the governments have focused their attention on include, Calandre Simpson who, in November 2001, was awarded almost $13 million for being disabled during botched forceps birth in 1979. Also, earlier in 2002, Lisa Palmer, 27, was left tetraplegic after receiving a spinal injury when her car left the road and rolled down a three to four metre embankment near Bathurst in February 1997. The accident occurred on a section of road that was being resealed. Justice Wood found the council and the road works contractor had been negligent and breached their duty of care by failing to remove gravel from the road and not providing adequate warning signs. Ms Palmer received damages for economic loss, past expenses, domestic care, equipment, housing, future medical expenses and holidays totalling $16,047,477.

State and Federal Responses

Commonwealth Government

The Government has held a number of meetings with State and Territory Governments and industry to discuss the level of insurance premiums. The Government commissioned an inquiry, the "Review of the Law of Negligence." The Review, chaired by the Honourable Justice David Ipp, was established as one of the measures agreed by the second Ministerial Meeting on Public Liability Insurance in May. The inquiry was asked to inquire into the law of negligence and to develop a series of proposals that provide a principled approach to reforming the law of negligence. It made a number of recommendations including:

- A national response embodied in a single statute;

- Changes to negligence law to protect doctors who provide treatment that accords with the widely held views of a significant number of respected practitioners in the relevant medical field; and
- Individuals taking part in recreational activities be more responsible for their own actions and be unable to sue for obvious risks.

The Government is considering the panel's recommendations and is expected to discussed these with State and Territory Governments.

The Howard government has introduced the *Taxation Laws Amendment (Structured Settlements) Bill* 2002. This Bill, if successful will amend the *Income Tax Assessment Act* 1997 to encourage the use of structured settlements for personal injury compensation, by providing an income tax exemption for annuities and deferred lump sums paid as compensation for seriously injured persons under structured settlements. The income tax exemption will be available in relation to such payments if the necessary eligibility criteria are met. Structured settlements involve periodic payments for life or over a substantial period.

The *Trades Practices (Liability for Recreational Services) Bill* 2002 was introduced in June and it aims to amend the *Trade Practices Act* 1974 so that individuals are able to waive their contractual right to sue when undertaking risky recreational activities. It allows people to voluntarily waive their right to sue, and is purported to achieve a balance between protecting consumers and allowing them to take responsibility for themselves.

New South Wales

The *Civil Liability Act 2002* has been in force since 20 March 2002 and begins the Carr government's plans for reform in this area. As highlighted in the Bill, the proposed reforms can roughly be broken down into 2 areas:

Personal injury damages claims

- Maximum amount of damages for non-economic loss (general damages) that may be awarded will be fixed at $350,000.
- Establishing a 15% threshold for non-economic damages determined according to a sliding scale.
- Maximum amount of loss for damages for economic loss (loss of earnings or deprivation/impairment of earning capacity) fixed at $2,712 per week.
- Lump sum damages for future economic loss will be required to be discounted by 5% (or as per Regulations).
- No interest awarded on damages for non-economic loss or gratuitous attendant care services.
- Damages claims under the *Compensation to Relatives Act* 1897 will be able to be reduced to incorporate contributory negligence of the deceased person.
- Exemplary or punitive damages will not be awarded.

- Awarding of damages for gratuitous attendant care services will be restricted consistent with *Health Care Liability Act* 2001 and parts of the *Workers Compensation Act* 1987 and the *Motor Accidents Compensation Act* 1999.

Barristers and Solicitors

- Amendment to the *Legal Profession Act* 1987 so that if an amount recovered for personal injury damages does not exceed $100,000, the maximum costs for legal services provided to the claimant is 15% or $5,000 which ever is greater.

Where there are no reasonable grounds for believing that a claim is likely to succeed:

- A barrister or solicitor is prohibited from providing legal advice on a claim and is capable of being found guilty of unsatisfactory professional conduct or professional misconduct.
- A barrister or solicitor will be ordered to pay legal costs in the event that a claim fails when there were no reasonable grounds to believe it would succeed.
- Where are court finds that a claim does not support a reasonable belief of success, then there is a presumption (rebuttable) that costs for legal services provided to the claimant were unreasonably incurred.

Draft legislation, *Civil Liability Amendment (Personal Responsibility) Bill 2002* introduced 3 September 2002.

In his press release[17], Premier Carr stated that the legislation was designed to "strike a balance between people with legitimate negligence claims and the blow out shown in recent outrageous public liability payouts". The Bill will involve fundamental changes to the law of negligence including:

- Preventing people from making public liability claims where their injury arises in the course of committing a crime;
- Stopping people claiming special consideration because they were intoxicated when they were injured. If someone carries out an activity when they are drugged, they should not get any special consideration;
- Restating what is reasonably foreseeable in the law of negligence so that people who have done the right thing are not made to pay just because they have insurance;
- Limiting the ability to sue when engaging in an activity that a reasonable person would consider to be inherently or obviously dangerous;
- Introducing proportional liability so that where there is more than one defendant, they only pay the amount of damages they are directly responsible for;

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[17] *Premier Carr releases landmark public liability legislation*, Premier Bob Carr, 3 September 2002.

- Protecting Good Samaritans who help in emergencies and volunteers doing work for community organisations;
- Ensuring that a warning of risk is a good defence for risky entertainment or sporting activities. If people choose to participate in dangerous activities for fun, they should do so at their own risk;

Moving to protect public authorities from unrealistic standards imposed with hindsight by a court. For example, a court should not hold a small rural council liable for damages due to a pothole when that pothole was going to be repaired under a reasonable maintenance program; and

- Changing the professional negligence test to one of peer acceptance.

Victoria

On 30 May 2002, following a meeting of insurance ministers held in Melbourne, the Victorian government announced that the following measures would be undertaken in addressing the public liability insurance issue:

- Provision of waivers under the *Trade Practices Act* through amending relevant Commonwealth and State laws that will allow people to accept responsibility for their own participation in risky activities. This is essential for the survival of a number of industries, especially adventure tourism;
- protection of volunteers and "Good Samaritans" from the risk of being sued;
- the development at a national level on a sector by sector basis of proper risk management strategies and group pooling arrangements;
- enabling substantial amounts of damages to be paid in regular instalments ("structured settlements") instead of one lump sum;
- improvement of legal procedures surrounding claims to enable quicker, cheaper and less stressful determination in civil liability disputes;
- compulsory collection of data from insurers on public liability claims through APRA and improved reporting of court statistics;
- the Productivity Commission to undertake a benchmarking study of claims processing in the insurance industry;
- ACCC to be given a standing brief to update its market pricing review of the insurance industry every six months; and
- a review of the law of negligence by 3 eminent persons from the legal profession to report within two months.

The Government introduced the *Wrongs and Other Acts (Public Liability Insurance Reform) Bill* into the Victorian Parliament 12 September 2002 to bring the intended reforms into effect as it applies to Victoria.

Queensland

The Queensland Government enacted the *Personal Injuries Proceedings Act* 2002 (21 August 2002) to include the following changes:

- mandatory early notification of claims following an injury or the appearance of symptoms;
- mandatory exchange of information (including medical reports) to facilitate early settlement and avoid costly litigation;
- mandatory offers of settlement and settlement conferences;
- maximum $2500 in legal costs for claims between $30,000 and $50,000.
- restrictions on legal advertising including the banning of "no win no fee" advertising;
- no legal costs payable for claims under $30,000 and maximum $2500 in costs for claims between $30,000 and $50,000.
- minimum thresholds on claims for loss of comfort (this is a claim by a person for the loss of comfort and support as a result of an injury to their spouse) and loss of service (claims by for example an employer when an employee is injured)
- minimum thresholds and limits on awards to cover gratuitous care (this is payment for a service provided voluntarily by a friend or relative). Payments for gratuitous care only applicable where service required directly as result of injury and where the service is provided for a minimum six hours per week over six months.
- provisions facilitating expressions of regret by defendants will assist in resolving minor complaints.
- capping of claims for economic loss (to three times average weekly earnings);
- exclusion of juries from hearing personal injury trials;
- exclusion of exemplary, punitive or aggravated damages;
- provisions for a court to make a consent order for a structured settlement.

South Australia

The Treasurer, Kevin Foley, in his press release[18] outlined legislative reforms proposed for the South Australian Government. The government will introduce three bills: the *Statutes Amendment (Structured Settlements) Bill 2002, the Recreational Services (Limitation of Liability) Bill 2002 and the Wrongs (Liability and Assessment of Damages) Amendment Bill 2002.* They will:

- Cap damages for pain and suffering in injury cases at a maximum of $241,500 (to be adjusted by CPI in future years);

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[18] *Proposed law will let people say sorry*, Hon Kevin Foley, 13 August 2002.

- Cap payments for total loss of earning capacity from the time of injury onward at$2.2million;
- Allow adults to waive their right to sue when they take part in sport or recreational activities covered by a registered code of practice but not to waive the rights of their children or children in their care;
- Allow people to say sorry without it being taken as an admission of liability;
- Restrict claims where the person injured was intoxicated at the time of the incident;
- Cancel liability where a person is engaged in serious criminal activity;
- Protect Good Samaritans from being sued when they help in a medical emergency;
- Allow the courts to award structured settlements as an alternative to lump sum payments; and
- NOT apply to any injury received before they became law, even where symptoms appear later or proceedings begin later. Thus someone injured by asbestos exposure before these measures become lawful and takes action subsequently, will not have damages capped.

Tasmania

Tasmanian treasurer, David Crean announced[19] the introduction of phase two in the government's strategic approach to addressing rising public liability premiums. These measures would:

- Restrict the level of damages that may be awarded in cases of recreational drugs, including alcohol, by the injured party, has contributed to their injury;
- Stop people from being able to claim damages if they are injured while engaging in criminal activities;
- Give courts the power to order structured settlements, as an alternative to lump sum payouts for future economic loss; and
- Clarify that saying "sorry" for an action, is not an admission of legal liability.

Western Australia

The Premier of Western Australia, Mr Geoff Gallop outlined his government's planned legislative changes[20]for the Spring Sitting. Two Bills-the *Civil Liability Bill 2002* and the *Insurance Commission of Western Australia Amendment Bill 2002* will be introduced.

The *Civil Liability Bill 2002* will:

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19 *Public liability insurance package,* David Crean , 11 September 2002.

20 State Government introduces public liability relief legislation, Hon Geoff Gallop, 14 August 2002.

- Place a cap on economic loss equal to three times the amount of gross weekly earnings;
- Allow for structured settlements by agreements between the parties;
- Institute a new threshold for general damages (pain and suffering) of $12,000. So that claims for general damages need to exceed $12,000 before payments can be made;
- Place a cap and thresholds on awards for gratuitous home care service claims; and
- Toughen restrictions on advertising by lawyers.

The *Insurance Commission of Western Australia Amendment Bill 2002* will allow the extension of public liability insurance provided by RiskCover after organisations have been assessed for their eligibility and received approval by the Treasurer.

These measures are part of the following five-point-plan developed by the State Government to address the public liability insurance crisis.

1. Law reform to be introduced in the Spring session of Parliament: A *Tort Law Reform Bill* 2002 that will include a threshold for general damages, capping of economic loss and restrictions on advertising by legal practitioners in the personal injuries area.

2. Government's insurance arm to provide cover to essential not-for-profit services: Legislation will also be introduced to enable the Government to provide insurance cover to not-for-profit groups that are aligned to Government, provide an essential service to the community and are unable to obtain affordable cover.

3. Risk management and public safety awareness campaign: A risk management and public safety awareness campaign is being developed that will benefit all businesses and the community alike. This will be done in co-operation and consultation with Government agencies, business and community groups.

4. Helping businesses and community groups achieve bulk buying power through pooling: The Government is also considering the best way to facilitate a number of pooling proposals for not-for-profit and community groups that are being submitted by key groups and associations.

5. *Volunteer (Protection from Liability) Bill* 2002 - protecting volunteers who serve the community: This Bill will provide many volunteers with qualified immunity from personal liability when doing community work. It is currently before Parliament and has already passed through the Lower House.

Northern Territory

The Northern Territory government is planning to introduce tort law Reforms in its October sitting that will include:

- Legislating to cap thresholds for general damages and placing caps on loss of future earning capacity (caps will not apply to medical expense).
- Discount rate for loss of earnings damages to be set at 5%.
- Prohibit claims arising from criminal activity and taking into account recreational drug use (including alcohol) in compensation payouts.
- Place limits on circumstances, and amount, of damages allocated to family carers.
- Introduction of compulsory conferencing or mediation prior to the commencement of court proceedings.

The NT government has also committed itself to the following changes:

- Legislation to exempt volunteers from any threat of public liability action.
- Legislation to implement national solutions for structured settlements.
- Limits on legal advertising.

The Chief Minister also announced that the Northern Territory would join the Queensland Grouping Scheme from 1 September 2002, to provide assistance for not-for-profit and community groups. This scheme will give both jurisdictions (QLD/NT) collective power, with the aim of delivering economies of scale and more effective risk assessment and claims management.

Short critique of the responses so far

As is evident from the range of reforms taking place across the nation, the Government responses to the issue of rising insurance costs has laid blame predominantly on the legal system. By far, the most far-reaching reforms have been in relation to tort reform and limiting the ability to sue and limiting the amount of damages that can be awarded to the injured. This approach, which has been fragmented to say the least, sensationalises the few large liability claims (eg Calandre Simpson, Guy Swain) to the detriment of the majority of legitimate claims for damages by those who are injured as a result of another party's negligence.

State and Territory government responses in particular, have responded to this issue without ascertaining the true causes of the crisis. The reforms proposed by the State and Territory governments have a major impact on the rights of individuals under common law and these changes were implemented, it seems, with little regard for the real consequences (and by real consequences, this does not include the lowering of insurance premiums). Perhaps state governments have been reluctant to implement or suggest that reform needs to take place with insurance companies because of the tax revenue that the states receive from insurance companies i.e. a total of around $ 3 billion[21]. This begs the question whether a reduction in stamp duty (which has been

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[21] While descriptions vary in the State budget papers it is likely that stamp duty accounts for the bulk if not all revenue from insurance. NSW received $480mil in 2001-2, VIC received

promoted by State governments as a means of tackling the insurance crisis) does little more than further line the pockets of insurance companies as there has been no guarantee given by the insurance industry that premium price increases will not occur. As the ACCC has shown, insurance companies are already expected hefty returns on capital in the coming financial year[22].

Regarding "waiver" of rights, it is desirable for those who participate in high-risk activities to take responsibility for their own actions. However, there should always be adequate protection for consumers and recourse to the court system where the providers of these activities have acted unprofessionally, engaged in misconduct that has led to injury, and where there has been fraud or misrepresentation in signing the waiver. At common law, waivers will not be given effect to, if the defendant was induced into signing by fraud or misrepresentation[23]. It is these sorts of safeguards that are not provided for in the federal government's current proposal on this matter.

Generally, with the large scale cutting back of individual rights, the restricting of the ability to make a claim for negligence or receive damages, there has been little or no discussion on what measures should be adopted to ensure that the community will be provided for if they are injured as a result of someone's carelessness. Nor has there been any discussion on what measures should be put in place to ensure that the community provides a safe environment, whether it be in the public, private or professional domain.

Anecdotal evidence

The points below provide examples of some of the widespread effects of the rising cost of public liability insurance premiums and lack of available cover:

- Local Art Classes and trail riding classes unable to get cover – for example, Arts Outwest, one of the many low risk activity groups, has been unable to get cover under Regional Arts NSW blanket cover and has been forced to cancel events. Daily Telegraph 9 July 2002.
- Local Government and Shires Association of NSW – claims that no Australian insurer was willing to cover local councils for public liability and that they have had to go to London in order to get cover. Daily Telegraph 9 July 2002.
- Wollongong City Council public liability insurance premiums were $400,000 in 1999 and $1,192,000 in 2002. Daily Telegraph 9 July 2002.

$789.8mil in 2002-3, QLD received $238.5mil in 2001-2 (including workers comp premiums), WA received $270.9mil in 2001-2, SA received $224.8mil in 2001-2, TAS received $250mil in 2000-1, ACT received $739mil in 2001-2 (including life insurance) and NT received $15.7 in 2001-2.

22 Financial Review, "ACCC uncovers big insurance returns", 21 September 2002, the ACCC in a recent review have found that several types of insurance will make returns on capital above 50%.

23 Fleming, *The Law of Torts* (9th edition) 1998 LBC, p329.

- Girl Guides have been hit with a 500% increase in insurance costs, putting an end to many of their activities. Herald Sun 27 June 2002.
- Victorian tourism companies claim that over 60 companies have shut their doors and another 54 face closure. Herald Sun 27 June 2002.
- Victorian Tourism Operators Association claim that more than 450 jobs had already gone and estimate that the cost in regional Victoria would be $10 million. Herald Sun 27 June 2002.
- Victoria Park concert and fete, Dubbo was not able to go ahead after organisers were not able to secure insurance. Daily Telegraph 11 June 2002.
- Darby Street and King Street fairs in Newcastle were both cancelled due to insurance difficulties. Daily Telegraph 11 June 2002
- Horse riding centres in Tumbarumba have been closed. Daily Telegraph 11 June 2002
- Oakvale Farm, near Port Stephens, was last year forced to stop offering $2 pony rides after its premiums rose from $7,500 to $20,000. Daily Telegraph 8 March 2002.
- *The Man from Snowy River* Mountain Muster. Held since 1987, the event was scrapped this year because rider insurance would have cost organisers more than $8,000. Last year they were quoted less than $3,000. Daily Telegraph 8 March 2002.
- The 2002 Tilba Festival in southern NSW was to be held Easter Sunday. Games such as the Egg Toss, Bushies Boot Throw and Greasy Pole Climb were considered too high risk by insurers, who wanted to increase the bill from $1,100 to $8,000. Daily Telegraph 8 March 2002
- The Bridge-to-Bridge water-skiing event was to be held last December. The race, which has been run for the last 40 years, saw its premiums double to $2 million. Daily Telegraph 8 March 2002.
- The CEO of the National Heart Foundation NSW division claims that about $2 million of income including money for research and public education is derived from community fundraisers events. Up to $100,000 of such income has been lost in the last 6 months due to the cancellation of these events. Sydney Morning Herald 25 June 2002.
- A country fun park has been forced to close after its public liability premiums rose from $14,652 in 2001 to $59,785 in 2002, an increase of 308 per cent. Submission by the Office of Small Business to the Senate Inquiry.
- A bushland camping ground and caravan park was refused renewal of its public liability cover despite never having a claim against it. Its broker managed to obtain an offer of insurance from a different insurer, but with a 350 per cent increase in premium. Because the business has a low turnover, the increase has prompted the owners to close the business. Submission by the Office of Small Business to the Senate Inquiry.
- A business that provides outdoor education programs faced closure when its public liability premium increased by 600 per cent. The business has never made a claim for insurance in 7 years of operation. The operator has indicated that the business managed to renew its insurance through a different insurer with

a 100 per cent increase in premium, but was advised that this relationship was not guaranteed beyond 12 months. Submission by the Office of Small Business to the Senate Inquiry.

- A business providing horseback adventures had its public liability coverage increase by 143 per cent, from $2,521 to $6,132, despite reducing its level of cover from $10 million to $5 million. To keep the same level of cover, the business would have had to pay $9,100, representing an increase of 261 per cent. It has been advised by its insurer to expect a further increase in excess of 100 per cent in 2002. In accordance with the rules of a national industry association of which the business is a member, all clients are required to complete a declaration that they understand and acknowledge the risks inherent in the activity. Submission by the Office of Small Business to the Senate Inquiry.
- A small business providing horse rides had its public liability premium increase from $2,438 to $17,875, an increase of 633 per cent. The operator indicates that, as the business only earned $22,000 last year, the cost of insurance will force the business to close. In the five years the current owner has run the business, there have been no successful public liability claims. Submission by the Office of Small Business to the Senate Inquiry.

Date Friday, 18 October 2002

Aden Ridgeway
SENATOR FOR NSW