

The Senate

Economics References Committee

A Review of Public Liability and
Professional Indemnity Insurance

October 2002

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Terms of Reference

On 20 March 2002, the Senate referred the following matter to the Senate Economics References Committee for inquiry and report by 27 August 2002:

- (a) the impact of public liability insurance for small business and community and sporting organisations; and
- (b) the impact of professional indemnity insurance, including Directors and Officers Insurance, for small business;

with particular reference to:

- (c) the cost of such insurance;
- (d) reasons for the increase in premiums for such insurance; and
- (e) schemes, arrangements or reforms that can reduce the cost of such insurance and/or better calculate and pool risk.

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Abbreviations

ABA	Australian Breastfeeding Association
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
AMA	Australian Medical Association
APRA	Australian Prudential Regulation Authority
CEO	Chief Executive Officer
COSBOA	Council of Small Business Organisations of Australia
CPA	CPA Australia
CWA	County Women's Association
FSR Act	Financial Services Reform Act 2001
GST	Goods and Services Tax
HIH	HIH Insurance Limited
ICA	Insurance Council of Australia
IEAust	Institution of Engineers, Australia
IEC	Insurance Enquiries and Complaints Ltd
ISA	Insurance Statistics Australia
ISC	Insurance and Superannuation Commission
MDOs	Medical defence organisations
NFPs	not-for-profit organisations
NIBA	National Insurance Brokers Association
NPO	not-for-profit organisation
PDS	Product Disclosure Statement
PLI	Public Liability Insurance
SCORS	Standing Committee on Recreation and Sport
TPA Bill	Trade Practices Amendment (Liability for Recreational Services) Bill 2002

Summary and recommendations

CHAPTER 1—THE PROBLEMS OF INSURANCE BUYERS

1. Concern about increasing public liability and professional indemnity insurance premiums has featured heavily in the news since early 2001. There have been severe effects on many community groups, small businesses (particularly in the outdoor recreation sector) and professionals (particularly health professionals).

2. A major part of the problem is the extreme variability of increases. Many submissions reported sudden, exorbitant increases in premiums, exclusions and excesses. Some reported that they cannot obtain insurance at any price. This is not the sign of an efficient competitive market. It suggests that some insurers are taking maximum advantage of the sellers' market created by the contraction of supply following the collapse of HIH in March 2001.

3. Many submissions argued that insurers are exploiting classes of buyers who have little market power, regardless of their risk, to cross-subsidise higher risk classes. This concern seems to be supported by figures from Insurance Statistics Australia which show that within the public liability line of business, sport and recreation and welfare/community groups have been among the least unprofitable. Yet these are the very groups that seem to have been hardest hit by the present crisis.

CHAPTER 2—CAUSES: INSURANCE MARKET ISSUES

4. The causes of the insurance crisis are generally summarised as:

- the 'hardening' of the insurance market as, after a period of underpricing and poor profitability in the mid 1990s, insurers now focus on improving profitability rather than merely increasing market share;
- the increasing cost of claims (dealt with in chapters 3 and 4); and
- international influences including the withdrawal of capacity and the increasing cost of reinsurance following the destruction of New York's World Trade Centre in terrorist attacks on September 11, 2001.

5. Public liability and professional indemnity insurance made very large losses in the mid to late 1990s. The present hardening of the market has been exacerbated by the removal of HIH. Liability insurance suffers particularly from a volatile insurance cycle because its 'long tail' characteristic, and the small risk pools, make it harder to price premiums.

6. The March 2002 Trowbridge report to ministers estimated that reinsurance costs, and flat investment returns in recent years, are relatively minor causes of the present problems.

CHAPTER 3 - THE NUMBER OF CLAIMS

7. There is some uncertainty in information on the trend in the number of claims. According to APRA statistics the ratio of claims made per 100 public liability policies has increased only slightly from 1996 to 2001. Other evidence suggested a sharp increase in claims against local councils since 1997, and a steady increase in public liability bodily injury claims in court statistics over the last five to ten years.

8. Suggested causes of increasing claims include arguments that Australia has become a more litigious society; that ‘no win no fee’ arrangements encourage claims; that there are not enough disincentives to pursuing unmeritorious claims; that courts over time have defined ‘negligence’ more generously to plaintiffs. However there seems to be little hard evidence on the validity of these arguments or the relative importance of the various items.

9. The Trade Practices Amendment (Liability for Recreational Services) Bill 2000 will enable a corporation supplying defined recreational services to contract out of the statutory implied warranty that the services will be provided with due care and skill. The Committee has concerns that the bill focuses on surrendering consumer rights without reference to risk management; and it provides the possibility of total immunity from liability even in case of gross negligence.

Recommendation 1 (paragraph 3.73)

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.**

10. The Committee considers that statutes of limitation should be standardised nationwide.

Recommendation 2 (paragraph 3.81)

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

11. In light of the Commonwealth's intention to protect recreational service providers through the Trade Practices Amendment (Liability for Recreational Services) Bill 2002, the Committee considers that landholders should be similarly protected.

Recommendation 3 (paragraph 3.84)

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.**

12. There are conflicting views on whether, or how much, volunteer and not-for-profit organisations should be given special treatment in respect of liability for negligence. This is a matter for further consideration.

Recommendation 4 (paragraph 3.96)

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.

CHAPTER 4—THE COST OF CLAIMS

13. Total claim costs have been increasing at an average rate well above the increase of average weekly earnings. This is one cause of increasing premiums. It is argued that the incidence of very high court awards to the catastrophically injured is a significant element in this.

Recommendation 5 (paragraph 4.20)

The Committee recommends that a working group of Commonwealth, state and territory officers be established to examine how best to provide for the long term care and treatment of persons who suffer catastrophic injuries as a result of someone's negligence.

14. The Committee supports efforts to improve the management of claims and to reduce legal and court costs.

15. The Committee supports measures to improve risk management and recommends that the Commonwealth assist with this.

Recommendation 6 (paragraph 4.50)

The Committee recommends that the Commonwealth continue to assist organisations to develop their own risk management practices for their particular industry.

16. The Committee considers that professional standards legislation has potential to reduce the number of claims through pro-active risk management, and suggests that the Commonwealth should encourage states and territories to adopt uniform professional standards legislation.

CHAPTER 5—UNDERSTANDING THE INSURANCE MARKET

17. Many submissions commented that setting fair premiums for public liability and professional indemnity insurance is hampered by lack of detailed enough industry-wide data on risks and claims.

18. The Committee supports proposals that APRA should develop a database to record this information. The Committee notes that this will be a new role for APRA additional to APRA's present role of prudential regulation. APRA will need to be suitably resourced to undertake it.

Recommendation 7 (paragraph 5.38)

The Committee recommends that the Government:

- **make a commitment to the development of a comprehensive national database on the insurance industry in Australia;**
- **put beyond doubt that APRA is to be given the responsibility for developing and maintaining this database;**
- **ensure that APRA has the statutory authority to require insurance companies and other relevant bodies to provide information; and**
- **ensure that it is adequately funded so that it has the resources and level of expertise to effectively collect, collate and analyse data on the insurance industry.**

Further, the Committee recommends that APRA:

- **look carefully at the evidence presented to the Committee on the nature and extent of information that is required to fully understand the insurance industry especially the pricing of premiums;**
- **make available a draft discussion paper that provides details of the data that it intends to collect and the procedures to be adopted in collecting this material;**

- **follow-up the publication of this paper with industry-wide consultation with a view to determining whether the new regime is going to meet the expectations of the insurance industry; and**
- **report to Parliament on its findings.**

19. There is a need for better quality, nationally comparable data on litigation relevant to insurance claims.

Recommendation 8 (paragraph 5.47)

- **In light of this ongoing problem of the lack of good quality, nationally comparable court data, the Committee recommends that the Commonwealth give high priority to the work being done by the Australian Bureau of Statistics in developing performance frameworks.**
- **It also recommends that the Attorneys-General treat this matter with urgency and, under the leadership of the Commonwealth Government, work together to ensure that good court data management systems are put in place throughout the country. The main objective is to have national standards apply so that the data across all jurisdictions is compatible, comprehensive and allows for consistency in interpretation.**

CHAPTER 6—INSURANCE CONSUMERS’ INTERESTS

20. The Committee is concerned by the reports it received in evidence of inappropriate or exploitative conduct by insurers, particularly in relation to last minute offers of policy renewal on exorbitant terms. The Committee considers that at the least insurers should be obliged to give 14 days notice of proposed terms of renewal or proposed refusal to renew a policy.

Recommendation 9 (paragraph 6.29)

The Committee recommends that the Government propose an amendment to section 58 of the *Insurance Contracts Act 1984* to ensure that insurers must give at least 14 days notice of the proposed terms of a policy renewal or proposed refusal to renew a policy.

21. The Committee notes that the Minister for Revenue and Assistant Treasurer, Senator Coonan, has asked the ACCC to continue to monitor insurance premiums and report six-monthly.

Recommendation 10 (paragraph 6.40)

Noting that the first update of the ACCC’s insurance industry market pricing review was made public in September, the Committee recommends that all subsequent six monthly reports be made public pursuant to section 27B of the *Prices Surveillance Act 1983*.

22. The Committee notes that at present the ACCC has no power to ensure that savings from current insurance reforms are passed on to consumers. The Committee considers that the ACCC should have power to control price exploitation in relation to insurance reforms. Amendments to the Trade Practices Act made in connection with the introduction of the GST are a precedent.

Recommendation 11 (paragraph 6.45)

The Committee recommends that the Trade Practices Act be amended to allow the ACCC to take enforcement action to ensure that any savings or benefits that accrue directly or indirectly from legislative reforms being implemented throughout Australia to minimise insurance premiums are passed on by the insurance companies to consumers.

23. In the Committee's view an efficient, strong and competent prudential regulator will go some way to restore public confidence in the insurance industry.

Recommendation 12 (paragraph 6.60)

The Committee recommends that the Government more actively monitor the activities of APRA and ensure that it has adequate powers and resources as well as a commitment to diligently supervise the industry.

24. There appears to be some continuing public uncertainty about the roles of the ACCC and ASIC in consumer protection in relation to financial services. In the Committee's view this should be clarified.

Recommendation 13 (paragraph 6.84)

The Committee recommends that, in close consultation, the ACCC and ASIC review and report publicly on their respective statutory obligations in regard to consumer protection and market integrity in the insurance industry with a view to:

- **clarifying their respective responsibilities, giving particular attention to whether there is any unnecessary overlap; and**
- **establishing whether, in their opinion, the legislation provides adequate and appropriate consumer protection in the insurance industry and, if not, identifying the gaps or weaknesses in consumer protection, including the prices and insurance coverage that are being offered to consumers.**

The Committee further recommends that the ACCC and ASIC actively promote their roles in consumer protection for all financial products, including general insurance.

25. The statutory dispute resolution provisions of the *Financial Services Reform Act 2001* (FSR Act) apply only to individuals and small businesses, and only to certain listed classes of insurance, which do not include public liability or professional indemnity insurance (though the list can be enlarged by regulation). It is unclear

whether a complaint about price exploitation in a proposed policy renewal is within scope. The Committee sees no good reason for these limitations.

Recommendation 14 (paragraph 6.101)

- **The Committee recommends that the Government amend the FSR Act to allow not-for-profit organisations to be included in the definition of ‘retail clients’.**
- **The Committee recommends that the Government, by regulation, include public liability insurance and professional indemnity insurance in the classes of insurance covered by the dispute resolution provisions of the FSR Act.**
- **The Committee recommends that ASIC monitor the effectiveness of the dispute resolution provisions and report on this annually to the Parliament.**
- **The Committee recommends that ASIC review, as a matter of urgency, the General Insurance Enquiries and Complaints Scheme and in consultation with the Insurance Council of Australia ensure that it covers adequately public liability and professional indemnity insurance and not-for-profit organisations. Further that it re-examine definitions in the terms of reference, such as small business, to ensure that they are consistent with definitions in Commonwealth legislation.**

26. The industry’s General Insurance Code of Practice excludes not-for-profit organisations and small businesses, and effectively excludes public liability and professional indemnity insurance. The Committee sees no good reason for these limitations.

Recommendation 15 (paragraph 6.111)

- **The Committee recommends that the General Insurance Code of Practice be revised so that it provides remedies for community groups and small businesses who are affected by price exploitation in relation to public liability or professional indemnity policies.**
- **The Committee recommends that Insurance Enquiries and Complaints Ltd submit the revised code for ASIC’s approval under the FSR Act.**

27. The Committee notes suggestions to establish an Insurance Industry Ombudsman. However the Committee believes that this would add another level of bureaucracy to an already unclear situation. The Committee has recommended that the ACCC should have increased powers to control price exploitation (recommendation 11).

Introduction

Establishment of the inquiry

1. The price of public liability insurance premiums has been a matter of ongoing debate over recent years. Every so often, a media report would comment on the growing tendency in Australia to litigate, or a substantial award for an injury would spark public discussion. Occasionally, the perceived trend in litigation would be held to ‘witness a rising tide of civil suits’ with Australia compared to the US.¹ Warning signs of trouble in public liability insurance were also registering elsewhere.

2. In November 2000, the NSW Report of the Public Bodies Review Committee found that:

There appears to be clear evidence that the number and cost of claims against councils are increasing. Further, all predictions are that the insurance market is ‘hardening’ and councils will be forced to pay much more for their insurance in the foreseeable future.²

3. This observation was borne out during the following year not only in relation to local councils but across a range of activities. During 2001, a greater sense of urgency crept into the reporting on public liability with suggestions that some councils may decide not to have playgrounds, or that local shows would close because of high public liability insurance costs.

4. As the year progressed, the implications of the collapse of HIH, a major Australian insurance company, became clearer and concerns about insurance premiums heightened.³ In April 2001, the media reported premium rises of up to 40 per cent for replacement cover for professional indemnity and public liability insurance.⁴ By May 2001, reports suggested that professionals such as lawyers, engineers and architects faced increased premiums for professional indemnity.⁵

1 The media reports are too numerous to cite here, but see for example: editorial, *Australian Financial Review*, 17 February 2001; Tom Morton, ‘Risky Business’, *Age*, 17 February 2001; Paul Heinrichs, ‘That’s no playground, it’s a legal minefield’, *Sunday Age*, 18 February 2001; Diana Bagnall, ‘The Blame Game’, *Bulletin*, 20 March, vol. 119, p. 26.

2 Parliament of New South Wales, Report of the Public Bodies Review Committee, *Public Liability Issues Facing Local Councils*, November 2000, p. 7.

3 The company was placed into provisional liquidation in March 2001.

4 See ‘HIH collapse puts charities, legal aid under pressure’, *Sydney Morning Herald*, 25 April 2001; John Breusch, ‘HIH leaves local councils in the lurch’, *Australian Financial Review*, 30 April 2001; ‘Disaster, Why Every Business Will be Hurt by HIH’, *Australian Financial Review*, 12 May 2001.

5 See for example, Trudy Harris, Andrew White, ‘Insurance premiums to rocket’, *Weekend Australian*, 19 May 2001; Sharon Kemp, ‘Insurer’s failure triggers big jump in premiums’, *Age*, 29 May 2001; Anne Lampe, ‘The rise and rise of insurance premiums’, *Sydney Morning Herald*, 29 May 2001.

During the following months stories appeared in the press of huge increases in premiums that threatened small business, community and sporting groups and adventure tourism.⁶ There were accounts of the cancellation of public events such as festivals. With the terrorist attack in New York on 11 September came speculation that the Australian domestic market would suffer from an expected increase in reinsurance rates.⁷ By year's end the situation appeared to worsen with media accounts of 'staggering' increases in public liability insurance premiums.⁸

5. As problems began to emerge in the public liability and professional indemnity area, the situation with medical indemnity, in particular, deepened during 2001 with fears that some doctors, notably those practicing obstetrics, were contemplating resigning their positions because of the escalating costs of insurance.⁹ By December 2001, the situation had so deteriorated that the Prime Minister, Mr John Howard, announced plans for a medical indemnity summit in early 2002.

6. The upheaval in the area of medical indemnity was felt even stronger when serious concerns were raised in February 2002 about the viability of Australia's major medical defence organisation, United Medical Protection.

7. On 3 February 2002, the Minister for Revenue and the Assistant Treasurer, Senator the Hon Helen Coonan, offered to host a meeting 'to coordinate the exchange of information about the affordability and accessibility of public liability insurance among relevant Ministers'. The meeting was to be held on 27 March 2002.¹⁰

6 The articles are too numerous to cite here, but see for example: Madeleine Milford, 'Huge liability rises hit Tassie', *Mercury*, 9 July 2001; Richard Baker, 'Insurance costs threat to adventure tourism', *Age*, 30 July 2001; Michael McGuire, 'Insurance crisis hits grassroots', *Australian*, 12 October 2001; Adrian Rollins, 'Insurance rise hits adventure tourism', *Age*, 29 October 2001; Geesche Jacobsen, 'Clubs, charities crippled as premiums soar', *Sydney Morning Herald*, 31 October 2001; James Wakelin, 'Huge rise in NT insurance costs', *Northern Territory News*, 22 November 2001.

7 Jacquie Hayes, 'Counting the cost of terror', *Weekend Australian*, 29 September 2001.

8 Allan Dick, 'liability wipeout', *The Land*, 13 December 2001; Claire O'Rourke and Stephanie Peating, 'Insurance costs crippling us, say sport groups', *Sydney Morning Herald*, 19 December 2001.

9 Julie Robotham, 'Top rural doctors resign as indemnity crisis grows', *Sydney Morning Herald*, 18 January 2001; Leah De Forest, 'Doctors warn of crisis as Govt Steps in', *Canberra Times*, 20 January 2001; Annie White, 'Crisis! What crisis?', *Australian Doctor*, 20 April 2001, p. 31; Leah De Forest, 'Home-birth midwives lose insurance', *Canberra Times*, 10 July 2001.

10 Press Release, C3/02, Senator the Hon Helen Coonan, Minister for Revenue and the Assistant Treasurer, 'Commonwealth proposes meeting on public liability insurance', 3 February 2002.

8. The issue of insurance premiums, however, remained at the forefront of public attention particularly in March with the prospect that some ANZAC Day marches would be cancelled because of high premiums.¹¹

9. It is against this background of mounting community and business concern about the availability of appropriate insurance cover at an affordable price that the Senate resolved to have the matter examined.

10. On 20 March 2002, the Senate referred the following matter to the Senate Economics References Committee for inquiry and report:

- a) the impact of public liability insurance for small business and community and sporting organisations; and
- b) the impact of professional indemnity insurance, including Directors and Officers Insurance, for small business;

with particular reference to:

- c) the cost of such insurance;
- d) reasons for the increase in premiums for such insurance; and
- e) schemes, arrangements or reforms that can reduce the cost of such insurance and/or better calculate and pool risk.

Conduct of the inquiry

11. The Committee advertised the inquiry in the *Financial Review* on 5 April and in the *Weekend Australian* on 6 April 2002, calling for written submissions to be lodged with the Committee by 13 May. The Committee also wrote to relevant Commonwealth Government Ministers, state Premiers and territory Chief Ministers drawing attention to the inquiry and inviting submissions. In addition, the Committee notified various academics, organisations and people interested in matters dealing with public liability and professional indemnity insurance about the inquiry.

12. The terms of reference and other information about the inquiry were also advertised on the Committee's internet homepage at <http://www.aph.gov.au/senate/committee/>

13. A total of 166 submissions was received. A list of submissions is contained in Appendix 1. All but five of the written submissions were made public documents.

14. Apart from the material contained in written submissions and in oral evidence presented to it, the Committee drew on a range of information contained in reports and

11 For example see Media Release, Senator John Cherry, Australian Democrats, Community Services Spokesman, 'Senate set to inquire into public liability insurance', 19 March 2002; *Australian*, 19 March 2002, *Herald Sun*, 19 March 2002; *Canberra Times*, 19 March 2002.

reviews from various committees of inquiry, and from comments and articles by people directly involved with public liability and professional indemnity matters.

15. After initial consideration of the submissions, the Committee began public hearings on 8 and 9 July in Canberra. These hearing were followed by further hearings in Melbourne and Sydney. Details of the hearings and the witnesses who appeared at them are contained in Appendix 2. The Hansard transcript of evidence taken at the hearings was made available on the internet.

16. The Committee continues to receive submissions and supplementary submissions. These later submissions have generally reinforced the evidence already received by the Committee and indicate that for many the problems caused by high premiums still remain.

Complementary reviews

17. The Committee is aware of the number of separate reviews and inquiries now taking place into public liability insurance. These include a panel of experts chaired by the Hon. Justice David Ipp, which has recently reported on the law of negligence; the ACCC's brief to monitor and report on premium costs; and the Productivity Commission's study into claims management. The Committee accepts that much of their work will traverse and in some cases examine at greater depth specific matters that are dealt with in this report. Nonetheless, the Committee feels strongly that it has a responsibility to ensure that the voice of the broader Australian community is heard on this matter. The inquiry has taken evidence from business people, community and volunteer workers, and representatives from a wide range of professions. They have been able to make known their views, experiences and concerns and to put forward their solutions for the Committee's consideration. This inquiry has certainly facilitated open public debate. Also, rather than focus on specific aspects, the inquiry provides an overview of key issues.

18. The Committee also appreciates that the states and territories and the Commonwealth Government are taking steps to address the problems. Some of their measures are being introduced in stages. The Committee is in a position to look at these developments but cannot assess their effectiveness at this early stage other than to place them in the broader context of reforms that are taking place across the nation. It can comment on the complementarity of reform between the states and between the states and the Commonwealth.

Structure of the report

19. The report reflects on recent developments in public liability and professional indemnity insurance that have given rise to the present problems. It also assesses the direction being taken by the various jurisdictions and the insurance industry in meeting the challenge caused by rising premiums and the difficulties being experienced in obtaining adequate cover.

20. This report is divided into the following three broad parts:

- A general introduction that describes the current situation in the public liability and professional indemnity insurance industry in Australia and its implications for Australian society and the business community. This includes a summary of recent developments in the overarching global and domestic insurance industry and the implications for the Australian insurance market.
- An analysis of the underlying causes of the current problems and an appreciation of the measures being taken to address them. This part is further divided into sections that deal with the rise in the number of claims and the increase in the amount of awards or settlements.
- An examination of the regulatory framework in which the insurance industry operates which includes an assessment of the data currently available on the industry. This part also considers the role of APRA, the ACCC and ASIC as regulatory bodies concerned with various aspects of the insurance industry and the adequacy of consumer protection.

Acknowledgments

21. The Committee wishes to express its appreciation to everyone who contributed to the inquiry by making submissions, providing other information or appearing before the Committee at public hearings.

Part I

The current situation in the public liability and professional indemnity insurance industry in Australia

This section of the report provides a general introduction that describes the current situation in the public liability and professional indemnity insurance industry in Australia and its implications for the business and the wider Australian community. It provides a wide representation of views from the medical profession, accountants, financial advisers, surveyors, engineers, retailers, community, sporting and volunteer groups, and local councils.

It also includes a summary of recent developments in the overarching global and domestic insurance industry and the implications for the Australian insurance market.

Chapter 1

The problems of insurance buyers

1.1 The effects of increasing premiums on various groups—particularly community groups, small business and professionals—are described in this chapter. It compares information on average sector-wide increases with the experiences of those who gave evidence.

1.2 Concern about rising public liability and professional indemnity insurance premiums has featured heavily in the news since early 2001—particularly since the collapse of HIH Insurance in March 2001. Concerns increased throughout 2001 and have snowballed during 2002. In the Commonwealth Parliamentary Library’s news clippings collection, items containing either ‘public liability’ or ‘professional indemnity’ number as follows:

2000, first half:	25
2000, second half:	33
2001, first half:	140
2001, second half:	116
2002, first half:	975

1.3 Broadscale statistics and industry surveys noted in submissions show significant premium increases. However a major part of the problem is the extreme variability of increases. Regardless of average figures, for many the situation is now undoubtedly a crisis. The Committee received many submissions from community groups, small businesses, and professional organisations describing sudden, exorbitant increases in premiums (regardless of claims history); inability to find insurance at any price; excesses and deductibles increased to an extent that makes the insured effectively self-insured for all but the biggest risks. Community events are cancelled, community groups are disbanding, professionals find themselves unable to practise their professions.

1.4 Unfortunately there is no suggestion that the increases will abate soon. Indeed, according to the Insurance Council of Australia, ‘the cost of public liability claims is still well in excess of the amount of premium collected.’¹

1.5 The matter is of high public importance, not only because of the widespread effects on small businesses and professionals, but also because of the effects on community groups and volunteer organisations which are the lifeblood of the country’s communities, especially in the regions. The writing has been on the wall

1 Insurance Council of Australia, *Liability losses underline need for reform*, media release 27 August 2002.

since mid-2001. The Committee regrets that it has taken governments so long to act in response.

Effects on community groups

1.6 Many submissions described the effects of insurance problems on community groups and community activities. For example, the New South Wales Golf Association described the fate of the Croppa Creek Golf Club:

Its membership totals only 8 people...The golf course consists of 9 holes on land leased from a local resident for a peppercorn rental...The club's public liability insurance was previously taken out by the Croppa Creek Bowling Club, a neighbouring facility. The bowling club simply included the golf club's land in its annual declaration to its insurance broker, and the golf club, in kind, provided an annual token donation of \$100 to the bowling club. Very quaint, very simple, very effective.

In March 2002, the Croppa Creek Bowling Club was advised by its insurance broker that it could no longer take out 'piggy back' insurance for the golf club...Aon [brokers to the NSW Golf Association] was able to obtain only two quotations, both from overseas, and the cheapest premium it could quote was for \$4,364 for \$10 million cover...the golf club's entire turnover the previous year had been \$2,000...Currently, their course is closed with little prospect of re-opening.

1.7 According to the Association, the situation is far from unique. As another example Molong Golf Club, with 54 members faced an insurance bill increasing from \$3,000 to \$12,500. 'They have advised us it is highly unlikely they can continue.'²

1.8 Similar stories are being played out all over the country. The Maclean Scottish Association, for its Easter Highland Gathering, suffered an increase in public liability insurance premium from \$1,500 to \$5,000 in 2001. 'Next year's festival is very much in doubt.' The premium of the Chatsworth Community Hall Committee rose from \$380 to \$1,350. 'The Committee was only able to pay this premium, and thus keep the hall open, through a one-off donation of \$900 from Council.'³

1.9 The Local Government and Shires Association of NSW listed over 80 threatened community events and community groups in New South Wales, from the Bombala local growers market to the Mudgee annual Christmas Carols.⁴ The NSW Department of Sport and Recreation listed 86 similar examples, mostly of sporting groups, from the Big Banana ('rise in public liability [premium] from \$39,900 to \$140,000 in one year') to the Blue Light Discos ('400 per cent price hike') to the Combined Pensioners and Superannuants Association ('May have to cut staff to pay

2 Submission 26, NSW Golf Association Ltd, p. 1.

3 Submission 9, Maclean Shire Council, p. 1.

4 Submission 23, Local Government and Shires Association of NSW, p. 23.

for premium rise from \$6,700 to \$76,000').⁵ Local government itself faces public liability premium increases of 30–50 per cent in the current year on average, with many examples of increases beyond this range—up to 100 per cent in several cases and 700 in one case. Industry sources suggest that further increases in the range of 30–50 per cent may be expected in 2003.⁶

1.10 Submissions gave many more examples of which some are reproduced in Appendix 4. It is obvious that they are only the tip of the iceberg. Similar situations have been in the media almost daily. The Local Government and Shires Association of NSW described the serious effects that the crisis is having on community cohesion, particularly in country areas:

The loss of these activities has a number of potential impacts...

- People lose the opportunity to interact and become less connected to their community
- People lose volunteering opportunities, diminishing their opportunity to serve their communities and enhance their sense of worth
- People lose recreational opportunities (which are already modest in many rural and remote areas)
- Communities feel a loss of cultural identity
- Communities lose fund-raising activities, impacting further on local facilities and services
- Communities lose economic benefits that flow from the tourist potential of many of these activities.⁷

1.11 According to the Country Women's Association of Victoria, 'Increases in insurance premiums are ruining the whole social fabric of communities...'

People can no longer afford to have functions to raise income to cover the short fall in providing equipment and offsetting running expenses for schools, hospitals and sporting clubs. This will have a long term detrimental effect on society, driving us down to third world country status, with no community volunteer system, for which Australia is noted.⁸

1.12 Sporting groups are also affected. The Standing Committee on Recreation and Sport of the Sport and Recreation Ministers Council notes that 'it may be the case that...sport and recreation organisations are disproportionately affected by increases in the cost of PLI cover. It is clear that many sport and recreation activities are

5 Submission 40, NSW Department of Sport and Recreation, appendix.

6 Submission 23, Local Government and Shires Association of NSW, p. 10.

7 Submission 23, Local Government and Shires Association of NSW, p. 8.

8 Submission 38, Country Womens Association of Victoria, p. 1.

regarded as high risk and attract larger premiums to compensate for that risk factor.’⁹ Sport Industry Australia advised that community events are being cancelled and clubs are closing down.¹⁰ A survey by the Sports Federation of Queensland in 2001 found that for sporting groups the average cost of public liability insurance had nearly doubled since 1999. Groups were concerned not only with the level of increase in premiums but also with the reduction in the level of coverage being offered and the difficulty of finding insurance in a shrinking market.¹¹

1.13 Some examples in other submissions are:

- Surf Life Saving Australia Ltd: PLI premiums from \$153,000 to \$600,000 from 1996 to 2001.¹²
- Soccer Australia: premium increase from \$42,785 to \$440,000 over one year.¹³
- Australian Swimming Inc: increases from 150–350 per cent among affiliated organisations.¹⁴
- Australian Cricket Board: ‘With renewals now approaching, brokers are advising some states to expect increases of over 100 per cent in their premiums...An additional impact of the increase in premiums in Victoria is seeing other organisations seeking to move their risk onto cricket...such a move creates a significant public policy issue as it threatens the viability of cricket clubs...’¹⁵

1.14 For the Country Women’s Association of NSW, ‘the most poignant effect of the current climate of litigation has come from Nursing Homes and Hostels....’

Elderly people in these places are now prevented from contributing to their communities by such small responsibilities as arranging flowers, setting tables, tidying sitting rooms. For fear they cause an injury to another party when so doing, they have been told they are not to do these things. The result? They feel useless, a burden, their existence basically pointless.¹⁶

1.15 The Local Government and Shires Association of NSW summarised the frustration of many:

9 Standing Committee on Recreation and Sport, *Review of Australian Sports Insurance—summary of a report prepared for the Sport and Recreation Ministers’ Council*, March 2002.

10 Submission 44, Sport Industry Australia, p. 2.

11 Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 12.

12 Submission 18, Surf Life Saving Australia Ltd, p. 1.

13 Submission 37, Soccer Australia, p. 1.

14 Submission 43, Australian Swimming Inc, p. 2.

15 Submission 100, Australian Cricket Board, p. 2.

16 Submission 13, Country Womens Association of NSW, p. 2.

The Daily Telegraph (Fri 8.0.3.02 p1) headlines it as the '*Death of Fun*' with the subheading '*As politicians plan another talkfest, community spirit is dying before our eyes*'.

Effects on small business

1.16 There have been severe effects on small business. Many submissions related to the outdoor recreation and tourism sector. The Queensland Outdoor Recreation Federation reported business closures and businesses operating without insurance.¹⁷ A recent Queensland Government Liability Insurance Taskforce reported that the outdoor recreation sector has been affected by increases in insurance premiums of between 40% and 900%, the refusal of insurance cover and the decline in the number of insurance companies prepared to underwrite insurance for the sector. In addition, landholders are beginning to refuse access to their land for outdoor activities for fear of being sued.

1.17 In relation to the tourism sector, the Taskforce reported that:

Anecdotal evidence has found that worst affected sectors of the industry are the events and adventure tour operators (with reported premium increases as high as 5,000 per cent). However, relatively soft-adventure operators (such as camping grounds), accommodation establishments, attractions and transport operators have also reported exorbitant increases in insurance premiums and inability to obtain public liability insurance cover...public liability insurance is the single largest issue confronting the amusement, leisure and recreation sectors, with the potential collapse of many operators in these sectors imminent because they can no longer afford to pay unreasonable public liability premiums. They have reported increases in premiums of 300 to 700 per cent over the previous year.

The Australian Parachute Federation reports public liability insurance premium increases of more than 300 per cent in the past few years. Individual operators have reported public liability insurance premium increases of between 40 and 209 per cent (accommodation establishments), 150 to 2,000 per cent (adventure activities) and 50 and 300 per cent (attractions).¹⁸

1.18 The Australian Hotels Association, as another example, reported particular hotels that had suffered increases from \$5,000 to \$26,000 over two years; from \$11,000 to \$31,000 over two years; from \$9,000 to \$27,000 in one year.¹⁹

1.19 In relation to event organisations, the Taskforce referred to a survey conducted by Deloitte Touche Tohmatsu (Deloitte) on behalf of Queensland Events Corporation in February 2001. The survey was conducted in order to assist in

17 Submission 47, Queensland Outdoor Recreation Federation, p. 1.

18 Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 16.

19 Submission 157, Australian Hotels Association, p. 5.

developing a response to difficulties that event organisers in Queensland had been experiencing in obtaining necessary public liability and other forms of insurance coverage. Approximately 400 responses were received. The Taskforce reported that the survey showed:

41.6% of respondents indicated that their insurance premiums (including public liability and professional indemnity) has increased by more than 50% over the last three years;

4.5% of respondents indicated that their insurance premiums had not increased;

66.9% of respondents indicated that they had found it more difficult to obtain insurance coverage over the last 3 years;

21% of respondents indicated that they had to either cancel or scale back their activities due to the cost or the unavailability of public liability and professional indemnity insurance.²⁰

1.20 The Taskforce stated that ‘it is important to acknowledge that there is a great difference from an insurance perspective between major events (Goodwill Games, Indy Car Race etc) and minor events (such as flower shows, community shows and country music festivals). The Deloitte report noted that there is competition amongst insurance companies to provide coverage for major events.’²¹

1.21 The Australian Horse Industry Council reported that ‘the insurance company under-writing the majority of Australia’s recreational horse industry has withdrawn from the market. At present the majority of commercial and not-for-profit associations in the horse industry have been unable to secure PLI after their current policies expire and will face closure if they cannot.’²²

1.22 More generally, the Council of Small Business Organisations of Australia (COSBOA) reported increases of 200–500 per cent in the 2001–2002 financial year among its members. Some members report inability to get any coverage.²³

1.23 According to the Country Women’s Association of NSW, the effects on small business are especially severe in the country:

When a carpenter in a country town finds his premiums have increased in a single year from \$500 to \$1100, a real instance, he has to decide if it is worthwhile to continue in business. In the average country town, the carpenters are not the leaders in earnings. When a horse riding business finds its cover now costs \$2400 for the year when previously it had

20 Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 17.

21 Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 17.

22 Submission 75, Australian Horse Industry Council, p. 3.

23 Submission 113, Council of Small Business Organisations of Australia, p. 2.

difficulties meeting a cost of \$1500, and has made no claims against the policy—the family is unable to allow the business to continue.²⁴

1.24 These closures not only withdraw the service from the town, they withdraw the wages from the local economy. As well, according to the CWA, small businesses are particularly affected by government demands that tenderers for government contracts carry \$10–20 million in public liability insurance:

The cost of such cover for the average small business has been estimated at \$15 000. When a contract is worth only \$20 000 such premium costs are unrealistic and impractical... While such premium increases are undoubtedly galling for big business, they are more easily absorbed or passed on to customers; neither of these options is realistic or affordable for the average small business.²⁵

Effects on professions

1.25 Many professional groups have been severely affected by rising professional indemnity insurance premiums. The Committee received submissions by or on behalf of architects, engineers, accountants, surveyors, actuaries, lawyers, property valuers, financial planners, real estate agents; and on the medical side (apart from peak bodies like the Australian Medical Association) anaesthetists, midwives, nurses, chiropractors, pharmacists, physiotherapists, dentists, audiologists, general practitioners, pathologists, obstetricians and gynaecologists.²⁶

1.26 For example, the Australian Council of Professions reported that professional indemnity premiums have risen by ‘between 20 and more than 200 per cent recently.’ The Council gives examples from its membership:

- dentists: 80 per cent increase this year
- engineers: 39 per cent increase from 1996-97 to 2000-2001
- ‘some physiotherapists’: 300 per cent increases over a year
- chartered accountants: 100–200 per cent
- from 2000 to 2001: architects 30–60%; engineers 30–60%; interior designers 20–35%; landscape architects 20–35%; management consultants 20–50%; project and construction managers 25–35%; quantity surveyors 30–45%; real estate agents 50–150%; town planners 30–45%; valuers 50–150%.

1.27 The Council believes it is unlikely that these increases reflect any sudden increase in claims.²⁷

24 Submission 13, Country Womens Association of NSW, p. 3.

25 Submission 13, Country Womens Association of NSW, p. 4.

26 Some of these are listed under the aegis of submission 55, Australian Council of Professions.

27 Submission 55, Australian Council of Professions, pp. 4, 9ff.

1.28 Other examples in submissions were:

- Surveyors: increases from 13% (with no changes or claims) to 300% (history not advised).²⁸
- Valuers: 350% increase over 3 years; reduced scope of cover with higher excesses and limitations in the covered activities; increasing percentage of valuers denied cover.²⁹
- Engineers: average increase of 18.9% in 2001–02 in a Victorian study. ‘We are concerned that increases in 2002–03 will be of a similar order.’³⁰
- Engineers: many firms report increases of 20–50 per cent during 2001; in some cases more than 100%. Some perceived high risk categories are becoming difficult or impossible to insure, and insurers are only offering policies with excesses/deductibles which are between 5 and 20 times what they were in 2000. Increased tendency for principals with market power to shift excessive and uninsurable risk onto smaller players such as consulting engineers and subcontractors.³¹
- Accountants: average increases of 25% in 2001; 40% since March 2002, with numerous instances of 100–300%. High excesses are being demanded which put them in breach of their professional body’s rules and effectively make members self-insured for most claims. Taxation advice is being excluded.³²
- Financial planners: increases from 30–1000%; increased excesses and exclusions.³³
- Real estate agents: increases of 40–400% for \$1 million cover; excesses increasing up to ten-fold. Agents who are not involved in many valuations each year, particularly in rural areas, are discontinuing valuation services as these are not covered.³⁴ [The problem is analogous to that of rural general practitioners discontinuing procedural work, considered below].

1.29 The extreme range of increases in these examples is noteworthy. This is taken up at paragraph 1.37.

28 Submission 28, Association of Consulting Surveyors New South Wales Inc, p. 2.

29 Submission 122, Australian Property Institute, p. 2.

30 Submission 48, Association of Professional Engineers, Scientists and Managers, Australia and others, p. 4.

31 Submission 54, The Association of Consulting Engineers Australia, pp. 3-4. Similarly submission 108, Department of Industry, Tourism and Resources, p. 8: ‘...representations from industry organisations representing professional services firms in the construction industry, who believe that the increase in professional indemnity premiums and excesses for these firms is a result of the transfer of risk to these firms, including from public sector clients.’

32 Submission 125, CPA Australia, pp. 2-4.

33 Submission 94, Financial Planning Association of Australia Ltd, pp. 8-10.

34 Submission 91, Real Estate Institute of Australia, p. 3.

1.30 The Institution of Engineers describes the effects:

increases in fees; a limiting of business activities to limit liability exposure by engineering firms; a diversion of financial resources by firms to enable them to self-insure; withdrawal of certain technical skills and services from the market; closure of small companies; a greater prevalence of uninsured engineers.³⁵

1.31 Submissions suggest that the same effects probably apply in most of the professions mentioned.

1.32 Many professional groups as well as non-profit organisations mentioned that blanket demands for \$10 million of cover as a condition of government contracts or grants are all out of proportion to the risks involved, and require premiums which have become prohibitive.

1.33 The Australian Council of Professions reports that directors and officers insurance 'is not widely held among professionals or, if held, is not seen as a big problem'.³⁶

1.34 Health professionals have also been hard hit, particularly in obstetrics and midwifery. According to submissions the number of doctors in rural areas who are prepared to undertake surgical procedures is declining rapidly, as their earnings do not cover the cost of medical indemnity insurance.³⁷ There is a decline in the number of anaesthetists willing to be involved in obstetrics.³⁸ Obstetricians face premiums of over \$100,000 per year, and neurosurgeons \$250,000.³⁹ In New South Wales, at the scheduled fee for a confinement (\$422.25), an obstetrician has to deliver 196 babies to pay the \$82,500 annual premium. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists expects a serious decline in the obstetrics workforce as older obstetricians retire prematurely and younger trainees increasingly opt out of obstetric practice.

The average age of our practising obstetricians is 51 years of age...The specialists graduating in the 1990s and in the 21st century are indicating strongly that this situation is deterring them from practising obstetrics. We conducted a survey of our senior trainees in 2001 and got a 98 per cent response rate. Of that group, 24 per cent—about 126 of them—indicated they would not practise obstetrics once they achieve their specialist status. The reasons were threefold: firstly, the stress of medical liability; secondly,

35 Submission 81, Institution of Engineers, Australia, p. 2.

36 Submission 55, Australian Council of Professions, p. 8.

37 Submission 111, Australian Medical Association, p. 1; Submission 52, Doctors Reform Society, p. 2.

38 Submission 16, Australian and New Zealand College of Anaesthetists, p. 2.

39 Submission 111, Australian Medical Association, p. 1; Submission 52, Doctors Reform Society, p. 2.

the lifestyle situation of being a practising obstetrician was not appealing; and, thirdly—and equally importantly—because of the medical indemnity costs.⁴⁰

1.35 Many independent nurses cannot practice their professions because they cannot get affordable professional indemnity insurance.⁴¹ According to the Royal College of Nursing, independent midwives cannot get insurance at all. Most have either left the profession or returned to employed situations.⁴² As a result national policies on homebirths cannot be implemented. Midwifery students cannot get clinical experience, with serious implications for the future supply of trained midwives. Hospitals are closing maternity wards.⁴³

1.36 Some further examples from all the categories above are:

- an agency providing activities for people with epilepsy unable to obtain public liability insurance cover for any of its participatory events, even though no insurance claim has been made in the program's 12 year history;⁴⁴
- an agency obliged to stand down all volunteers aged over 65 years because its public liability insurance cover excluded them;⁴⁵
- refusal of cover for induction and training of people with disabilities where this occurs on sites other than at the organisation's own premises;⁴⁶
- businesses forced to withdraw from government tenders due to being unable to obtain the required professional indemnity insurance;⁴⁷
- professionals forced to breach their professional association's rules by continuing to practice while unable to obtain insurance cover at the level set by the association's rules; and⁴⁸
- increasing exclusions from schools' policies may limit core curricular activities.⁴⁹

40 Dr J. Campbell (Royal Australian and New Zealand College of Obstetricians and Gynaecologists), *Committee Hansard*, 10 July 2002, p. 190.

41 Submission 70, Australian Nursing Federation, p. 1.

42 Submission 102, Royal College of Nursing, p. 102.

43 Submission 117, Australian College of Midwives.

44 Submission 59, ACROD Ltd, p. 3.

45 Submission 59, ACROD Ltd, p. 3.

46 Submission 59, ACROD Ltd, p. 4.

47 Submission 108, Department of Industry, Tourism and Resources, p. 7.

48 Submission 125, CPA Australia, p. 3.

49 Submission 106, National Council of Independent Schools' Associations, p. 1.

Individual stories versus wider statistics

1.37 Many submissions from peak groups reported surveys of their members. These usually showed more moderate—yet still significant—average premium increases than the extreme individual cases mentioned above. The survey figures are more in line with figures shown in *Selected Statistics on the General Insurance Industry* by the Australian Prudential Regulation Authority (APRA)—with the proviso that APRA’s latest figures are to December 2001, and the situation has probably developed significantly since then.

1.38 Some average increases are mentioned above at paragraphs 1.26 and 1.28. Other examples are:

- A survey of members by the Australian Industry Group found that on average premiums were expected to rise by 41 per cent in 2002 (though small companies were worst affected with projected increases of 65 per cent).⁵⁰
- A survey of members by the Queensland Council of Social Services in July 2001 found an average increase in premiums of around 30–40 per cent. [It should be remembered that the situation has probably changed greatly since then.]⁵¹
- The Australian Chamber of Commerce and Industry reported various surveys of members by its State branches. The Victorian Employers Chamber of Commerce and Industry found average increases in PLI premiums of 80 per cent in early 2002. The Chamber of Commerce and Industry of Western Australia found a median rise of 35 per cent over the past year. The Victorian Automobile Chamber of Commerce found an average increase of 36.4 per cent. The State Chamber of Commerce (NSW) found that 51 per cent of respondents had increases from 10–100 per cent.⁵²

1.39 In considering the apparent discrepancy between average figures and the extreme individual cases, it should be remembered that both average and median figures, regardless of sample size, can conceal wide individual variations. As well, it is natural that those who have been worst affected are keenest to have their stories heard, so collections of individuals cases will naturally tend to highlight the worst ones. Nevertheless, in the Committee’s view the more moderate average figures are no cause for complacency. The extreme variability of increased premiums, and the apparently capricious way this has affected so many people and particular sectors, is an essential feature of the current crisis.

1.40 The March 2002 Trowbridge report for ministers summarises movements in public liability premiums. From a 1993 index of 100, premiums of survey respondents dipped to 68 in 1998 (that is, on average 1998 premiums were 68 per cent of 1993

50 Submission 49, Australian Industry Group, p. 1.

51 Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 10.

52 Submission 90, Australian Chamber of Commerce and Industry, pp. 3-4.

premiums), rose back to 98 by June 2001, and are forecast to be 130 by June 2002 and 145 by 2003.

year	% change in premium rates	premium rate index (1993=100)
1993	-	100
1994	+4%	104
1995	-2%	102
1996	-12%	90
1997	-17%	74
1998	-8%	68
1999	+4%	71
2000	+17%	83
2001	+18%	98
2002 forecast	+32%	130
2003 forecast	+12%	145
source: Trowbridge Consulting, <i>Public Liability Insurance—analysis for meeting of ministers 27 March 2002</i> , March 2002, p.27; pers. comm. August 2002		

1.41 Comparing APRA statistics on public liability premium per \$1,000 of private sector Gross Domestic Product shows a similar trend. Trowbridge comments: ‘It is clear that the average premium rate increase in the current year is very steep, and that the insurance industry is expecting further increases next year.’⁵³

1.42 The table above does not take account of inflation. As well, increasing premiums must of course be seen in context of the long term increase in claims expense. It is the balance between premium income and claims expense which chiefly determines the level of profit. According to ISC/APRA figures the net claims expense of public liability, product liability and professional indemnity insurance has almost doubled from 1993 to 2001.⁵⁴ Figures on average claim size from Insurance Statistics Australia’s contributors show a similar trend.⁵⁵ Trowbridge summarises movements in the interim thus:

- healthy level of profit for 1992 and 1993 business

53 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, pp. 26-7.

54 ISC/APRA data quoted in ACCC, *Insurance Industry Market Pricing Review*, March 2002, appendix C. Net claims expense (\$million), year to 12/6/1993: public & product liability \$283.118, professional indemnity \$175.568, total \$458.686. Year to 12/6/2001: public & product liability \$582.728, professional indemnity \$279.549, total \$862.277.

55 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 16. Insurance Statistics Australia is a non-profit company owned by a number of insurance companies. It collects data for the benefit of members. It covers 22 per cent of the market.

- marginally unprofitable business in 1994 and 1995
- severe losses from 1996 through to 2000 with 1998 representing the low point in trends of profitability.

On the basis of this data, which we regard as currently the best available indication, premiums would need to increase by around 100 per cent from 1998 levels to give adequate profitability.⁵⁶

1.43 On the different effects on different categories of insurance buyers, Trowbridge comments that there are no reliable statistics; however anecdotal and qualitative evidence ‘indicates that all segments of industry have faced increases in public liability premiums, but with extreme increases for organisations with high exposure to personal injury claims’. These are:

- any organisation with a high level of public traffic
- shopping centres etc (referred to as “slip and fall” risks)
- those with participants in dangerous activities (eg horse riding)
- local governments.

This evidence indicates that premium increases of 20% are routine; 100% are not uncommon; 500% to 1000% have occurred. Those largest increases have typically arisen following a change of insurer (HIH collapse or another insurer no longer covering the event) where the basis of calculating premiums is different between insurers particularly if the risk is unusual.⁵⁷

Market failure?

1.44 A notable feature of the crisis is the common report from insurance buyers that the number of insurers willing to deal has dropped dramatically; or at the limit, insurance cannot be obtained at any price. For example:

- Independent midwives cannot obtain insurance, as noted above.
- In 2000/2001 there were 23 professional indemnity insurance underwriters. Now there are eight, of whom only four write financial planning business.⁵⁸
- ‘The number of major multiline insurers has decreased from over 20 in the early 1990s to around six today...there are also indications that insurance companies

56 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 33.

57 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 28.

58 Submission 94, Financial Planning Association of Australia Ltd, p. 3.

are taking the opportunity to improve the quality of their customer base by shedding low value customers.’⁵⁹

- ‘Lack of competition for the schools’ liability business. Ten years ago in Victoria there were 10–12 underwriters prepared to write liability business for schools. Today there are 3...A take it or leave it approach in relation to price (premiums and deductibles)’.⁶⁰
- ‘Some perceived high risk categories [of engineering] are difficult or impossible to insure.’⁶¹
- ‘Reduction in the number of companies prepared to underwrite outdoor adventure activities, leading to monopoly.’⁶² For example, the insurance company underwriting the majority of Australia’s recreational horse industry has withdrawn from the market. Most commercial and non-profit associations in the horse industry cannot renew their public liability insurance and face closure.⁶³

1.45 As well as sudden exorbitant increases in premiums, excesses and exclusions, submissions report delays in confirming renewals:

In many instances the negotiations have commenced a considerable time before the existing policy has expired. However the insurance companies appear to have deliberately strung out negotiations until the final 24 hours of the existing policies expiring before offering cover at a steeply increased premium on the previous year’s cover. At this point of time business operators are faced with a decision of whether to shut down operations or continue to operate uninsured.⁶⁴

The experience has been that renewal notices are not being served until one week to two days before cover expires. In addition, quotes in relation to renewal are then taking up to three weeks and sometimes longer. This leads to uncertainty, the need to negotiate short-term extensions at the last minute to ensure interim cover, and gaps in cover.⁶⁵

59 Submission 23, Local Government and Shire Association of NSW, p. 5. The Australian Rugby League Ltd, Submission 82, p. 2 stated, ‘No competition from other underwriters. When only one insurer is prepared to take on the risk our client has to pay the premium charged.’

60 Submission 24, Association of Independent Schools of Victoria Inc., pp. 4-5.

61 Submission 54, The Association of Consulting Engineers Australia, p. 3.

62 Submission 47, Queensland Outdoor Recreation Federation, p. 1. The Queensland Government, *Report of Liability Insurance Taskforce*, February 2002, p. 14, stated ‘Of the three companies previously involved in underwriting outdoor recreation operations, there remains one in the market at present... there is a reluctance to insure, and in some instances even quote on the provision of policies, for some perceived “high risk” activities.’

63 Submission 75, Australian Horse Industry Council, p. 3; Similarly submission 6, Equestrian Federation of Australia, p. 1; submission 19, Riding for the Disabled Association of Australia Inc., p. 2.

64 Submission 147, Fire Protection Association Australia & Fire Contractors Federation, p. 6.

65 Submission 94, Financial Planning Association of Australia Ltd, p. 10.

1.46 In situations where the seller knows that the buyer cannot do without the service and has no alternative source of supply, it might be arguable that such behaviour is unconscionable conduct.

1.47 This behaviour is not the sign of an efficient competitive market. It suggests that some insurers are taking maximum advantage of the sellers' market created by the contraction of supply following the collapse of HIH.

1.48 As noted above, we should be cautious of taking the worst stories as representative of the average situation. Mr West of Royal and SunAlliance commented:

Certainly there are some areas where there is limited competition; that is absolutely right...I would say that they are tip of the iceberg; they are not everybody. In looking at some of the solutions put in place in Victoria on the not-for-profit side, it is interesting to note how many cases have actually gone to that scheme. At the moment it is less than five per cent of the expected cases within a not-for-profit area...Ninety-five per cent of people actually got the cover, and they are not having a problem. Of course, obviously, the ones who come to attention are the ones who do have the problem.⁶⁶

1.49 APRA stresses the high number of general insurers and comparatively low barriers to entry (compared with other financial services), indicating a competitive market:

There are 111 companies now writing new business in the general insurance industry and the entry hurdle is \$5 million...you would have to conclude that across the spectrum of the financial sector the general insurance industry is one of the more competitive parts.⁶⁷

1.50 The Committee acknowledges this. However, as noted before, a fundamental element of the present insurance crisis is the highly variable and even capricious way it has struck particular groups and particular types of insurance buyers—particularly community groups and some types of small businesses such as outdoor recreation businesses. It is small comfort to an insurance buyer to know that there are 111 general insurers, if *not one* is interested in bidding for that particular business.

1.51 Mr Tony Abbot, Law Council of Australia, made this point:

Although there are over 100 insurers in Australia, not all of them offer this type of insurance to segments like horse riding clubs. Many of the witnesses before you have found that, practically, they only have one or two insurers

66 Mr D. West (Royal and SunAlliance), *Committee Hansard*, 9 August 2002, p. 362.

67 Dr D. Roberts (Australian Prudential Regulation Authority), *Committee Hansard*, 9 July 2002, p. 133.

in the market. They have no financial or actual ability to get alternative quotes in Australia or from overseas. It is a captive market.⁶⁸

Are some insurance buyers being unfairly penalised?

1.52 Many submitters complained that their premiums had increased even though they have never made a claim. This misunderstands the nature of insurance. Individual buyers are pooled with others of similar character, and premiums are set to cover the claims expense of the pool. It is the essence of insurance that those who do not make claims subsidise those who do. They cannot expect to be insulated from the risk of the pool because of their personal good record.

There are a lot of very innocent victims out there who are being penalised for poor performance and poor risk management on behalf of similar organisations or similar companies across Australia. There are some very innocent adventure risk people who do manage their businesses very well [but] the insurance industry has never been able to go down to a one-on-one individual risk level... You look at that class of business and work out how well it runs as a class of business Australia wide.⁶⁹

1.53 However the complaint has more force when generalised to larger groups. For example, the Australian Cricket Board argued that ‘cricket is also a low risk sport with claims history that demonstrates that the sport is not a major user of public liability insurance. Insurers do not seem to have taken account of these characteristics in setting premiums.’⁷⁰ Our Community surveyed the claims history of over 1,000 community groups:

Over 1,000 community groups completed this survey undertaken by Our Community on a national basis... 96% of respondents had not had a claim in five years. Of those groups who did have a claim on their insurance, the total money paid out by insurers represented less than 5 per cent of the total premiums paid over one year.⁷¹

1.54 Many submissions argued that insurers are exploiting classes of buyers who have little market power, regardless of their risk, to cross-subsidise higher risk classes:

We believe that low risk professions such as quantity surveyors are being penalized by insurers who are attempting to offset their losses from the higher risk areas. In our opinion this is unconscionable conduct by insurers and likely to be a breach of the Trade Practices Act.⁷²

68 *Committee Hansard*, 8 August 2002, p. 269.

69 Mr R. Jones (Insurance Council of Australia), *Committee Hansard* 8 July 2002, p. 57.

70 Submission 100, Australian Cricket Board, p. 2.

71 Submission 71, Our Community, p. 3.

72 Submission 142, The Australian Institute of Quantity Surveyors.

...it may be the case that professions with low numbers of claims are effectively cross-subsidising claims by professions and by other insurance clients in sectors where claims and litigation are more common.⁷³

Buying power seems to be a key factor here. The smaller the voluntary organization, the greater the cost for insurance...Collapse of companies is not the fault of volunteer organizations currently being held to ransom by those who are survivors in the insurance industry.⁷⁴

1.55 Figures from the Trowbridge report of March 2002 seem to support these complaints. Within the public liability line of business, sport and recreation and welfare/community groups have been among the more profitable (or at least, the least unprofitable). Yet, according to submissions to this inquiry, these are the very groups that seem to have been hardest hit by the present crisis.

Public liability insurance— Insurance Statistics Australia members loss ratio 1994-1998 by industry segment	
industry segment	loss ratio
all industries	142%
building	140%
special trades	94%
food stores	125%
welfare/community	87%
hotel accommodation	178%
sports and recreation	104%
unlicensed clubs	215%
<p>source: Trowbridge Consulting, <i>Public Liability Insurance—analysis for meeting of ministers 27 March 2002</i>, March 2002, pp.34,69</p> <ul style="list-style-type: none"> • Loss ratio is claims expense divided by premiums. A lower figure is a better result for the insurer. Break-even point is about 90%, since other expenses must also be allowed for. • Figures are averaged over accident years 1994-98. • Insurance Statistics Australia is a non-profit company owned by a number of insurance companies. It collects data for the benefit of members. It covers 22 per cent of the market.⁷⁵ 	

1.56 APRA generally stresses the need for premiums to rise from their unnaturally low level of the late 1990s to restore the industry to reasonable profitability:

We do not see higher premiums as either necessarily undesirable or completely avoidable. The most important protection a policyholder can have is the survival of the insurer, as a failed insurer cannot pay claims.⁷⁶

73 Submission 55, Australian Council of Professions, p. 12.

74 Submission 17, The South Australian Country Women's Association Inc., p. 2.

75 Mr R. Drummond (Insurance Council of Australia), *Committee Hansard* 8 July 2002, p. 49.

1.57 The Committee acknowledges this. However, as noted before, it does not explain the huge variations in premium increases. The March 2002 Trowbridge report suggests that public liability and professional indemnity premiums on average ought to rise by up to 100 per cent to restore them from the unnaturally low 1998 level to 'adequate profitability'. Trowbridge estimates that this will have happened by June 2002.⁷⁷ This raises the question of why so many people report vastly greater increases.

1.58 The Committee suspects that the answer lies partly in the different market power of the different types of insurance buyers, as suggested above; and partly in the difficulties of assessing the risk of many smaller pools. In the small Australian market, in the absence of industry-wide data-sharing, many insurers will tend to have too few customers in many categories to assess risk reliably.

Where you have data built into wider cluster groups or you have to cluster data together, inevitably you get some cross-subsidisation within that pool, and we are not sophisticated enough, particularly in the liability area. We are better in some of the personal lives areas where the risks are more homogenous...⁷⁸

1.59 One result of this may be unavailability of insurance if insurers regard the risk as too hard to estimate.

...this absence of adequate data exacerbates the current insurance problem. Many insurers have realised that they need to take a more scientific approach to public liability and are very reluctant to enter some segments of the market because they have no data on which to base premium rates.⁷⁹

1.60 Another result of inadequate information will be that different types of risks are lumped together in a way that will seem unfair to the lower risk insureds. The Committee received many submissions in the form 'We are being treated like X, with whom we have some superficial similarity, but our risk profile is actually much lower.'⁸⁰ Better information about risk, at a finer grain, is essential for tackling this problem.

Senator BRANDIS—...it seems a bit silly that the bingo hall's premium should go up because it is in the same sector as the hang-gliding club.

76 Dr D. Roberts (Australian Prudential Regulation Authority), *Committee Hansard*, 9 July 2002, pp. 130,133.

77 Dr D. Roberts (APRA), *Committee Hansard*, 9 July 2002, p. 137: for the year to June 2001 the loss ratio for professional indemnity business was 158.7; for public liability 171.3. Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, pp. 26-7,33.

78 Mr D. West (Royal and SunAlliance), *Committee Hansard*, 9 August 2002, p. 355.

79 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, pp. 40-41.

80 For example, the Australian Cricket Board noted in paragraph 1.53.

Surely, the narrower it [the pool] is the more fairly individual cases will be treated.

Mr West—That is right, and that is where the data issue becomes critical... you have to have a certain amount of data in a cell to be able to price that. But, yes, within reason we want to narrow it down to smaller segments so that you can actually differentiate from a pricing point of view.⁸¹

1.61 There are two aspects to this problem. Firstly, databases must be designed so they can distinguish bingo halls from hang-gliding clubs. Secondly, there must be enough bingo halls in the dataset to give statistically reliable information. It is the second point which, in Australia's small market, implies the need for more orderly collation of industry-wide information—compulsorily if necessary. This is taken up in chapter 5.

1.62 There were many references in evidence to the effect that 'such-and-such category/activity is now *perceived* as being high risk [and this is the reason for large increases in premiums].' This raises the question: are the perceptions accurate? There was no evidence on this. As noted in paragraph 1.55, in the public liability line welfare, community and sporting groups have been among the least unprofitable. The Committee thinks it likely that in some areas—particularly in relation to community groups of the 'bingo hall' variety—the industry is over-reacting. The implication of many stories is that insurers, having become more risk-averse, and unsure what the risk really is, if they are willing to bid for the business at all, are bidding high to give themselves a good safety margin. Better industry-wide data should help answer these questions.

The more data available, and the more rigorous that data, the more insurable the risk (generally), and the more equitable the price paid by the customer.⁸²

1.63 Individual initiative may alleviate problems of lack of information. For example, Wollongong City Council, like many, suffered a significant public liability premium increase in 2001. Fearing the same in 2002, Council made every effort to impress on international underwriters that it is not involved in many risky activities that local governments overseas are often responsible for. As a result Council obtained insurance with only a small premium increase in 2002.⁸³

1.64 However, the possibility of this type of initiative does not reduce the need for co-ordinated industry-wide data sharing. Community groups and small businesses cannot be expected to have the resources to take Wollongong's action and, having only small accounts, cannot so easily win the attention of insurers. For them the key need is better information about the risks of certain *classes* of insured, at a useful level

81 Mr D. West (Royal and SunAlliance), *Committee Hansard*, 9 August 2002, p. 362.

82 Trowbridge Consulting, *Public Liability Insurance—practical proposals for reform*, 30 May 2002, p. 42.

83 Submission 56, Wollongong City Council, pp. 10-12.

of detail. That is a matter peculiarly within the knowledge and responsibility of insurers.

Chapter 2

Causes: insurance market issues

2.1 The causes of the insurance crisis are generally summarised as:

- international influences including the withdrawal of capacity and the increasing cost of reinsurance following the destruction of New York's World Trade Centre in terrorist attacks on September 11, 2001;
- the 'hardening' of the insurance market as, after a period of underpricing and poor profitability in the mid 1990s, insurers now focus on improving profitability rather than merely increasing market share; and
- the increasing cost of claims.

2.2 This chapter considers the international and domestic market influences, and some related matters: APRA's new prudential requirements and the effects of taxes on premiums. Chapters 3 and 4 consider the increasing number and cost of claims.

Global influences

2.3 Many submissions mentioned global influences as contributing to the present crisis—particularly the terrorist attacks on New York's World Trade Centre on September 11, 2001. The global insurance cycle was already hardening, but September 11 compounded the effect. Trowbridge Consulting observed:

The direct insurance losses (likely to be over \$A100 billion), the recognition of a major new risk factor, and greater caution throughout the business world have combined to further reduce the willingness to write business and further increase premium rates.¹

2.4 The effects in Australia arise largely from the impact on the cost of reinsurance. Overseas reinsurers dominate the Australian reinsurance industry.² According to the Insurance Council of Australia:

...the terrorist attack on September 11 was the biggest insurance loss in history and, of course, it resulted in reinsurers substantially increasing their rates to the insurance market. The average increase on liability classes or the long tail classes was probably somewhere between 30 and 50 per cent,

1 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 11.

2 Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review—Release Draft*, March 2002, p. 67.

which meant at least 10 to 15 per cent on top of premiums being charged to businesses and the public for insurance cover.³

2.5 APRA's summary was:

...it is increasingly difficult post 11 September for direct insurers to obtain affordable reinsurance in the contracting international market. Reinsurance rates available to local insurers have recently risen on average by around 25%. Even before September 11, APRA statistics showed reinsurance expenses increased by 59% over the three year period to June 2001. While capital inflow into international reinsurance will over time moderate the rising costs, this will likely take years rather than months.⁴

2.6 A qualitative survey of insurers by JPMorgan in August 2001 found that insurers then predicted average public liability premium increases of 18 per cent in the year to June 2002. An update to February 2002 found predictions of 32 per cent, suggesting that 14 percentage points of increase could be attributed to the effects of September 11 and any other market changes in the interim.⁵

2.7 On the other hand, Trowbridge suggests that reinsurance costs are a relatively minor driver of public liability premiums:

During the upward cycle, reinsurers have increased their rates by in the order of 25% although one insurer has reported a significantly greater increase. However, reinsurance programs for public liability are typically "excess of loss programs" and only pick up the top end of large claims (say over \$2 million–\$5 million depending upon insurers' capital levels). As such, they account for less than 10% of the direct insurers' premium in this class and hence the reinsurance rate increase has a marginal effect (25% of 10% or say 2–3%) on price for most insurers.⁶

2.8 JPMorgan's assessment is:

...in the face of the large pay-outs from September 11, insurers had the resolve to reprice premium rates to an appropriate level. In our view, the industry's resolve to improve its risk/reward position has been the greatest driver of the increase in premium rates.⁷

2.9 The global and domestic investment cycle is also sometimes mentioned as contributing to the crisis. Insurers supplement their income by investing premiums.

3 Mr R. Jones (Insurance Council of Australia), *Committee Hansard*, 8 July 2002, p. 48.

4 Submission 127, Australian Prudential Regulation Authority, p. 2.

5 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 26.

6 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 38.

7 JPMorgan, *2002 Interim Insurance Survey*, February 2002, p. 3.

Investment returns are lower now than they were in the early 1990s. However Trowbridge suggests that this is not a significant factor:

Most such funds obtained from premiums are invested by insurers in low risk fixed income securities. The average returns available on such investments have been between 5% and 5.5% since mid-1997, having been in the range 6.5% to 8.5% in the first half of the 1990's. This evidence indicates that changes in the rate of investment return should not have been a factor in premium rate changes in the last three years.⁸

2.10 Australia makes up less than two per cent of the world's insurance market and cannot expect to be quarantined from global changes.⁹ However, in the Committee's view Australia can moderate their effects by developing a stable domestic insurance market. The Committee now turns to the domestic insurance market.

The hardening insurance market

2.11 The insurance business is by nature cyclical.¹⁰ During a 'soft' market capital flows into the market. Insurers compete on price to gain market share, even at the expense of profitability. The competitive pressure is more intense where customers can and do move quickly from one insurer to another depending on price. This is the case with the commercial classes of insurance, including public liability and professional indemnity.

2.12 In this highly competitive market, falling prices may lead to an unsustainable level of unprofitability—which happened in the case of public liability and professional indemnity insurance during the mid to late 1990s.¹¹ According to the Insurance Council of Australia, 'Public liability insurance losses across the industry have been very large...'

The APRA statistics show that for the period 1998–2000 gross premiums were approximately \$2.5 billion, whilst claims, also gross incurred, were \$3.5 billion. In addition, if you add the expenses to the industry for public liability insurance, which was another \$600 million, it results in an underwriting loss of \$1.6 billion for public liability insurance over that

8 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 38.

9 See Background Paper no. 1, *A Profile of the General Insurance Industry*, prepared by the Insurance Council of Australia for the HIH Commission, November 2001, p. 6.

10 For most of the ideas in this section the Committee acknowledges submission 152, Department of the Treasury; Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, pp. 9ff; JPMorgan, *2002 Interim Insurance Survey*, February 2002.

11 By contrast, the domestic classes—householders and domestic motor—have shown relatively stable premiums and profit margins over the last nine years. JPMorgan, *2002 Interim Insurance Survey*, February 2002, p. 4.

three-year period...The professional indemnity side has also been very unprofitable for a number of years.¹²

2.13 When the industry's profits decline to such a level of unsustainable unprofitability, capital is withdrawn from the market and prices rise again.

2.14 Globally most classes of insurance have been hardening over the last two years, but in Australia the position was exacerbated by the collapse of HIH in March 2001. HIH, a major player in public liability and professional indemnity insurance, had been a driver of price competition, and removal of HIH allows remaining insurers more easily to increase prices. However the market was hardening even before the collapse of HIH.

2.15 The 'long tail' nature of liability insurance exacerbates the cycle because it increases the risk of insurers under- or over-estimating the premiums needed to reach a target profit level. The long tail refers to the fact that (by contrast with most other types of insurance) claims on liability insurance can be made many years after the premium is paid. This is particularly so for personal injury claims. Insurers, in effect, must sell their product some years before they know how much the product will ultimately cost them. Today's prices must make provision for future costs.

2.16 The problem is not new: predicting future costs is a large part of the business of insurers. In large part, the accuracy of the prediction depends on:

- the volume of similar business: a greater volume allows more reliable prediction;¹³ and
- the trend in claim costs: a more stable trend allows more reliable prediction.

2.17 Liability insurance, compared with other classes, suffers on both counts. The pools of similar risks are often small (enlarging the database to enable better calculation of risk is a major purpose of the proposed industry-wide data sharing discussed in chapter 5). As well, claim costs have increased in recent years faster than expected. According to Insurance Australia Group, 'with the benefit of hindsight, it is now clear that a number of insurers seriously under-estimated the growth rate in claims costs for much of the 1990s...'

...a policy written today is not priced on the basis of the current cost of claims but on an estimate of claims costs when claims under that policy will, on average, be paid out...Under-pricing (and potentially over-pricing) occurs when these estimates prove to be seriously inaccurate.

12 Mr R. Jones (Insurance Council of Australia), *Committee Hansard*, 8 July 2002, pp. 45-6.

13 This a matter of the mathematics of probability. The greater the number of events, the more accurately the outcome of a group of events can be predicted. In one trial of tossing a coin, we cannot predict the outcome. In 1,000 trials of tossing a coin, we can predict with confidence that the outcome will be heads close to 500 times.

With the benefit of hindsight, it is now clear that a number of insurers seriously under-estimated the growth rate in claims costs for much of the 1990s. The impact on profitability for some was masked, for a time, by buoyant but unsustainable investment profits... Today's premiums reflect the market's adjustment to that reality and some expectation that this trend will continue to impact on claims going forward.¹⁴

2.18 The longer the tail, the harder it is to predict future claim costs. The problem is worse where the size of claims, as well as the number of claims, is less predictable. This is particularly the case for personal injury claims, which vary enormously. For example, the Insurance Council of Australia cited the following example:

One of our member companies collected £300 for an insurance policy for workers compensation back in the sixties. Asbestos is now a very real problem, and they have reserved 20 \$1 million claims against that £300 premium. So long tail classes have some sting.¹⁵

2.19 To compensate for this extra risk, JPMorgan suggests that to achieve a reasonable rate of return on capital the profit margin on premiums would need to be 2–3% for short-tail classes and 5–8% on long-tail classes.¹⁶

2.20 Mr P. McCarthy, in a paper quoted in Trowbridge's March 2002 report, suggested that the causes of underprovisioning for future claims have been poor data and inadequate access to levels of detail; limitations of actuarial models and science; management pressure on actuaries; inadequate understanding of the business by actuaries; an underlying environment that leads to increases in personal injury claims; manipulation of case estimates by insurers; poor corporate governance; and characteristics of public liability business, especially the variety and the types of risks.¹⁷

2.21 Where supply of capital is tight and insurers have become more risk-averse, as at present, the more unpredictable classes will have most difficulty finding affordable insurance or, sometimes, any insurance.

Today's premiums....also reflect a shortage of global capital, particularly since the events of 11 September 2001, and a preference to allocate the available capital to under-write less volatile, and therefore less risky, products.¹⁸

At a time when your attitude to risk is maybe more averse, you tend to avoid those areas where, 99 times out of 100 or 999 times of 1,000, you do not

14 Submission 143, Insurance Australia Group, pp. 2-3.

15 Mr R. Jones (Insurance Council of Australia), *Committee Hansard*, 8 July 2002, p. 47.

16 JPMorgan, *2002 Interim Insurance Survey*, February 2002, p. 5.

17 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 37.

18 Submission 143, Insurance Australia Group, p. 3.

have a problem, but the one problem you have will cost you \$X million. You tend to go for those where you have maybe a few more incidents but each one will cost you less because you can predict them more.¹⁹

Unless there is predictability in pricing and claims development then companies are not particularly keen to play.²⁰

2.22 As suggested from paragraph 1.58, the relative unpredictability of claims in the public liability and professional indemnity lines is probably a significant cause of the enormous variation in premium increases which submissions reported.

2.23 The Insurance Australia Group suggested that ‘a sustainable solution therefore requires a concerted effort by all stakeholders to embed much greater certainty and stability to the underlying cost drivers of long tail insurance classes.’²¹

Other issues

New prudential standards

2.24 The new prudential standards for general insurers are sometimes mentioned as a possible contributor to increased premiums. The standards came into force on 1 July 2002. The minimum capital requirement is increased from \$2 million to \$5 million. Above the \$5m floor, the capital requirement is risk based. Insurers writing liability lines need more capital to meet the greater uncertainty they face—due to the potential time lag between premium and claim—than insurers writing property business.²²

2.25 The Insurance Council of Australia claimed that the more rigorous standards ‘will increase the costs for insurers and that increased cost could be reflected in premiums’.²³ The Law Council of Australia suggested that ‘if the federal government wanted to do something to attract insurers into the market then they could relax the capital prudential requirements that have been imposed by APRA from 1 July...’

We are told that they are a disincentive to new insurers coming into or back to the market and to insurers writing more business.²⁴

2.26 Trowbridge commented: ‘These changes are not a primary driver of the increase in public liability rates, although they reinforce the more conservative attitude to risk of insurers and a greater focus on profitability.’²⁵

19 Mr D. West (Royal and SunAlliance), *Committee Hansard*, 9 July 2002, p. 355-6.

20 Mr R. Jones (Insurance Council of Australia), *Committee Hansard*, 8 July 2002, p. 47.

21 Submission 143, Insurance Australia Group, p. 3.

22 APRA, *Australia’s World Class Insurance Reforms Come into Effect*, media release 28 June 2002.

23 Submission 67, Insurance Council of Australia, attachment 1, *Public Liability Submission to Ministerial Forum*, March 2002p. 5.

24 Mr A. Abbott (Law Council of Australia), *Committee Hansard*, 8 August 2002, p. 269.

2.27 In general, though, the new standards were not a major concern in evidence, and others who mentioned them approved them for their primary purpose of improving the stability of the industry.²⁶

2.28 APRA does not believe that the new prudential requirements are a significant element in the insurance crisis:

It is true that companies writing long-tail liability insurance are facing relatively higher regulatory capital requirements (because of the greater uncertainty involved in this business) than are companies writing predominantly short-tail property insurance, and that some smaller companies are facing a risk-adjusted capital requirement beyond their current resources. By and large, however, the industry overall has sufficient capital to meet the new requirements. And in particular, the major providers of these liability business classes are among the largest (eight or so) insurance groups in the Australian market, and are well placed to meet the new standards.²⁷

2.29 The Committee expects that the new prudential standards will affect premiums to some degree. However, it accepts the new standards as a necessary precaution in strengthening the solvency of insurance companies.

Taxes and stamp duty

2.30 State stamp duty on public liability and professional indemnity premiums varies among the states from 8 per cent to 11.5 per cent. Stamp duty is levied on the GST-inclusive premium.²⁸

2.31 A number of submissions complained that the increasing premiums have caused a windfall in stamp duty receipts for the states and territories. Others complained about the 'tax on tax' effect of levying stamp duty on the GST-inclusive premium.²⁹ Some suggested that the states and territories should remit or discount stamp duty for a period as a contribution to ameliorating the crisis.³⁰ New South, Wales, Queensland, Tasmania and the Australian Capital Territory have made concessions or plan to do so.³¹

25 Trowbridge Consulting, *Public Liability Insurance—analysis for meeting of ministers 27 March 2002*, March 2002, p. 11.

26 For example, submission 23, Local Government and Shires Association of NSW, p. 5.

27 Submission 127, Australian Prudential Regulation Authority, p. 2.

28 Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review—Release Draft*, March 2002, pp. 59ff.

29 For example, submission 123, National Farmers Federation, p. 7.

30 For example, submission 90, Australian Chamber of Commerce and Industry, p. 6; submission 115, Australian Business Ltd, p. 5.

31 Hon. M. Egan MLC, New South Wales Budget Speech, 4 June 2002, p. 21; Hon. T. Mackenroth MP, Appropriation Bill 2002 [Queensland], Second Reading Speech, 18 June

Comment

2.32 Some submitters who wished to talk down the extent of the present crisis have analysed the insurance cycle in this way: ‘Insurance buyers have had bargain prices for several years—they cannot expect it to last forever.’ For example, APRA said:

Australian policyholders have been getting a free ride in the form of unduly cheap premiums for a number of years and they now need to accept that this was an aberration that may never recur.³²

2.33 The Committee agrees that insurance companies cannot be expected to continue offering unprofitable prices. However in the Committee’s view such comments miss the point. The essence of the present crisis is the way so many people have been harmed by the extreme volatility of the insurance cycle. The community groups and small businesses who are the chief victims are not sophisticated insurance buyers. It is unrealistic to expect them to set aside funds during the good years to pay for the bad ones. It is probably unrealistic to expect that they would even notice that the good years were good. They are now being hit by huge increases which they are ill-placed to cope with. Their problems rebound in the form of bad press for insurers. The volatility of the cycle is bad for insurance buyers and bad for the public credit of insurers. It should be in everyone’s interest to moderate the effects of the cycle. Governments should take an active responsibility in helping to do this.

2002, p. 17; Hon. D. Crean MLC, 2002-2003 Budget Speech [Tasmania], 23 May 2002, p. 9. Hon. T. Quinlan, Deputy Chief Minister of the ACT, media release 15 July 2002.

32 Dr D. Roberts (Australian Prudential Regulation Authority), *Committee Hansard*, 9 July 2002, pp. 132-3.

Part II

High Premiums—causes and solutions

The recent increases in both public liability and professional indemnity insurance have had and will continue to have a dramatic impact on small business, community and sporting organisations, individuals and local councils. While the increases in public liability and professional indemnity insurance have affected the profitability of small business, they have also resulted in many community and sporting organisations being forced to reduce the level of services they provide or, in many cases, to cease operations altogether, due to their inability to obtain any affordable, or sometimes any, insurance cover.

This section of the report builds on the analysis contained in Part I where the report looked at the global insurance industry and the cyclical nature of the domestic market. Part II narrows the focus to analyse the more specific and immediate causes of premium rises.

The two following chapters deal with;

- the rise in the number of claims and
- the increase in the amount of awards or settlements.

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.

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

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.

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

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

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

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

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.

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

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 activities³⁰ 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

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

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.

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

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

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

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 Bill⁴⁴ 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

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

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 be acting within the scope of the organisation’s authorised activities and not contrary to instructions; and

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.

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.

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.

Chapter 4

The cost of claims

4.1 Evidence presented to this Committee suggests that not only has the number of claims risen but that the cost of claims has also increased. Trowbridge Consulting concluded that the continuing upward trend in claim costs is an underlying factor contributing to the insurance problems.¹ It stated that:

Analysis has shown that the cost of public liability claims has been rising for a number of years at a growth rate above the level of inflation. This phenomenon is driven by bodily injury claims and it is to these claims that the proposals for broad-based tort reform are directed.²

4.2 According to Trowbridge Consulting, the estimated average public liability claim size for ISA contributors increased by about 10% per year on average between 1990 and 2000, although not in a steady progression. This increase was about double the increase in average weekly earnings:

Year	ISA	AWE at May	Change in AWE	AWE	12% p.a. Growth
1990	\$7,219	569.3	-	\$5,000	\$5,000
1991	\$5,068	591.7	3.9%	\$5,197	\$5,600
1992	\$4,714	617.6	4.4%	\$5,424	\$6,272
1993	\$5,900	632.6	2.4%	\$5,556	\$7,025
1994	\$11,811	656.1	3.7%	\$5,762	\$7,868
1995	\$10,561	687.8	4.8%	\$6,041	\$8,812
1996	\$14,188	715.2	4.0%	\$6,281	\$9,869
1997	\$15,111	736.8	3.0%	\$6,471	\$11,053
1998	\$14,314	767.8	4.2%	\$6,743	\$12,380
1999	\$13,986	790.6	3.0%	\$6,944	\$13,865
2000	\$17,489	821.5	3.9%	\$7,215	\$15,529

Source: Trowbridge Consulting *Public Liability Insurance, Analysis for Meeting of Ministers 27 March 2002*, March 2002, Figure 5, p. 68. This analysis was based on 'accident year' and involved projection of the ultimate cost of claims based on the amounts paid to date and insurer case estimates from time to time.

ISA= average public liability claim size, ISA contributors.

AWE= average weekly earnings

The fifth and sixth columns show AWE growth, and 12% per annum growth, from a 'best fit' starting point, for comparison

1 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. iii.

2 Trowbridge Consulting, *Public Liability Insurance, Practical Proposals for Reform*, May 2002, p. 12.

4.3 The Law Council of Australia disputed the significance of these figures. Based on an actuarial report by Cumpston Sarjeant, the Council noted that it ‘does appear that statistically an increase in the average cost of claims can be shown to occur because small claims have been taken out of the number of claims. That has been done over the last few years because insurers have increased excesses.’³

4.4 However, ISC and APRA data for the years ending 30 June 1993 to 2001 show that the total net claims expense for public and product liability and professional indemnity also increased greatly, from \$458.6m to \$862.2m:

Professional Indemnity & Public and Product Liability Insurance			
Year ended 30 June	Claims recoveries	expenses less revenue (\$'000)	Yearly percentage change
1993		458,686	-
1994		515,380	12.3
1995		600,089	16.4
1996		646,931	7.8
1997		752,997	16.4
1998		910,119	20.9
1999		1,194,996	31.1
2000		1,238,183	3.6
2001		862,277	-30.4

Source: ISA/APRA data quoted in ACCC, *Insurance Industry Market Pricing Review*, March 2002, appendix C.2.1 –C.2.9

4.5 Although there are conflicting opinions about the extent of the increase in the cost of claims, the Committee is in no doubt that the cost of claims has risen over the years and is a factor in the rise of premiums.

4.6 This chapter examines the reasons behind the increasing cost of claims and the proposed solutions. The statistics available concentrate on public liability insurance premiums but the Committee is mindful that professional indemnity insurance premiums appear to be following a similar trend of escalating numbers and costs of claims.

4.7 Evidence presented to the Committee has identified the following areas of concern:

- the amount of damages awarded;
- increased costs associated with particular heads of damage, notably the cost of on going care;
- administration costs associated with claims;
- claims involving small sums for damages; and

3 Mr Tony Abbott, *Committee Hansard*, 8 August 2002, p. 268.

- legal costs.

4.8 The report also examines the role that risk management has in preventing or minimising loss or damage.

The amount of damages awarded

4.9 Several submitters asserted that the increase in insurance premiums is partly the result of increases in claim payouts.⁴ Some consider courts have been awarding unrealistic high damages, although no specific details were provided to support such a view apart from the few highly publicised cases.⁵ It is impossible to reach any conclusion on whether a particular award was excessive without detailed knowledge of the case. The Committee accepts that what to some might seem to be an excessive award may be totally reasonable having regard to the plaintiff's injuries, loss and future needs.

4.10 In respect of claims that are settled, either by insurance companies or by the insured, it can only be assumed that both the claimant and the insurance company or the insured consider the amount agreed upon to be reasonable. However, several submitters and witnesses maintained that in cases involving 'small' amounts, these are often settled by the insurance companies or the insured on the basis that it is more economical to settle than to contest the matter in court.⁶ The decision to settle rather than to defend claims may also be influenced by the perception that courts are regarded as being plaintiff friendly.

General damages

4.11 The Panel reviewing the law of negligence considered many options on how to limit liability and quantum of award for damages. It proposed imposing a threshold for awards of general damages as an appropriate way to reduce significantly the number and cost of smaller claims. General damages are damages for non-economic loss, including pain, suffering, loss of amenities, and loss of expectation of life. The Panel recommended that the threshold be based on 15 per cent of a most extreme case.⁷

4.12 Placing a cap on awards was also examined by the Panel as a means to contain costs. It believed that capping general damages would not have as material effect on the cost of claims as would the imposition of a threshold. Nonetheless, it found:

4 For example, submission 79, Queensland Government; submission 80, Royal Australian College of General Practitioners.

5 For example, submission 20, Agricultural Societies Council of NSW Inc, p. 2.

6 Submission 47, Queensland Outdoor Recreation Federation, p. 7.

7 *Review of the Law of Negligence: Final Report*, September 2002, p. 193.

In the light of the variety of caps that exist and the disparity in the levels of awards in the various jurisdictions, it might be thought impractical, at this stage, to recommend a national cap fixing a single monetary amount for all States and Territories. On the other hand, because of the absence of any measurable correlation between money, on the one hand, and pain, suffering, loss of amenities and loss of expectation of life, on the other, a reasonable cap on damages could not be said to be unprincipled.⁸

4.13 It went on to suggest that a cap of \$250,000 would be appropriate. In the Panel's opinion such a cap would promote national consistency in awards of general damages, and have the additional advantage of reducing awards particularly in the two states with the greatest amount of personal injury litigation—NSW and Victoria.⁹

On-going care and rehabilitation

4.14 It is clear, however, that one of the main contributing factors in increasing court awards relates to the cost of future on-going care and rehabilitation, both of a medical and non-medical nature, particularly in cases involving catastrophic injuries. Some of the factors contributing to increases in these costs are the increased life expectancy of injured parties and improvements in the treatment of injuries, which often can be expensive. According to Dr Sedgley, Chairman of Council, Australian Medical Association (AMA), this is 'an ongoing thing—and they are expanding and expanding.'¹⁰

4.15 The degree to which these damages have increased in recent years is difficult to determine. However, the Royal Australian College of General Practitioners, in an exposure version of a background paper dated 17 April 2002, maintained that previously, claims in cases involving severe neurological impairment were in the order of \$1–2 million; they are now usually in the range between at least \$5 million and \$10 million. It stated further that the \$13 million in damages awarded to Sydney woman Calandre Simpson, who sued her obstetrician for negligence, would further boost claimants' expectations.

4.16 Ms Pamela Burton, Legal Counsel, Australian Medical Association, highlighted the increasing costs involved in the care of the severely disabled:

...occupational therapy, machinery, equipment and types of aids to make life more comfortable are being bettered and come at much higher costs. Electric wheelchairs are being perfected. There are all sorts of communication machines—computers of all types to help people talk or to indicate their needs through their mouths and so on. These have expanded enormously. They were not considered or even thought of years ago...so

8 *Review of the Law of Negligence: Final Report*, September 2002, p. 194.

9 *Review of the Law of Negligence: Final Report*, September 2002, p. 194.

10 *Committee Hansard*, 8 July 2002, p. 24.

there is a huge cost when you estimate the replacement costs up to, say, the age of 70.¹¹

4.17 Dr Sedgely said that the AMA would:

like to see long term care and rehabilitation costs removed from the system and also that the people who are injured are properly managed.¹²

4.18 When asked how long term care and rehabilitation costs could be removed from the system, Dr Sedgely stated that AMA was not advocating a no-fault compensation scheme similar to that which operates in New Zealand, but rather a scheme that is similar to that which applies in Victoria under the Transport Accident Commission.¹³

4.19 Both the Australian Amusement Leisure and Recreation Association Inc¹⁴ and the Victorian Employers' Chamber of Commerce and Industry¹⁵ also opposed the adoption of the New Zealand model. However, other submissions considered that a scheme similar to that which operates in New Zealand would be more appropriate.¹⁶

4.20 Witnesses presented the Committee with a range of schemes to address the cost of long term care and rehabilitation. The Committee considers that the issues involved are many and complex and require a detailed examination. Some of the proposals raised issues such as:

- should an injured party's right to determine his or her own form of care and treatment be removed, and if so, who would make the decisions on the level of care and treatment;
- should long term medical treatment and care be covered by Medicare or should the costs be covered by some national insurance fund; and
- how would such a fund be funded, by direct government funding or by imposing some form of levy on insurers.

Recommendation 5

The Committee recommends that a working group of Commonwealth, state and territory officers be established to examine how best to provide for the long term care and treatment of persons who suffer catastrophic injuries as a result of someone's negligence.

11 *Committee Hansard*, 8 July 2002, p. 31.

12 *Committee Hansard*, 8 July 2002, p. 26.

13 *Committee Hansard*, 8 July 2002, p. 26.

14 Submission 78, p. 9.

15 Submission 98, p. 2.

16 For example, submission 34, Mr Nigel Bucknell.

Structured settlements

4.21 One of the schemes suggested to the Committee to provide for the long term care and treatment of seriously injured persons was structured settlements. Structured settlements were described by Ms Jane Campbell, Manager, Structured Settlement Group as:

a way of paying compensation for personal injury, usually in very serious cases. Instead of a single lump sum being paid to an accident victim, the parties can agree that the defendant or insurer will use some or all of the compensation money to purchase a lifetime annuity for the accident victim. The annuity will be part of the settlement agreement between the parties and, once it has been purchased for the accident victim, the insurer can close their file. The accident victim will thereafter own an annuity contract with a life insurance company.¹⁷

4.22 As the Committee has previously noted, the Commonwealth and some states have introduced or propose to introduce legislation to facilitate structured settlements. However, such legislation is unlikely to result in a reduction in the amount of damages awarded. As explained by the Structured Settlement Group:

The policy principle behind structured settlements is to provide a small tax incentive to encourage accident victims who would otherwise take their compensation as a single lump sum to take at least part of their compensation in the form of an annuity that can provide financial security for life.

It went on to say that structured settlements:

will not, however, have any significant impact on the cost of claims and insurance premiums.¹⁸

4.23 The Committee considers the Commonwealth's structured settlement legislation is a worthwhile initiative as it will encourage people to take a long term view on how best they can provide for their future needs, particularly having regard to the tax exemption that will apply to certain annuities and deferred lump sums. However, it should not be seen as a complete solution to the problem of increasing insurance premiums.

4.24 The Committee notes that state and territory legislation would have to be introduced to provide for the awarding of damages under a structured settlement arrangement rather than a lump sum amount. The Committee would encourage those states and territories that have not enacted such legislation to do so.

17 *Committee Hansard*, 9 August 2002, p. 371.

18 Submission 87, pp. 3-5.

Administrative costs in relation to claims

Insurance companies

4.25 Many submissions considered the increase in the number of claims has meant that administration costs of insurance companies has also increased and this has been a contributing factor in increasing premiums. It appears that the insurance industry does not keep details of administration costs associated with the handling of claims. Accordingly, it is impossible to say to what extent such costs impact on insurance premiums. Trowbridge Consulting stated that:

Our assessment, both from our industry experience over the years and from research during this assignment, is that there has been little or no material change to the manner in which insurers have handled claims in recent years. Changes in claim handling can thus be excluded as a possible cause of the increase in the average size of claims...¹⁹

The insured

4.26 It was suggested to the Committee that there were several approaches that the insured could take to reduce their public liability and professional indemnity premiums. These include the adoption of good risk management practices, which is discussed later in this chapter, and taking a pro-active approach to reported incidents to discourage potential plaintiffs from proceeding to litigation. It was suggested that early intervention could be done without any admission of liability, and could be as simple as a phone call to the person expressing regret about the incident, sending a bunch of flowers with an appropriate note apologising for the incident or agreeing to meet any medical or other expenses the person may incur.²⁰

4.27 Even in cases where a claim has been lodged, the insured can take an active role in trying to resolve the matter as soon as possible. An example is the practice adopted by Australian Consulting Surveyors Insurance Society in relation to claims. Once a claim is received a panel, made up of Society members, examines the claim to determine its merit. This is done in consultation with the insurer. This ensures that the merits of the claim are determined as early as possible, thus reducing the possibility of protracted court proceedings and the administrative costs of claims.²¹

4.28 The Committee endorses any measures that the insured can take to improve the management of the claims process. The Australian Consulting Surveyors Insurance Society has taken a sensible and practical approach to minimise the costs of claims. The Committee commends their initiative.

19 Trowbridge Consulting, *Public Liability Insurance, Analysis for Meeting of Ministers 27 March 2002*, March 2002, p. 22.

20 Mr P. Cundall (Property Council of Australia), *Committee Hansard*, 9 August 2002, p. 402.

21 Submission 27, ACSIS Limited, pp. 2-3.

Legal and court costs

4.29 Where a claim for negligence has been lodged with an insurance company, legal costs will inevitably be incurred by both the claimant and the insurance company. In any subsequent successful court action or settlement the claimant's costs will be included in the amount of any award or settlement. While legal and court costs are significant components in the cost of claims, there is dispute over how important they are.

4.30 The Standing Committee on Recreation and Sport (SCORS) commissioned Rigby Cooke Lawyers to undertake a national review of issues relating to sport and recreation insurance. In their summary report to SCORS, dated March 2002, they stated that:

According to the Insurance Council of Australia (ICA)...research undertaken by the insurance industry suggests the legal costs in liability cases are equivalent to around 50% of the value of the court award. Ultimately, these costs are reflected in premiums and as such it is policy-holders who pay these costs.²²

4.31 The Australian Plaintiff Lawyers Association has disputed this figure. They maintain that the insurance industry's claim is based on the assumption that a plaintiff's legal costs are similar to a defendant's legal costs. As the insurance industry maintains that their legal costs in liability insurance claims amount to 25% of any award, the total legal costs would therefore amount to 50% of an award. According to the Association, it is too simplistic to assume that defendant's and plaintiff's costs correspond.²³

4.32 In his evidence to the Committee, Mr Duncan West of Royal and SunAlliance Australia stated that he considered legal costs in personal injury cases would amount to approximately 40% of the total costs.²⁴

4.33 In relation to a successful plaintiff's legal costs, these are paid on a party/party basis, which is invariably less than a solicitor/client basis. The difference in the level of these costs will depend on the agreement between the solicitor and his or her client. This difference can be increased where the solicitor acts on a 'no win no fee' basis due to an uplift factor which is provided for in relevant legislation. Without data that identifies specific amounts for both damages and legal costs in awards, plus details of the insurance industry's own legal costs in dealing with these claims, it is not possible to say what percentage total legal costs represents of the overall amount of damages awarded.

22 Submission 40, NSW Dept of Sport and Recreation, p. 8.

23 Submission 61, p. 20.

24 *Committee Hansard*, 9 August 2002, p. 356

4.34 If the insurance industry's claim that legal costs represents 40-50% of the total cost of a claim is accepted, any reduction in these costs should lead to a reduction in public liability and professional indemnity insurance premiums.

4.35 Several submissions and witnesses suggested that the way claims are handled could be improved, which could result in reduced legal costs. Some of the suggestions included:

- notification of incidents by possible claimants which may not necessarily lead to a claim;
- notification of claims by claimants before court proceedings can be commenced;
- compulsory mediation and or conferencing; and
- independent panels to assess a claimant's degree of injury and incapacity.

4.36 The Committee was advised that some of these procedures already apply in some states in respect of workers compensation and compulsory third party insurance claims. The Committee notes that the Queensland *Personal Injuries Proceedings Act 2002* introduces these procedures in respect of personal injury claims. As the majority of negligence matters are prosecuted in state and territory courts, the Committee considers that all states and territories should investigate whether similar procedures could be adopted in respect of such claims. The Committee also notes the review of the law of negligence which, in looking at expediting the legal process, noted the success of '90 day rule' in South Australia particularly in resolving matters of professional negligence. It stated:

This rule essentially provides that, at least 90 days before commencing an action, a plaintiff must give the defendant notice of the proposed claim. The notice must give sufficient detail of the claim to give the defendant a reasonable opportunity to settle the claim before it is commenced.

4.37 The Committee endorses its recommendation that consideration should be given to the introduction of a rule requiring the giving of notice of claims before proceedings are commenced.²⁵

4.38 As referred to earlier, Mr Ian Marler, Chairman and Managing Director, Australian Consulting Surveyors Insurance Society, advised the Committee that his Society has established a series of panels which work closely with insurers to examine claims as soon as they are lodged. He considered this approach in dealing with claims, coupled with its pro-active role in risk management, has resulted in members' insurance premiums being contained to acceptable levels. He indicated that the general level of increase in premiums would be in the order of 30 to 40 per cent. Those surveyors with higher premium increases would be as a result of 'very bad claims record'.²⁶

25 *Review of the Law of Negligence: Final Report*, September 2002, p. 57.

26 *Committee Hansard*, 9 August 2002, pp. 391-395.

4.39 The Committee notes that the Productivity Commission is undertaking a research study into Australian insurance claims management practices. Its terms of reference include benchmarking Australian insurers' claims management practices against world practice, having regard to differences in legal processes between states and territories in Australia and the impact of litigation on claim costs. Legal costs should be a major consideration in this study.

4.40 The Committee also notes the findings of the Panel which considered measures to reduce the number and cost of smaller claims. It proposed legislation based on the principles that:

- no order that the defendant pay the plaintiff's legal costs may be made in any case where the award of damages is less than \$30,000;
- in any case where the award of damages is between \$30,000 and \$50,000, the plaintiff may recover from the defendant no more than \$2,500 on account of legal costs.²⁷

4.41 The Committee considers that these proposals along with other proposals aimed at reducing the number and costs of claims that have been mentioned in this report require closer consideration.

Risk management

4.42 Risk management is considered to be an important factor in minimising the number of injuries and loss, limiting the extent of any damage and reducing the number of claims.

4.43 It was claimed that insurance companies have become more selective in the types of matters they are prepared to cover. Factors being taken into account are the type of matters for which insurance is being sought and the risk management practices of the person or organisation seeking insurance. It would seem that insurance companies are either refusing to provide public liability and/or professional indemnity insurance or substantially increasing premiums and imposing stricter conditions on policies in respect of activities which they perceive as high risk or where good risk management practices are not in place.

4.44 The Professional Standards Council stated that specialist engineers had reported reduced insurance premiums of 40% and more following their participation in the Cover of Excellence scheme under the *Professional Standards Act 1994 (NSW)*. Valuers had also seen insurance premiums drop from about 7% to 3% of gross fees since participating in the Cover of ExcellenceTM scheme.²⁸

27 *Review of the Law of Negligence: Final Report*, September 2002, p. 186.

28 Submission 99, p. 3. In its website, the Professional Standards Council states that 'Professional standards schemes underscore the commitment of members of occupational associations to maintain high ethical standards. They encourage professionals to adopt practical risk management strategies to achieve quality of service and to create a culture of excellence and

4.45 A contrary view was expressed in several other submissions where it was claimed that while their organisation or business had good risk management procedures in place with few or no claims, they still had experienced substantial increases in premiums.²⁹

4.46 The principles spelt out in the exposure version of the Royal Australian College of General Practitioners Background Paper On Medical Indemnity Insurance (17 April 2002) has wide application across many disciplines and professions, not just the medical area. It identified a need:

to establish a system that encourages voluntary anonymous reporting of all mistakes, beyond practice level, to ensure data is documented. It is important to develop a number of integrated local, regional and national reporting schemes.

It noted that:

In the UK and in Australia, the absence of a national aggregated database of health care litigation claims has hindered the analysis. It has been impossible to identify where the real risks are, whether they are changing and which size claims are increasing most.³⁰

4.47 The paper goes on to say that the level of reporting should go beyond claims. It cites 'The Heinrich Ratio' that suggests that:

Most accidents can produce serious injury, however, they do not. For every one major injury, there are another 300 mistakes that do not result in injury. By limiting analysis and learning to events, which results in serious harm, there is a risk skewing learning to a very small cross section of accidents.³¹

4.48 As mentioned earlier, the Australian Consulting Surveyors Insurance Society, for example, has adopted a pro-active role in risk management. As evidence of this role, Mr Marler pointed out that in the last 4 to 5 years the Society has conducted 50 to 60 seminars, produced videos and audio tapes, sent out technical circulars and in

responsibility. That culture supports qualified, proficient practitioners to serve the best interest of clients and provide a proper cover of protection.' The Council 'only approves schemes that adopt risk management strategies, complaint and discipline mechanisms, and insurance requirements that are likely to improve standards and protect consumers.' <http://www.lawlink.nsw.gov.au/psc.nsf>.

29 Submission 42, Royal Agricultural Society of Tasmania, p. 3; Dr Paul O'Callaghan, Australian Horse Industry Council, *Committee Hansard*, 10 July 2002, p. 265; Ms Therese Charles, Association of Consulting Engineers Australia, *Committee Hansard*, 8 August 2002, p. 290.

30 Royal Australian College of General Practitioners Background Paper *On Medical Indemnity Insurance*, April 2002, p. 27.

31 Royal Australian College of General Practitioners Background Paper *On Medical Indemnity Insurance*, April 2002, p. 28.

2001 produced a comprehensive risk management kit which was sent to all members.³²

4.49 The Committee accepts that good risk management not only helps limit liability but also promotes ethical conduct. It fosters an ethos of personal responsibility and also reinforces the notion of one's duty of care. It is both a broad educational tool and a specific risk aversion mechanism. The Committee can see a most important role for the Commonwealth Government in taking the lead to promote risk management at a grass roots level at the workplace and in the playground.

4.50 An example of the lead being taken by the Commonwealth in improving the skill of small business in risk management was provided by the Department of Industry, Tourism and Resources. The Department advised that \$250,000 was made available to the Australian Horse Industry Council, which is operating as the peak body for the industry, to develop a risk management model for the horse industry. The model will not only include a regulatory framework but risk management protocols. The Department advised that it would be encouraging other industry associations to adopt the model to develop their own risk management practices.³³

Recommendation 6

The Committee recommends that the Commonwealth continue to assist organisations to develop their own risk management practices for their particular industry.

Professional Standards legislation

4.51 The Committee notes that both New South Wales³⁴ and Western Australia³⁵ have introduced professional standards legislation. The legislation provides for the limitation of liability of members of occupational associations as well as facilitating improvement in the standards of services provided by members. In return for receiving limitation on civil liability, members agree to compulsory indemnity insurance and the implementation of risk management strategies and complaint procedures. The Acts, however, do not apply to all types of occupational liability, eg liability for damages arising from the death of or personal injury to a person is specifically excluded.

4.52 Mr Warwick Wilkinson, Chairman, Professional Standards Council, advised that occupational associations whose schemes have been approved under the legislation 'administer risk management strategies upon their members. The focus is on systems for improving standards, reducing risks and protecting consumers'. He also advised that:

32 *Committee Hansard*, 9 August 2002, p. 395.

33 *Committee Hansard*, 8 August 2002, pp. 316-317.

34 *Professional Standards Act 1994* (NSW).

35 *Professional Standards Act 1997* (WA).

A strategic goal under the scheme is to improve the professional standards of members of the occupational association and protect consumers who utilise the services of those members. Underlying this are three strategic objectives: to improve the quality and competency of association members, to improve the ethical conduct of association members, and to make association members accountable for their work and conduct. The associations apply strategies to meet these key objectives. Some common strategies are entry qualifications, codes of ethical conduct, continuing education, quality assurance, technical standards and guidance, advisory and support services, complaint and disciplinary systems—and with that we encourage an element of transparency—and claims monitoring.³⁶

4.53 Mr James Malins, Manager, Government Affairs, Institute of Chartered Accountants in Australia, advised that the Institute had concerns about the Trade Practices Act being used to circumvent the New South Wales professional standards legislation. He said:

The scheme in New South Wales obviously cannot cap claims outside New South Wales or limit claims brought under federal legislation. We are concerned that section 52 of the Trade Practices Act is a cause of action that is commonly pleaded as an alternative in claims against professionals generally, and a claim brought under section 52 cannot be capped under the New South Wales legislation. Another concern is that we have national based practices. A firm that is a genuine national practice or national partnership will have some questions as to whether or not particular services are capped, particularly where they cross-border, in terms of New South Wales. It does raise the possibility of some jurisdiction-shopping to avoid the scheme in New South Wales.³⁷

4.54 The Committee considers that the New South Wales and Western Australia professional standards legislation has potential not only to reduce the number of claims through pro-active risk management but also to establish procedures for resolving disputes at an early stage. The Committee suggests the Commonwealth encourage other states and territories to consider adopting similar legislation with the view to achieving uniformity.

Pooling

4.55 The Committee considers that another way for people to improve risk management procedures and at the same time improve their prospects of obtaining insurance at an acceptable premium would be through pooling.

4.56 Many submissions recommended the establishment of group insurance as a means of reducing premiums. Under such an arrangement people or organisations which carry out similar activities would combine as a single group to purchase public liability or professional indemnity insurance for the whole group. It is considered that

36 *Committee Hansard*, 8 July 2002, p. 79.

37 *Committee Hansard*, 8 August 2002, p. 304.

such arrangements would be particularly useful to community and not-for-profit organisations.

4.57 Under a pooling or group insurance scheme the premium could either be shared equally by each member of the group or divided between them in accordance with their perceived level of risk. It would seem that where pooling or group insurance schemes operate, risk management procedures form an integral part and that members are obliged to adhere to these procedures in order to retain membership.

4.58 By pooling resources in this way it could be expected that there would be cost savings for all participants when compared to the cost of individual policies. However, the level of savings would depend on the number of participants in the scheme.

4.59 Several submitters advised that they were already taking part in such a scheme. These included Surf Life Saving Australia Limited and the Agricultural Show Council of Tasmania.³⁸

4.60 One of the issues involved in group insurance is whether, in relation to community and not-for-profit organisations, membership should be voluntary or made compulsory.

4.61 In its report to the Queensland Government in February 2002, the Liability Insurance Taskforce, established by the government to develop strategies to assist organisations affected by increasing liability insurance premiums, stated in relation to the not-for-profit sector that:

Many insurers believe that a voluntary pool would not be viable as more attractive risks are likely to be picked off by other insurers leaving the pool with the less attractive risks and therefore higher costs.³⁹

4.62 In its submission, the Australian Plaintiff Lawyers Association referred to two case studies where pooling arrangements had led to savings in public liability insurance premiums:

- Agfest, an agricultural event organised by the Rural Youth Organisation of Tasmania, where premiums fell from \$14,000 in 2001 to \$3,000 in 2002; and
- Community Sector Insurance Program set up by NSW Meals on Wheels, through which member organisations are provided with pooled public liability insurance as well as assistance with risk management.⁴⁰

38 Submission 18, Surf Life Saving Australia Ltd. Submission 42, Agricultural Show Council of Tasmania.

39 Submission 79, Queensland Government, p. v.

40 Submission 61, pp. 21-22.

4.63 It would seem that where pooling or group insurance schemes operate, risk management procedures form an integral part of the scheme and members are obliged to adhere to these procedures in order to retain membership.

4.64 The Committee considers that, where possible, organisations should examine whether pooling arrangements would be appropriate for them. Governments could consider playing a leadership role in providing information on how to ‘pool’.

4.65 While pooling or group insurance has led to savings for some organisations and professional groups, such arrangements may not be available to all industry groups, particularly those involved in high risk activities, eg adventure tourism and those that involve people with disabilities. In these circumstances some form of government assistance, either by way of subsidisation or underwriting may need to be considered.

Part III

The regulatory framework within which the insurance industry operates

The insurance industry is subject to cyclical movements. One of the most worrying aspects of the current situation was the suddenness and severity of the turn in the market which caught the industry and governments flat-footed when seeking to address the problem.

This section of the report provides an examination of the regulatory framework in which the insurance industry operates which includes an assessment of the data currently available on the industry.

This part also considers the role of APRA, the ACCC and ASIC as regulatory bodies concerned with various aspects of the insurance industry and the adequacy of consumer protection.

Chapter 5

Understanding the insurance market

Introduction

5.1 In the report, the Committee has considered a number of proposals aimed at containing the increasing cost of insurance cover for public liability and professional indemnity. This chapter continues this theme but turns its attention to the regulatory framework of the insurance market.

5.2 Mr Duncan West from Royal and SunAlliance Insurance told the Committee that hard and soft markets are not good for anybody. He stated:

They are not good for the consumer and they are not good for the industry—they ruin the industry's credibility. For business and the individual to have massive changes in their insurance costs, year on year, is just not good news. Consistency has got to be the way that things should happen.¹

5.3 While recognising that the insurance industry moves through phases of soft and hard periods in the market, the Committee looks at ways to temper or moderate severe shifts in the cycle.

5.4 In this chapter, the Committee considers the importance of having a comprehensive and reliable database readily accessible so that industry and governments can be better informed about the market and better able to respond to any shifts. Such a database would lay the foundations for a more stable and predictable market.

The quality of available data

5.5 The section of the report that looked at risk management underlined the role of sound data collection and analysis in identifying risk and suggesting remedies to help minimise loss or damage. This section looks at the importance of data management in the broader context of understanding the forces in the market place that influence the pricing of premiums.

5.6 Some attribute the current situation, in part, to the failure of the insurance industry to recognise the danger signs in the public liability and professional indemnity insurance market until the problem was full blown. As noted earlier in the report, insurance companies during the second half of the 1990s failed to take account of changing conditions in the market, such as increasing claims costs, and consequently underpriced premiums for certain classes of insurance. According to the

1 *Committee Hansard*, 9 August 2002, p. 360.

Treasury, it also appeared that in some cases insurance companies were more intent on increasing market share than on maintaining profitability.²

5.7 APRA, the industry's prudential regulator, was also slow to respond to the emerging problem. Indeed, the report of the Senate Select Committee on Superannuation inquiring into prudential supervision of superannuation and other financial institutions expressed concern at APRA's apparent laxity in its monitoring role. The Select Committee found that there was scope for APRA to improve its performance in detecting signs of trouble in the industry:

There may not be sufficient warning signals of institutional and fund failure and that those signals which do occur appear to be overlooked at times by the regulator...Although it was not one of the committee's case studies, the collapse of HIH Insurance is yet another example where early warning signals seem to have been ignored by the regulator.³

5.8 Clearly, the early identification of a problem allows a more orderly and coordinated approach to address the difficulty. At the moment, the insurance industry and the State and Commonwealth governments, confronted with escalating premiums, are looking to the available statistics to help them analyse the problem and understand the causes. The available statistics, however, are not providing the information needed to obtain a clear and sound appreciation of what is happening in the insurance market.

5.9 The Insurance Council of Australia informed the Committee that it does promote the collection of data from everyone in the industry through the work of Insurance Statistics Australia (ISA). This collection of information, however, is voluntary and represents around 22 per cent of the market. The Council admitted that it, on behalf of the insurance industry, had not collected enough data and that was one of the major problems. The Council told the Committee that it was developing arrangements for 'an improved official data set on insurance'.⁴

5.10 The Committee welcomes the steps being taken by the Insurance Council of Australia to improve its data collection processes. It recognises, however, the limitations placed on ISA to compel insurance companies to provide data and the reluctance of such companies to make available information, particularly commercially sensitive material.

5.11 Currently, people working in this field of insurance premiums and claim costs use data gathered and published by APRA to gain an understanding of how the market is performing. A number of recent studies, however, have questioned the quality of these statistics. For example in providing actuarial advice on public liability,

2 See for example evidence presented by Mr Nigel Ray, Acting Executive Director, Department of the Treasury, *Committee Hansard*, 8 August 2002, p. 319.

3 Senate Select Committee on Superannuation, *Prudential Supervision and Consumer Protection for Superannuation, Banking and Financial Services*, First Report, August 2001, p. 45.

4 Mr R. Jones, President, Insurance Council of Australia, *Committee Hansard*, 8 July 2002, p. 48.

Cumpston Sarjeant Pty Ltd maintained that APRA figures were unreliable. In his report, Mr Cumpston stated:

I asked (the CEO, APRA) for reasons for some extraordinary increases in claim numbers for four classes of insurance. These claim numbers are set out in the table below, together with revised figures advised to me by APRA.

Class	1998 original	1999 original	2000 original	1998 revised	1999 revised	2000 revised
Professional indemnity	14,000	19,000	166,000	12,000	17,000	30,000
Public/product liability	55,000	72,000	88,000	48,000	69,000	89,000
Mortgage	1,000	0	114,000	1,000	1,000	1,000
Consumer credit	37,000	85,000	284,000	77,000	90,000	142,000

5.12 Mr Cumpston stated further that ‘APRA revised its statistical system in December 1997, and it appears as if the subsequent claim number statistics are deeply flawed. Unfortunately, some of these claim numbers have been widely used to argue for sweeping changes’. In brief, he maintained:

I do not think that recent APRA figures on public liability claim numbers are reliable enough to allow any conclusions to be safely drawn.⁵

5.13 Mr Nigel Ray, Department of the Treasury, agreed that the available data, particularly on claims, is inadequate.⁶ APRA itself recognised the weaknesses in its statistics. It informed the Committee:

We would note that there are presently some serious data gaps in the publicly available information on premium trends, which we understand the Insurance Council of Australia is addressing. We would certainly caution against drawing conclusions from APRA’s own public liability and professional indemnity insurance data over the past year or so (or any other short-term period) because of the inevitable attendant statistical quirks.⁷

5.14 Consistent with these findings, a number of submissions suggested that there needs to be more information made available on the insurance industry in Australia to facilitate an informed debate on the issues now confronting the industry.

5.15 The Institute of Actuaries expressed the concerns of many witnesses that the public liability insurance system is hampered by a lack of good quality data and technical analysis. It argued that, because of insufficient data, it is difficult for insurers

5 Attachment to submission 132, Actuarial advice on public liability, Cumpston Sarjeant Pty Ltd, p. 4-5.

6 *Committee Hansard*, 8 August 2002, p. 329.

7 Submission 127, p. 3.

and their actuaries to set appropriate rates for individual risks and to set aside appropriate claim reserves.

5.16 It noted that there has been a long history of substantial losses by insurers writing various forms of liability insurance. In some cases, according to the Institute, 'this is an issue of incompetent (or even no) underwriting'. It goes on to state, however, that mostly the losses reflect the extreme difficulty of assessing the profitable cost of public liability risks. It explained further:

Given adequate data, the matching of price to insured benefits is a basic actuarial skill. Until adequate data is collected, it is difficult to quantify the problem...

As better data becomes available, actuaries will be better able to advise on appropriate premium levels at both an aggregate and individual policy level. However, because individual risks are highly diverse, underwriting judgement will remain a critical ingredient.⁸

5.17 Mr Michael Playford from the Institute of Actuaries explained to the Committee that one of the problems with insurance companies is that they can only look at the data for their own portfolio, which may be very small in some cases. They would certainly benefit from having access to a wider body of data to help them with their pricing.⁹ He maintained that collecting data on at industry level would help in identifying which practices produce claims and which practices have fewer claims.¹⁰

5.18 A number of other witnesses from the broader business community also commented on their inability to effectively analyse the underlying causes of increased premiums simply because of the lack of adequate data. Mr Michael Potter, Chief Executive Officer, Council of Small Business Organisations of Australia, told the Committee that more facts and figures are needed. He stated:

Getting the facts and figures out of the industry to actually relate them to what the real cause is would help small business to understand whether the increase in premiums is only due to reinsurance, or whether it is due to the bad management of local companies that have been basically underpricing themselves and not having enough reserves.¹¹

5.19 The Committee met the same difficulties during its inquiry. It could not obtain figures to ascertain, with any degree of accuracy or certainty, relatively straightforward information on the ratio of the number of annual claims made and

8 Submission 103, p. 12.

9 *Committee Hansard*, 8 August 2002, p. 282.

10 *Committee Hansard*, 8 August 2002, p. 285.

11 *Committee Hansard*, 9 July 2002, pp. 92, 93. The Victorian Employers' Chamber of Commerce and Industry suggested that the insurance industry maintain a detailed up-to-date incident database that provides business and the insurance industry with a better risk profile of industry segments. Victorian Employers' Chamber of Commerce and Industry, submission 98, p. 7.

settled to the number of premiums. So in determining whether the number of claims had risen, the Committee was presented with data not only incomplete but subject to a range of qualifications and interpretations. A similar problem emerged when the Committee sought information on the costs of claims. This lack of comprehensive and reliable data frustrates attempts to gain an understanding of the precise nature and extent of the root causes of the current problem.¹²

5.20 Clearly, this lack of adequate data has implications for insurance companies assessing costs and setting premiums, for consumers seeking to understand and manage the price rises, and for governments looking to address the problem of rising premiums.

Committee's view

5.21 The Committee accepts that not only insurance companies but the market place as well should have access to industry-wide data so they can better assess risk and premium pricing. The Committee believes that a well-informed market is far better equipped to anticipate shifts, to adjust to trends in the industry and to plan future strategies.

Central database

5.22 The Institute of Actuaries suggested that a detailed central database is required before any comprehensive analysis can be undertaken. It noted that because some claims are reported a long time after the incident and because some claims take time to settle, it would take considerable time to build up such a database. It stressed that it is 'essential for the database to include adequate exposure information and that, as far as possible, information from different sources be captured in consistent form'. The Institute noted that there is a similar need for good data for decision making in all forms of liability insurance.¹³ The Institute provided a list of the main items that it believed should be included in a database (see appendix 6).

5.23 The Insurance Australia Group Limited endorsed the proposal to establish a comprehensive national database for personal injury and possibly other types of liability claims. It concluded that this would provide, for the first time, a complete picture of the economic cost base for liability insurances and emerging trends in particular areas.¹⁴

5.24 Australian Business Ltd also argued for co-ordinated national action. It suggested that the Commonwealth seek to obtain the necessary information from

12 See the introductory sections of chapters 3 and 4.

13 Submission 103, pp. 21–22. In recommending that a national database of policy and claim information be established, the Institute of Actuaries proposed that a system similar to that of the US Insurance Services Office should be created; and that governments be involved jointly to commission an actuarial study of this data.

14 Submission 143, p. 4.

insurers that would enable further analysis of the reasons for the current increase. It stated that ‘the insurance community should redouble efforts to provide clear and candid information for the community’.¹⁵ Royal & SunAlliance maintained that it was time to make the collection of essential statistical information mandatory. Many witnesses supported this view.¹⁶

5.25 The Committee notes that the National Insurance Brokers Association (NIBA) in a submission to the Parliamentary Joint Committee on Corporations and Financial Services drew attention to a relaxation of reporting requirements on unauthorised foreign insurers. It stated:

At the present time insurance brokers and other intermediaries that place general insurance business with unauthorised foreign insurers are required, as part of their annual return to ASIC under the Insurance (Agents and Brokers) Act, to provide details of the amount and nature of such business. There is, however, no such requirement under the FSR arrangements, as a result the limited information that is currently available will be lost. NIBA considers that this information is vital for the effective monitoring of insurance in Australia and urges appropriate provision be made within FSR for the collection of information about insurance being placed with unauthorised foreign insurers.¹⁷

5.26 According to the Association this information is not available from any other source and is vital to an understanding of the insurance market in Australia.

Committee’s view

5.27 The Committee maintains that the present system for the collection of data is far from satisfactory and requires prompt attention. It fully endorses the establishment of a comprehensive central database and believes that statistical information about unauthorised foreign insurers should be a necessary component of this database. The Committee also believes that reporting obligations for insurance companies should be made mandatory.

15 Submission 115, para 3.2.

16 See for example Queensland Government, Report, *Liability Insurance Taskforce*, February 2002 in Queensland Government, submission 79, p, xi; Victorian Employers’ Chamber of Commerce and Industry, submission 98, covering letter and executive summary: ‘The ‘Commonwealth Government has a key role to play in ensuring that there is an appropriate level of data collection, competition and prudential regulation of the Australian insurance industry’.

17 National Insurance Brokers Association, submission 33 to the Inquiry into the regulations and ASIC Policy Statements made under the Financial Services Reform Act, Parliamentary Joint Committee on Corporations and Financial Services.

Responsibility for the database

5.28 This proposal to establish a comprehensive database then raises the question of who should have responsibility for it. As noted earlier, APRA already collects statistics from the insurance industry. APRA explained, however, that it:

...does not collect information on the individual components of claims expense, such as policy benefit amounts and details of direct and indirect claims settlement costs, as there is no prudential need for the imposition of the additional reporting burden. Also, the extent to which detailed components of claims expense are captured by insurers themselves is not uniform across the industry. For example, there are different approaches to recording the number and cost of claims that are litigated. In other words, the data needed to make a detailed assessment of product line cost drivers is not available and would not add value to the conduct of prudential supervision; nor would it be complete, as APRA does not collect data from unregulated state insurers, mutual insurers or unauthorised foreign insurers.

Finally, it is important to remember that much of this data is complex and difficult to collect, collate and verify. The collection of such data would place a heavy respondent burden on the insurers. Nonetheless, if the government were to ask us to collect more detailed data for this purpose, we would of course do so. This would, however, take time and resources to put in place and it would be years before reliable and useful trends became apparent.¹⁸

5.29 Ms Lorraine Allan, Acting Manager, Financial Systems Division, Department of the Treasury, reinforced this point about the focus of APRA's work. She explained that APRA's data collection is designed for prudential supervision, so its main concern is with the solvency and capital adequacy of companies. She told the Committee:

It does not drill down into claims, so it would be a change for them to collect claims data.¹⁹

Committee's view

5.30 The Committee notes the explanations for the approach taken by APRA to gathering information on the insurance industry. It appreciates APRA's view that data on detailed components of claims and costs is 'complex and difficult to collect, collate and verify'. But the Committee is also fully cognisant of the call from many quarters of the insurance industry for the collection of better quality statistics.

18 Dr Darryl Roberts, *Committee Hansard*, 9 July 2002, p. 133.

19 *Committee Hansard*, 8 August 2002, p. 329. Ms Lynne Curran, Acting Manager, Financial Systems Division, Department of the Treasury restated the point (p. 339): 'As Ms Allan said earlier, the focus of the APRA data is prudential concerns, so it is not looking at claims data at an individual or disaggregated level'. Section 38, *Insurance Act 1973*, sets down APRA's functions in monitoring prudential matters.

New data collection system

5.31 In the Joint Communique issued after the Ministerial Meeting on Public Liability, 30 May 2002, ministers agreed that the lack of comprehensive data on claims was a significant constraint in the appropriate pricing of premiums by the insurance industry for not-for-profit, adventure tourism and sporting groups. It stated further that the ‘paucity of data is also inhibiting the development of insurance products suitable for these sectors.’

5.32 Senator Coonan announced in the Communique that the Commonwealth had agreed to use the *Financial Sector (Collection of Data) Act 2001* to require all authorised insurers operating in Australia to submit claims data to APRA for analysis and publication.²⁰

5.33 Mr Duncan West from Royal and SunAlliance Insurance would like to see a ‘more robust proposal’. He told the Committee:

Unless you start getting down to a much more micro level of data and you force insurers to collect data at that micro level—as would be the case in workers compensation, where most workers authorities force you to collect and submit data at a much more detailed level—unless you get right down to minute trade specifications and you have consistent trade specifications and consistent accident types, so that you can start measuring the accident type and the cause of that accident type, and unless you mandate those at a much more detailed level than currently APRA, ISA or anybody else is proposing, the data will stay at a macro level.²¹

5.34 The Committee notes APRA’s advice that it has been undertaking a major project to modernise its data collection technology and forms. According to APRA, the new system will apply to the general insurance industry from the September quarter 2002 onwards. General insurance covers property, liability and personal injury.²² APRA told the Committee:

The primary focus of our data collection is to monitor the overall prudential soundness of regulated insurers. This does not automatically encompass pricing considerations for individual product lines. Product pricing is a commercial decision for each insurer and may reflect a variety of considerations that go beyond, for example, claims history and administration expense.²³

20 Joint Communique, Ministerial Meeting on Public Liability, Melbourne, 30 May 2002, p. 6 of 12, <http://assistant.treasurer.gov.au/atr/content/pressrelease/2002/900.asp> (13 August 2002).

21 *Committee Hansard*, 9 August 2002, p. 352.

22 Background Paper No. 1, *A profile of the General Insurance Industry*, Prepared by the Insurance Council of Australia for the HIH Royal Commission, November 2001, p. 4. The *Insurance Contracts Act 1984* defines ‘general insurance’ as insurance that is not life insurance: section 11.

23 Dr Darryl Roberts, *Committee Hansard*, 9 July 2002, p. 133.

5.35 Dr Roberts stated ‘I think that the new regime will do a lot to make the reporting and the accounts of the industry more transparent’.²⁴

Committee’s view

5.36 The Committee agrees with the view that a comprehensive central database is needed. It believes that such a resource is essential to bring stability and some predicability to an industry subject to cyclical movements and a degree of uncertainty because of long term claims. It is also of the opinion that APRA is best placed to collect and analyse information on the insurance industry and to assume responsibility for establishing and maintaining that database.

5.37 The Committee understands that APRA’s primary responsibility is with ensuring the prudential soundness of insurance companies. It notes, however, the advice from the Institute of Actuaries and other witnesses that underlines the need for a comprehensive database that extends well beyond the narrow range of data collection and analysis currently undertaken by APRA. Although APRA is introducing a new regime, the Committee is unsure whether it intends to collect the range of data that some hope is to be collected. Further, the Committee is not convinced that APRA has the resources to meet such expectations.

5.38 In light of these findings, the Committee makes the following recommendations.

Recommendation 7

The Committee recommends that the Government:

- **make a commitment to the development of a comprehensive national database on the insurance industry in Australia;**
- **put beyond doubt that APRA is to be given the responsibility for developing and maintaining this database;**
- **ensure that APRA has the statutory authority to require insurance companies and other relevant bodies to provide information; and**
- **ensure that it is adequately funded so that it has the resources and level of expertise to effectively collect, collate and analyse data on the insurance industry.**

Further, the Committee recommends that APRA:

- **look carefully at the evidence presented to the Committee on the nature and extent of information that is required to fully understand the insurance industry especially the pricing of premiums;**

24 Dr Darryl Roberts, *Committee Hansard*, 9 July 2002, p. 146.

- **make available a draft discussion paper that provides details of the data that it intends to collect and the procedures to be adopted in collecting this material;**
- **follow-up the publication of this paper with industry-wide consultation with a view to determining whether the new regime is going to meet the expectations of the insurance industry; and**
- **report to Parliament on its findings.**

Court data

5.39 In 1997, the Australian Law Reform Commission, prompted by concerns about the lack of data about the operation of the civil litigation system in Australia, produced an issue paper entitled *Review of the adversarial system of litigation*. In outlining its view on court statistics, it stated:

The lack of relevant qualitative and quantitative data about the operation of the civil justice system is a significant barrier to reform. Debate about reform options needs to be informed appropriately by an empirical understanding of key justice system performance indicators including cost and delay, satisfaction, compliance with outcomes and the nature of disputes (who is litigating, and in what types of proceedings). This information is important in assisting to evaluate reforms and enable informed decisions to be made about the allocation of resources to different dispute resolution processes. It also enables reform processes to build upon existing strengths where possible.

5.40 In summary, the Commission found that ‘while almost all Australian courts and tribunals now have some form of data collection and analysis of matters commenced in their jurisdiction the data lacks comparability because of the lack of uniform information standards’.²⁵

5.41 The most recent report by the Productivity Commission on Government Services highlighted this apparent ongoing difficulty in obtaining data of high quality. It stated:

Differences in court jurisdictions and the allocation of cases between courts across States and Territories affect the comparability of efficiency and effectiveness data. The different methods undertaken to collect the data can also have an impact on the data consistency and quality.

5.42 The Report noted that the Commonwealth, States and Territories had recently signed a Memorandum of Understanding with the Australian Bureau of Statistics (ABS) to improve the quality of statistical data within the court administration data collection, and to improve the standard of statistical comparability across jurisdictions.

25 Australian Law Reform Commission, *Review of the adversarial system of litigation*, Issues Paper 20, 1997, <http://www.austlii.edu.au/au/other/alrc/publications/issues/20/04nature.html> (27 August 2002).

The ABS is providing advice and contributing to the development and refinement of the *Court Administration Data Manual* which includes the development of civil data standards dealing with matters such as definitions, classifications, coding and recording and reporting procedures.²⁶

5.43 The ABS and the Court Administration Working Group are developing a new performance indicator framework which, however, is still in an initial stage.

5.44 The Committee in chapters 3 and 4 noted that the problems created by the lack of good data management of court records throughout Australia frustrates any detailed analysis of the underlying causes for premium increase. The data was merely indicative of trends such as the number of claims lodged and the types of settlement as well as the costs associated with processing a claim through the courts. Clearly, there is much scope for improvement.

Committee's view

5.45 The Committee notes that the Commonwealth, the states and territories with the ABS have signed a memorandum of understanding that should lead to improving the standard of reporting and data collection of court proceedings. The Committee notes, however, that this problem of poor quality data is long standing.

5.46 The Committee also acknowledges the work being done by the ABS and the Administration Working Group in developing performance indicators but again understands that this project is in its infancy.

5.47 Although the Committee's concern in this report is with obtaining data on litigation, it appreciates that for the sake of uniformity and efficiency any data gathering system should take account of both civil and criminal proceedings.

Recommendation 8

- **In light of this ongoing problem of the lack of good quality, nationally comparable court data, the Committee recommends that the Commonwealth give high priority to the work being done by the Australian Bureau of Statistics in developing performance frameworks.**
- **It also recommends that the Attorneys-General treat this matter with urgency and, under the leadership of the Commonwealth Government, work together to ensure that good court data management systems are put in place throughout the country. The main objective is to have national standards apply so that the data across all jurisdictions is compatible, comprehensive and allows for consistency in interpretation.**

26 Productivity Commission, *Report on Government services 2002*, chapter 9 'Court administration, section 9.5 'Future directions in performance reporting', p. 500.

Chapter 6

Insurance consumers' interests

Introduction

6.1 The Committee understands that consumers of insurance products have fewer options in the current hard market because of reduced competition in the market place. This chapter discusses the relationship between the insurer and the consumer and considers whether measures to strengthen consumer protection are needed. Overall, the Committee in this chapter looks at:

- concerns about consumer interests and consumer protection; and
- the regulatory bodies that have responsibility for various aspects of the insurance industry including discussion of:
 - APRA's role,
 - the ACCC's role,
 - ASIC's role, and
 - the role of the insurers and the industry code of practice.

Assessment of premiums

6.2 One of the most persistent messages to emerge from this inquiry has been the confusion surrounding the assessment and pricing of premiums. Generally, witnesses were not only bewildered by the sudden and severe increase in premiums, despite relatively good claims history, but also by the growing use of clauses to exclude coverage of particular activities.

6.3 Dr Kenneth Baker, Chief Executive Officer, ACROD Ltd, told the Committee:

There have been premium increases ranging from 30 per cent to, by today's evidence, 400 per cent. In some cases, organisations are having great difficulty getting any insurance cover at all. These refusals to insure and the great increases seem to be unrelated to the history of claims of the organisation. Organisations which may have been around for more than two or three decades and had no claims have nevertheless faced dramatic increases in premiums.¹

6.4 The Royal Agricultural Society of Tasmania submitted that for the majority of Agricultural Societies in Tasmania there was no basis for premium increase which relates to the activities or heightened public risk in the conduct of their affairs. It

¹ *Committee Hansard*, 8 July 2002, p. 70.

maintained that in their case there had been no recent claims which could in any way have impacted on the increases quoted by the underwriters.² Similarly, the Australian Speleological Federation Inc. informed the Committee that in spite of a claimless record, its public liability insurance premium increased in 2002 from \$4,500 to \$18,000.³

6.5 The experience of the Australian Breastfeeding Association (ABA) highlights the experiences of many others. It stated:

The threefold rise in our professional indemnity costs and doubling of public liability insurance premiums does not seem to reflect a realistic actuarial assessment of the actual risk associated with the ABA's activities. Rather, it seems that we are simply a low risk, small customer that does not contribute significantly to insurance company profitability.⁴

6.6 St John Ambulance Australia, the Australian Private Hospitals Association, Australian Nursing Federation, Outdoor Recreation Council of Australia Incorporated, Volunteering Australia, the Australian Rugby League, the Australian Cricket Board, the Australia Council, the Financial Planning Association of Australia and the Institute of Chartered Accountants are among the many witnesses who expressed concern that their risk assessment bore little relationship to the good rating in their claim records. They assert that insurers do not seem to take into account claims history in setting

2 Submission 42, p. [3].

3 Submission 50, p. 1. See also submission 51, Illawarra Speleological Society, p. 1. The Australian Council of Professions Ltd cited a draft survey taken by the Australian Institute of Quantity Surveyors which indicated that quantity surveyors with no claims history have borne premium increases of between 50 and 200 per cent. It further shows that in five years only six insurance claims proceeded to court or arbitration and the total payout on claims was just \$585,000 yet they were paying total premiums of \$2 million a year.

4 Submission 64, p. 7. See also Mr Raymond Jones, President, Insurance Council of Australia Ltd, who acknowledged that 'There are a lot of very innocent victims out there who are being penalised for poor performance and poor risk management on behalf of similar organisations or similar companies across Australia. There are some very innocent adventure risk people who do manage their business very well. The insurance industry has never been able to go down to a one-on-one individual risk level.' *Committee Hansard*, 8 July 2002, p. 57.

premiums.⁵ CPA Australia stated bluntly that underwriters 'are picking and choosing clients without regard for previous good risks.'⁶

6.7 The Financial Planning Association of Australia also noted that coverage is being increasingly restricted with respect to policy wordings and endorsements as well as the introduction of new exclusions.⁷ The Institute of Chartered Accountants agreed with this view. It submitted:

There is clear evidence that professional indemnity insurance is being offered on increasingly restrictive terms by insurers. In some cases, feedback from members has raised concern that up to 90% of a firm's activity could essentially be uninsured because it falls under one or another exclusion clause contained in the insurance contract.

...

Considerable uncertainty surrounds a number of new exclusions and as a consequence members do not know to what extent they are protected by their insurance policy.⁸

6.8 Moreover, the failure of the insurance companies to communicate effectively and openly with consumers about premiums has generated unnecessary disquiet at a time of difficulty in the industry.

6.9 Mr Gregory Nance from the Surf Life Saving Association stated simply 'I have never had adequately explained to me how insurers assess the amounts for premiums'.⁹ Similarly, Mr Michael Potter from the Council of Small Business Organisations of Australia called for transparency in the process. He stated, 'Tell us, as the people who are basically going to be paying the premiums, how you came up with your actual premium content—where is the risk and where do you see the value of the claim?'¹⁰

5 Submission 65, St John Ambulance Australia, p.[2]; submission 68, Australian Private Hospitals Association Limited, p. 3; submission 70, Australian Nursing Federation, p. [2]; submission 73, Outdoor Recreation Council of Australia Incorporated, p. [1]; submission 77, Volunteering Australia, p. 9; submission 82, Australian Rugby League Limited, p. 1; submission 94, Financial Planning Association of Australia Limited, p. 8, submission 95, Institute of Chartered Accountants, p. 8; submission 100, Australian Cricket Board, p. 2; submission 112, the Australia Council, executive summary. See also The South Australian Country Women's Association Incorporated, submission 17, p. 1; submission 129, Outdoors WA, p. [2]; submission 92, Logikal Health Products, p. 1; submission 96, Australian Council of Social Service, p. [2]; submission 97, Queensland Tourism Industry Council, p. 1. This list does not include all submissions that commented along similar lines.

6 Submission 125, CPA Australia, p. 3.

7 Submission 94, Financial Planning Association of Australia Limited, pp. 8–9.

8 Submission 95, Institute of Chartered Accountants, p. 7.

9 *Committee Hansard*, 8 July 2002, p. 3.

10 *Committee Hansard*, 9 July 2002, p. 93. See also Ms Sha Cordingley, Chief Executive Officer, Volunteering Australia, *Committee Hansard*, 10 July 2002, p. 176; Dr Rhonda Galbally, Chief

6.10 Some witnesses were asking that associations or other representative bodies have access to the claims history of their respective profession, trade or activity.¹¹ The Association of Independent Schools of South Australia submitted that the insurance industry should be required to be more transparent in explaining the increased cost of insurance premiums.¹²

6.11 A number of witnesses were not only troubled by the lack of explanation for higher premiums and the use of exclusion clauses but they also mentioned the lack of regard and fairness shown by insurers. Mr Paul Orton, General Manager Policy, Australian Business Ltd, told the Committee that a number of brokers in dealing with insurers had found a certain sense of indifference about ‘the difficulty that the ultimate consumers of insurance products are facing’. He noted that that indifference is ‘reflected in the lack of rationale for knockbacks for the retention of what had been long held cover with a particular firm’.¹³

6.12 Mr Stephen Ball, Director, National Insurance Brokers Association, pointed out the hard reality of the insurance business. He explained:

In a market of abundant supply, insurers would say. ‘I don’t really want to do that but, to be able to secure the premium placement, I will give you cover for that risk.’ In a market of contracted supply, they will say ‘Sorry, I don’t really want to provide that cover any more.’¹⁴

6.13 While most acknowledged that insurance companies operate in a commercial environment and are accountable to their shareholders, they found difficulty in accepting the high increases and the lack of consideration. A number harboured suspicions that the increases were not solely the result of rising claim costs but were

Executive Officer, Our Community, *Committee Hansard*, 10 July 2002, pp. 183–4, 186; Ms Karen Curtis, Director, Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 10 July 2002, p. 237. Dr David Stephens, Policy Consultant, Australian Council of Professions Ltd, called for better information to be provided particularly the reasons for rises. He told the Committee, ‘The discipline of requiring in some way—whether through self-regulation or some other way—an insurance company to specify what component of a rise was attributable to what cause we think would make a hell of a difference in this field.’ *Committee Hansard*, 8 July 2002, p. 41. Australian Business Ltd endorsed the need for insurance companies to open their books on a confidential basis to assist in the identification of the causes of rising premiums. It also suggested that, ‘At the very least insurers need to be encouraged to embark on a communication campaign which explains to their customers why individual risk circumstances may be irrelevant in assessing the level of premium for public liability and professional indemnity insurance. Australian Business Limited, submission 115, p. 4.

11 See for example, submission 102, Royal College of Nursing Australia, p. 4. See also submission 142, Australian Institute of Quantity Surveyors, p. [3].

12 Submission 85, p. 6.

13 *Committee Hansard*, 8 July 2002, p. 64. See also statements by Stephen Harrison, Institute of Chartered Accountants, *Committee Hansard*, 8 August 2002, p. 308.

14 *Committee Hansard*, 9 July 2002, pp. 103–4. See also Dr Paul O’Callaghan, President, Australian Horse Industry Council, *Committee Hansard*, 10 July 2002, p. 262.

related to attempts to recoup other business losses. A number of sporting and charitable organisations felt strongly that it was 'unjust and inappropriate to seek to recover losses from sporting, charities and not-for-profit sectors of the community'.¹⁵

6.14 The Australian Council of Professions asked whether professions with low numbers of claims were effectively cross-subsidising claims by professions and by other insurance clients in sectors where claims and litigation were more common. Similarly, Volunteering Australia believes that they may be bearing the costs of others' liabilities.

6.15 This suggestion of cross subsidy was made in numerous other submissions often accompanied by a request for an investigation into the pricing of premiums.

6.16 The Australian Council of Professions suggested that it would be an appropriate subject for APRA or other relevant bodies to investigate. It went on to state:

To the extent that claims history *does* influence premium rises, APRA could also look into whether the 'targeting' of insurance claims, and thus their impact on premiums is being driven more by the capacity to pay rather than by responsibility for the damage or loss.¹⁶

6.17 As well as an independent investigation of the pricing process, witnesses also wanted the insurance industry to take steps to improve the way companies determine premiums. Some wanted changes and were asking for the levels of risk in the various workplaces or activities undertaken to be assessed and the premiums adjusted accordingly.

6.18 Sport Industry Australia suggested that the Government should 'require insurance companies to review the process by which they assess the true risk of individual organisations to ensure it is fair and equitable, and reflects the true risk of the sport'.¹⁷ Likewise, the Institution of Engineers recommended that the insurance industry change the way its costs premiums. It stated that currently, costs are spread across the board for all types of insurance. It suggested that premiums be structured so that everybody pays different rates according to their risk profile and claims history. The Institution submitted that only through 'a consistent Australia-wide approach can an effective solution to the complex problem of liability be solved.'¹⁸

15 See for example, submission 44, Sport Industry Australia, p. 3; submission 77, Volunteering Australia, p. 9; submission 71, Our Community, p. [2].

16 Submission 55, 12.

17 Submission 44, p. 3. See also, submission 90, Australian Chamber of Commerce and Industry, p. 6.

18 Submission 81, p. 3. Mr Neil Coulson, Chief Executive Officer, Victorian Employers Chamber of Commerce and Industry, suggested that the insurance industry become more innovative in its approach. *Committee Hansard*, 10 July 2002, p. 232.

6.19 The general thrust of the need for improvement in the insurance industry focused on the principles of transparency, fairness and equity. The Australian Institute of Quantity Surveyors suggested that governments consider legislating to prevent the unfair penalizing of low risk professions in relation to both professional indemnity and public liability insurance.¹⁹

6.20 The Real Estate Institute of Australia proposed that the ‘Federal Government initiate consistent and meaningful measures to ensure that there is a proper balance in professional indemnity insurance between realistic premiums and small business confidence that they are satisfactorily covered under insurance’.²⁰

Committee’s view

6.21 The Committee believes that at the moment consumers, in many cases, are not receiving adequate explanation for the increase in premiums or the refusal by an insurer to cover particular services or activities. This has been acknowledged by some companies in the industry. The Committee believes that consumers deserve to be better informed about the reasons for the increase or for the withdrawal of coverage. It accepts the view that the insurance industry needs to improve the provision and clarity of information they provide to consumers, which would include offering clear explanations for increases, providing pricing trend data, improving query and complaint handling systems, and using Plain English and standard terms in policies.²¹

Unfair advantage

6.22 Criticism of the insurance industry, however, extended beyond the paucity of information regarding the pricing of premiums and the actual method of assessing premiums. The Committee also received reports of insurance companies using unfair tactics, such as unreasonable timeframes in which to accept increased policy quotes. Ms Monica Persson, Executive Manager, Audiological Society of Australia, told the Committee that their organisation had been deliberately hindered in their efforts to access alternative cover. She explained that their insurer had:

...been tardy in providing documentation upon which another insurer can assess our potential risk. By delaying the provision of appropriate documentation, they have, in effect, deprived us of the opportunity to negotiate alternative insurance options for our members, leaving our members in a potentially precarious position as they try to find insurance cover in order to continue to practise.²²

6.23 Members of the Australian College of Midwives Inc had similar experiences. Mrs Alana Street, Executive Officer, explained that they had had a successful

19 Submission 142, Australian Institute of Quantity Surveyors, p. [3].

20 Submission 91, p. 4.

21 Submission 55, Australian Council of Professions, p. 17.

22 *Committee Hansard*, 8 July 2002, p. 34.

arrangement with their insurer for some years. Initially, little notice was given of the insurer's intention to withdraw from the market. Mrs Street explained that:

We had to contact them directly to ask them to 'please explain'. It took them two weeks to contact us by letter, explaining that the reason for their decision was a commercial one. We asked for evidence to support their decision, and they chose not to provide any. We feel there is no evidence, financial or otherwise.²³

6.24 Mr Stephen Harrison, Chief Executive Officer, Institute of Chartered Accountants in Australia, also commented on the inadequate notification given to renew their cover. He told the Committee that:

Despite the advanced notice that they gave over the renewal process and starting that process with the brokers and, presumably, the brokers with the underwriters, advice about renewal terms was left until the last 24 or 48 hours, leaving some firms either the option of taking those terms without the ability to renegotiate with another company or risking going bare for a period.²⁴

6.25 Mr Leonard Earl, Member, Public Indemnity Insurance Panel, Institute of Actuaries added that brokers generally have been concerned about the lateness with which underwriters have provided them with terms. He told the Committee that some people receive their renewal terms very late and with restrictions on the various forms of coverage. According to Mr Earl this situation has caused great angst and concern for many. In his words, 'Suddenly, they find themselves without coverage in certain areas of practice or with draconian terms'.²⁵

6.26 In responding to a question about the problems facing some in renewing their insurance cover, Mr Raymond Jones, President, Insurance Council of Australia, told the Committee:

Rationalisation in the insurance broking sector of our industry is also happening, and it is badly needed. A lot of the problems and publicity that has been given to risks that have been hard to place and have not been put away on time are because you have a lot of small suburban brokers out there who are really being challenged by a very difficult environment. The big professional brokers are very quick to get in touch with us and communicate on issues, and we work closely with them. But a lot of these small brokers are really having trouble.²⁶

23 *Committee Hansard*, 10 July 2002, pp. 256-7.

24 *Committee Hansard*, 8 August 2002, p. 307.

25 *Committee Hansard*, 8 August 2002, p. 308.

26 *Committee Hansard*, 8 July 2002, p. 59.

6.27 While agreeing that the insurance market was experiencing trouble in adjusting to the changed circumstances, Mr Earl placed a different slant on the reasons for poor service. He told the Committee:

...many experienced people left the industry as a result of mergers and amalgamations over the last 10 years, so we have many people who have never really gone through a hard market such as we are seeing now, which is probably the most volatile that I have seen in 30-odd years in the business. They just do not know how to manage the market.²⁷

Committee's view

6.28 The Committee accepts that the insurance industry is having difficulty adjusting to current conditions. However it is concerned at the many reports it has received of what seems to be inappropriate or exploitative conduct by insurers, particularly in relation to last minute offers of renewal on exorbitant terms. The Committee considers that at the least insurers should be obliged to give 14 days notice of proposed terms of renewal or proposed refusal to renew a policy.

6.29 Section 58 of the *Insurance Contracts Act 1984* goes part way towards this. An insurer must, at least 14 days before expiry, advise 'whether the insurer is prepared to negotiate to renew or extend the cover'. Unfortunately this does not require the insurer (if it is inclined to negotiate) to make a firm offer at the time of giving notice. It leaves the way open for bargaining to continue up to moment of expiry—a situation which, in current conditions, will naturally favour insurers. The Committee does not think this is adequate consumer protection. The Committee considers that the provision should be strengthened to require insurers to make a firm offer at the time of giving notice.

Recommendation 9

The Committee recommends that the Government propose an amendment to section 58 of the *Insurance Contracts Act 1984* to ensure that insurers must give at least 14 days notice of the proposed terms of a policy renewal or proposed refusal to renew a policy.

A captive market and consumer concerns

6.30 Ms Lynne Curran from Treasury pointed out that if the insured is 'dissatisfied with the service that it is getting from an insurance company, it can always go to another insurance company'.²⁸

6.31 While agreeing in part with this view, Mr West from Royal and SunAlliance placed the problems facing consumers in the context of today's market. He stated:

27 *Committee Hansard*, 8 August 2002, p. 308.

28 *Committee Hansard*, 8 August 2002, p. 341.

...if people do not like the premium from one insurer, they have been able to just go to another insurer, get another premium and maybe find it lower. There has not been the need for that same rigour. Obviously, the liability issue has made that significantly more difficult for people. It is also more difficult as to how you regulate free enterprise in terms of how it prices individual risk.²⁹

6.32 Clearly, in the current market, the option for dissatisfied customers to take their business elsewhere is limited. As mentioned earlier, for some it is a captive market and under such market conditions the need for consumer protection increases.³⁰

Committee's view

6.33 The Committee accepts that at the moment consumers looking for liability coverage do not have the degree of choice they may have had a few years ago. Evidence presented to the Committee shows that the current situation has certainly brought to the fore the issue of consumer protection particularly in the area of setting premiums.

6.34 The following section of the chapter looks at consumer protection matters and the regulatory bodies relevant to the insurance industry.

Current reviews—the ACCC and the Productivity Commission

6.35 As mentioned in the report, a number of current reviews of various aspects of the insurance industry are underway. Two of particular relevance to consumer protection are: the one being undertaken by the ACCC and the other by the Productivity Commission.

6.36 On 30 May 2002, the Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, announced that the ACCC would monitor 'market developments and premium prices and that the Commonwealth would review the ACCC's involvement if it becomes clear the cost savings being made are not being passed through to consumers'. She stated that the Commonwealth would provide ACCC with a standing brief to continue to update its report on a six monthly basis over the course of the next two years.

This ongoing monitoring role will enable an assessment of whether the insurance industry is adjusting premiums to take account of cost savings, and provide the gauge for the effectiveness of measures taken on a national basis to stabilise and contain management costs as reflected in public liability premiums.³¹

29 *Committee Hansard*, 9 August 2002, p. 354.

30 See paragraphs 1.49–51.

31 Senator the Hon Helen Coonan, Minister for Revenue and the Assistant Treasurer, Joint Communique, Ministerial Meeting on, Public Liability, Melbourne, 30 May 2002.

6.37 The updated report was expected to be completed by July 2002.

6.38 On 26 July 2002, the Parliamentary Secretary to the Treasurer, Senator Ian Campbell, asked the Productivity Commission to undertake a research study into Australian insurers' claims management practices in the public liability class of insurance and benchmark them against world's best practice. In undertaking the study, the Commission is to have regard to a number of aspects dealing mainly with claims costs such as the impact of litigation on claims costs, the proportion of claims settled out of court, and the time taken to finalise claims. It is also to have regard to any connection between claims management practices and the affordability, and the availability of public liability insurance.³²

6.39 The Commission is to report by 31 December 2002.

Committee's view

6.40 The Committee welcomes both reviews and recommends that their findings be made available to the public.

Recommendation 10

Noting that the first update of the ACCC's insurance industry market pricing review was made public in September, the Committee recommends that all subsequent six monthly reports be made public pursuant to section 27B of the *Prices Surveillance Act 1983*.

6.41 Although the reviews will provide information and improve transparency in the industry, the Committee notes that their role is limited to review not enforcement. In particular, the Committee notes that the ACCC, at the moment, has no power to ensure that savings from reforms currently being implemented are passed on to consumers.

6.42 The ACCC, however, may intervene under the Trade Practices Act if anti-competitive conduct is thought to be involved. It cannot initiate action for the purpose of ensuring that cost savings being achieved through current reforms are being passed through to consumers. The Committee does note, however, that Senator Coonan in the Joint Communique stated that the Commonwealth will 'review the ACCC's involvement (including more formal processes) if it becomes clear that cost savings are being made but not passed through to customers'.³³

6.43 An example of a measure that the Commonwealth could take, and for which there is a precedent with the introduction of the GST, is to introduce price exploitation legislation. Such a measure would build into the Trade Practices Act a requirement

32 Productivity Commission, Public Liability Claims Management, Terms of reference, <http://www.pc.gov.au/research/studies/insurance/tor.html> (15 August 2002).

33 Senator the Hon Helen Coonan, Minister for Revenue and the Assistant Treasurer, Joint Communique, Ministerial Meeting on Public Liability, Melbourne, 30 May 2002.

that businesses do not engage in price exploitation as a result of the implementation of reforms designed to lower the cost of insurance premiums.³⁴ Penalties would apply for breaches of the legislation.

6.44 The ACCC would also have the responsibility to educate and inform business and consumers about their rights and obligations under the proposed price exploitation legislation. It could undertake activities, as it did with the GST, such as establish a price 'hotline', which would allow consumers to alert the ACCC to any unjustified price increase in insurance premiums, as well as develop an information network database of consumer, community and volunteer groups, businesses and organisations.³⁵

6.45 The Committee believes that under such legislation, the ACCC would be an effective force in protecting consumers from exploitation by ensuring that insurers pass on the full benefits of any savings due to law reform designed to reduce the costs of claims.

Recommendation 11

The Committee recommends that the Trade Practices Act be amended to allow the ACCC to take enforcement action to ensure that any savings or benefits that accrue directly or indirectly from legislative reforms being implemented throughout Australia to minimise insurance premiums are passed on by the insurance companies to consumers.

6.46 While the Committee believes that the reviews are important, they do not address the problems raised by witnesses about the actual method of assessment of premiums and whether unfair cross-subsidisation is occurring. In other words, they do not deal directly with the lack of transparency, fairness and equity in the assessment of premiums. The studies also do not appear to take account of some of the consumer interest matters raised by witnesses such as the imposition of unrealistic deadlines to renew insurance coverage.

Market integrity, consumer protection and the regulators

6.47 At the moment there are three main regulatory bodies responsible for monitoring and regulating various aspects of the insurance industry in Australia—APRA, the ACCC and ASIC. A number of witnesses, however, spoke of the

34 See Part VB—Price exploitation in relation to A New Tax System, *Trade Practices Act 1974*. The legislation confers on the ACCC a number of statutory responsibilities including—to formulate guidelines, to issue a Notice when it considers a business has contravened the prohibition on price exploitation, to take court enforcement action, to monitor prices and to report to the Minister. See also, the ACCC, *Price Exploitation and the New Tax System*, http://gst.accc.gov.au/publications/24mar_final.htm (25 August 2002).

35 For more information on the work of the ACCC under Section 75AZ of the *Trade Practices Act 1974*, see *Report to the Minister Under Section 75AZ of the Trade Practices Act 1974, 1 April to 30 June 2001, and 1 July to 30 September 2001*.

confusion that exists in ascertaining the particular area of responsibility covered by the respective bodies. In commenting on the monitoring and complaints process, Dr Rhonda Galbally, Chief Executive Officer, Our Community, told the Committee that their organisation was 'very unclear about where complaints should go and how they could be dealt with'.³⁶

6.48 Dr David Stephens, Policy Consultant, Australian Council of Professions, also told the Committee that one of the difficulties they have is determining who is responsible for matters such as consumer protection.³⁷

6.49 Ms Sue Weston, General Manager, Office of Small Business, Department of Industry, Tourism and Resources, acknowledged that one of the main areas of complaints raised by small business was the lack of timeliness in notifying a consumer that cover was not being renewed. She, however, was uncertain of where such a complaint could be taken. She told the Committee 'we need to have a look at the extent to which there is any mechanism they feel they can go to complain'.³⁸

6.50 The Committee now looks at the role of the three regulatory bodies involved in the insurance industry with particular emphasis given to consumer protection issues.

APRA

6.51 Under legislation, APRA is established for the purpose of prudentially regulating bodies in the financial sector, which includes general insurance, and for developing the policy to be applied in performing that regulatory role. In providing regulation and developing policy, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality.

6.52 As mentioned earlier, one of APRA's key responsibilities is to ensure the financial viability of insurance companies. It told the Committee:

APRA is *inter alia* responsible for general insurance safety and soundness in the interests of policyholders, which is essentially a matter of helping keep insurance companies solvent and liquid, and thus able to pay claims as they become due. APRA does not regulate insurance prices (premium levels), as this would be inconsistent with the Australian tradition of financial deregulation over the past 20 years. Nor is APRA responsible for consumer protection matters more generally, these are the province of the Australian Securities & Investments Commission.³⁹

36 *Committee Hansard*, 10 July 2002, p. 186.

37 *Committee Hansard*, 8 July 2002, p. 42: 'I think we said that APRA, again, should investigate whether professionals with low numbers of claims are cross-subsidising claims by others'.

38 *Committee Hansard*, 8 August 2002, p. 314.

39 Submission 127, p. 1.

6.53 The Committee accepts that APRA does not have a consumer protection role apart from ensuring that insurance companies are able to meet claims. As discussed in the previous chapter, as part of its responsibility as a regulator, APRA collects and analyses data on the insurance industry. The Committee has already made recommendations in this area.

6.54 In regard to APRA's role as a prudential regulator, the Committee refers to APRA's recent performance which has drawn strong criticism. Media reports suggest that public confidence in APRA has suffered and that the failure of HIH further eroded APRA's credibility as a strong and active regulator.⁴⁰

6.55 In August 2001, the then Minister for Financial Services and Regulation, Mr Joe Hockey, acknowledged that the management and regulation of general insurance had been subject to intense scrutiny from the media, State and Federal politicians and the community. During a keynote address, he told the audience that:

The failure of HIH is clear evidence that our reforms to general insurance are absolutely necessary. It has also given us the opportunity to reflect on what additional improvements could be made.⁴¹

6.56 In turning to government reforms intended to improve and strengthen the insurance industry, Mr Hockey mentioned the introduction of the General Insurance Reform Bill 2001. He noted that the Government had decided to amend the Bill with a view to 'harmonise and improve enforcement capabilities across all APRA-regulated institutions'. He stated:

It was decided to bring forward these particular amendments in response to APRA's dealing with HIH. The Act's current enforcement provisions lack flexibility and require the establishment of a high level of certainty by APRA before it can take appropriate action.⁴²

40 See for example: the *Age*, 'APRA hits back at critics over HIH' 26 June 2001; the *Age*, 'Ex-Treasury head takes aim at HIH', 10 August 2001; the *Advertiser*, "Financial authority 'too slow'" 21 August 2001; the *Sydney Morning Herald*, 'Mystery why watchdog didn't bite', 1 September 2001; the *Western Australian*, 'Why weren't HIH bells loud, clear?', 1 September 2001; the *Sydney Morning Herald*, "HIH crash 'caught napping'", 4 December 2001; the *Australian Financial Review*, "HIH collapse signs 'relatively clear'", 4 December 2001.

41 Speech by the Hon Joe Hockey, Minister for Financial Services & Regulation, Keynote address for the ICA Canberra Conference, 9 August 2001.

42 Speech by the Hon Joe Hockey, Minister for Financial Services & Regulation, Keynote address for the ICA Canberra Conference, 9 August 2001. The Supplementary Explanatory Memorandum to the General Insurance Reform Bill 2001 stated that amendments to the enforcement provisions of the Insurance Act 'were not initially included in the Bill as they were to be considered in a separate process to update and harmonise enforcement and resolution of failure provisions across all Australian Prudential Regulation Authority regulated institutions'. It noted further 'following the failure of the HIH Insurance Group (HIH) it is proposed that some enforcement provisions that relate specifically to general insurance be brought forward for inclusion in the Bill'. The proposed amendments were 'to enhance APRA's investigative powers and its ability to gather information and issue directions to an entity'.

6.57 Also recognising the need to improve the regulatory regime under APRA, Mr Graeme Thompson, CEO of APRA, conceded in August 2001 that ‘the few months since the HIH Insurance went into provisional liquidation have demonstrated sharply some of the perils of prudential regulation, as well as opening some opportunities for us’. He expected that the Royal Commission on HIH, would ‘show that not only did APRA inherit a flawed regulatory system for general insurers, we inherited a deeply flawed company in HIH’.⁴³

6.58 Concern about prudential regulation of the general insurance industry had been current for at least five years before then. Senator Conroy noted that ‘In 1995, the ISC—the predecessor to APRA—first mooted changes to general insurance prudential standards....’

So here is the key: in 1995, the ISC stopped talking about trying to lift the standard...After a lengthy period of consultation, APRA released a draft prudential standard on risk management for general insurers on 13 September 2000. It has taken five years for ISC and APRA just to get to the draft guideline.⁴⁴

6.59 The Committee regrets that it took so long to establish a new prudential regulation regime. The General Insurance Reform Bill was passed on 29 August 2001 and received assent on 19 September 2001.

Committee’s view

6.60 The Committee believes that in light of the recognised weaknesses in the regulatory system for the insurance industry, a close watch must be kept on the implementation of the legislative reforms recently introduced to the Insurance Act to ensure that they produce the intended benefits. The Committee also suggests that it is important for APRA to now prove itself as an effective and assiduous regulator in ensuring the prudential soundness of insurance companies. Its success in this area will help to better prepare those in the industry to adjust to changing market conditions and to prevent severe disruptions, such as the one Australia is currently experiencing. An efficient, strong and competent regulator will go some way to restore public confidence in the insurance industry.

Recommendation 12

The Committee recommends that the Government more actively monitor the activities of APRA and ensure that it has adequate powers and resources as well as a commitment to diligently supervise the industry.

6.61 The Committee also notes concerns that have been raised about organisations such as medical defence organisations that are outside APRA’s purview.

43 Graeme Thompson, ‘APRA—3 years on’, Speech, 9 August 2001.

44 Senator S. Conroy, *Senate Hansard*, 27 June 2001, p.25163.

Medical defence organisations (MDOs)

6.62 The National Farmers' Federation maintained that either medical defence funds are insurers or not. It stated:

If they are insurers, they should be subject to the same requirements as other insurers, particularly prudential and reporting requirements. This could have prevented the collapse of UMP. On the other hand, if the defence funds are not insurers, it is not clear why doctors are allowed to practice without insurance.⁴⁵

6.63 Mr Nigel Ray from Treasury explained to the Committee that medical indemnity is, indeed, different from other types of insurance. Their operations are formally conducted on a discretionary basis and so fall outside the APRA regulatory regime. He stated:

As it is currently structured it is not technically insurance and it is not provided by insurance companies but, rather, by mutual structures—which...are called medical defence organisations. Unlike insurance products, which impose a contractual obligation upon insurance companies to honour a policy when an insured event takes place, doctors are covered by discretionary indemnity—that is, MDOs have an absolute discretion to deny cover in any circumstance.⁴⁶

6.64 MDOs, at the moment, are not covered by the *Insurance Act 1973*, which has enabled them to do a range of things while not having to hold the sorts of reserves that the insurance companies are obliged to hold. Dr Robert Bain, Secretary General, Australian Medical Association, stated that the Association would like to see some:

APRA requirements on the MDOs so that all of them have to meet minimum capital. There is also the question of common accounting standards. They have all adopted slightly different accounting conventions, with the most starkly different being at UMP, which had not brought the tail of what are called IBNR—incurred but not reported—incidents onto their balance sheet.⁴⁷

6.65 The Insurance Australia Group agreed with the view of bringing medical defence organisations under the General Insurance Act. It stated:

The same prudential and reporting standards should apply to all providers of general insurance, regardless of ownership structure, to ensure consistency

45 Submission 123, p. 11.

46 *Committee Hansard*, 8 August 2002, pp. 321-2, 343.

47 *Committee Hansard*, 8 July 2002, p. 29. See also Dr Michael Sedgley, Chairman of Council, Australian Medical Association, who agreed that medical defence organisations should be more accountable to their members. *Committee Hansard*, 8 July 2002, p. 23.

in the management of long tail classes and full funding of all premium pools.⁴⁸

6.66 As part of the Government's longer term strategy to deal with the difficulties in the medical indemnity market, the Prime Minister, Mr John Howard, proposed on 31 May 2002 to improve transparency in the financial reporting of MDOs and to bring all of their insurance business into the prudential framework for general insurers.⁴⁹ This measure was only one key element in a number of proposals. He announced that it was the Government's intention that 'a new comprehensive framework of measures' would be in place before 31 December.

6.67 According to Mr Ray, the Department of the Treasury is currently consulting on the possible measures to bring MDOs into the APRA framework. As an example, Treasury is considering 'requiring their services, or at least their insurance-like services, to be offered via a contract of insurance'.⁵⁰

Committee's view

6.68 The Committee supports the consultative process that is taking place and hopes that it will lead to better regulation of MDOs. The Committee, however, suggests that the current consultations take a broader view of insurance providers and, with a view to assessing the level of protection that they offer to Australian consumers, give consideration to unregulated state insurers, all mutual insurers and overseas insurers providing cover in Australia. By bringing all unauthorised and insurance-like providers under the purview of APRA, the regulator is better able to appreciate how the industry works as a whole including consumer protection matters.

ACCC

6.69 The ACCC is an independent statutory authority with responsibility for administering the *Trade Practices Act 1974* and the *Prices Surveillance Act 1983*. The Trade Practices Act covers matters such as anti-competitive practices, unconscionable conduct, industry codes, unfair practices, product safety and information and product liability. The Prices Surveillance Act has three main functions which in broad terms allow the ACCC, under certain circumstances, to vet proposed price rises, to hold inquiries into pricing practices and to monitor prices, costs and profits of an industry or business.⁵¹

6.70 The ACCC told the Committee that it has a 'fairly limited role in relation to insurance'. It noted that it has a reporting role which started in June 2001 when it was asked by the then Minister for Financial Services and Regulation, Mr Joe Hockey, to report on the general insurance industry and premium increases following the collapse

48 Submission 143, p. 3.

49 Press Release, Prime Minister, *Medical Indemnity Insurance*, 31 May 2002.

50 *Committee Hansard*, 8 August 2002, p. 343.

51 For more detail see <http://www.accc.gov.au/about/about.htm> (25 August 2002).

of the HIH group of insurance companies. The ACCC reported in March 2002 and, as noted earlier, has been asked to update the report which it anticipated would be finalised by the end of July 2002. It is now available.⁵² As already discussed, the ACCC has also been asked to monitor insurance premiums over a two year period and to report on whether they reflect the legislative changes that are currently being made or proposed by Commonwealth and state governments.⁵³

6.71 The Committee, however, believes that more is required than simply monitoring and recommended earlier that the ACCC be given the authority to ensure that savings from reforms are passed on.

6.72 The evidence before this Committee clearly demonstrates that there is wide support for the work of the ACCC in monitoring insurance pricing.⁵⁴ ACROD submitted:

The dramatic rise in premiums, the widespread refusal to renew or offer new public liability cover, the contradictory signals over profitability, the failure and collapse of several companies (apart from HIH), the uncertain consequences of current rationalisations and the industry's reluctance to disclose appropriate data—among many other things—all point to an industry in denial. Traditionally cloistered, the private insurance sector has unwittingly been subjected to critical public scrutiny. If only for the industry's own sake, a formal investigation of the more damaging aspects of recent developments should be undertaken. From the viewpoint of disability services, the most appropriate subject and mechanism would be an investigation by the ACCC into premium rises of above 25% in the non-profit sector. The purpose would be not so much to detect collusion as to explicate pricing policy.⁵⁵

6.73 Mr Paul Orton, General Manager Policy, Australian Business Ltd, wanted the ACCC's role to be maintained so that they could be confident that 'we have a competitive public liability insurance market and that we see evidence of the state of competition through increased capacity coming into the industry and new products that better deal with particular sectoral insurance needs'.⁵⁶

6.74 The ACCC informed the Committee that it has a role in relation to consumer protection provisions in the Trade Practices Act, notably, the warranty and liability provisions and the provisions relating to misleading or deceptive conduct.

52 Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review*, September 2002.

53 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 9 July 2002, p. 111.

54 See for example, submission 55, Australian Council of Professionals Ltd, p. 17.

55 Submission 59, p. 11.

56 *Committee Hansard*, 8 July 2002, p. 69.

6.75 It is in this area of consumer protection that confusion exists about the precise responsibility of the ACCC. The ACCC, under the Trade Practices Act, is responsible for consumer protection generally, but excluding financial services. ASIC, under the ASIC Act, is responsible for consumer protection in relation to financial services—which includes insurance. In these Acts ‘consumer protection’ refers to controlling a variety of objectionable behaviours, of which the most important is ‘misleading or deceptive conduct.’ However, separate provisions apply to ‘unconscionable conduct’. Both authorities have continuing responsibilities in relation to unconscionable conduct in the supply of financial services.⁵⁷

6.76 This framework does not make it clear to whom consumers should complain when they feel that pricing for public liability and professional indemnity services is too high or inconsistent with previous prices or policy coverage. Given that the ACCC is already monitoring pricing within the public liability and professional indemnity insurance market to ensure market competitiveness, and the Committee has recommended the provision of enhanced enforcement powers (see paragraphs 6.43–45), it would be prudent for the ACCC to handle complaints alleging price exploitation. The additional information flow would provide a deeper understanding of the market and lead to greater competition.

6.77 In turning to the more general aspects of consumer protection, Mr Robert Antich from the ACCC explained that:

Insurance is a part of the financial services role that ASIC now has after 11 March this year as part of the Financial Services Reform Act. In terms of insurance itself...we do not have a role in relation to consumer protection.

...our understanding is that ASIC would have that primary responsibility in relation to consumer protection relating to insurance services.⁵⁸

6.78 Mr Brian Cassidy, Chief Executive Officer, the ACCC, explained further that up till March, the ACCC would have potentially been able to take action in relation to conduct that was thought to be misleading or deceptive but that ASIC now had that role.⁵⁹ He also noted that the ACCC has joint responsibility with ASIC for the ‘unconscionable conduct in business transactions provisions insofar as they relate to the provision of financial services’.⁶⁰

57 *Australian Securities and Investments Commission Act 2001*, Part 2, Division 2. *Trade Practices Act 1974*, Part IVA. In the Trade Practices Act one unconscionable conduct provision - s51AB - does not apply to financial services (it is replicated in s12CB the ASIC Act). Another unconscionable conduct provision - s51AC - is replicated in s12CC of the ASIC Act but also continues to apply in the Trade Practices Act.

58 *Committee Hansard*, 9 August 2002, p. 113.

59 *Committee Hansard*, 9 July 2002, p. 114.

60 *Committee Hansard*, 9 July 2002, p. 123.

6.79 Obtaining a clear understanding of who has responsibility for consumer protection in regard to insurance matters is complicated by the recent transfer of power to ASIC. Mr Antich explained:

That has been a source of discussion between us and ASIC in relation to how this is handled. Obviously you will have investigations that will straddle that date; you will have conduct that will happen before and after that date [11 March 2002]. It is a very live issue and it is one we are well aware of. There is a process in place and dialogue with ASIC so we can have an orderly handover of those sorts of issues.⁶¹

6.80 Mr Sean Hughes from ASIC told the Committee that they are aware of a number of consumer concerns in relation to accessing cover and the terms in which the cover is offered. He told the Committee that they refer those consumers and those inquiries elsewhere—to the ACCC—because it is not within ASIC's bailiwick. Mr Peter Kell stated:

It is the ACCC's jurisdiction to cover the general price issues, as long as the price is clearly and accurately disclosed and there is no misleading information given about it; those are the issues that we are concerned with.⁶²

6.81 The confusion may in part stem from the statements concerned about consumer interests and protection made by the ACCC. For example in March 2002, the Chair of the ACCC, Professor Fels, suggested that consumers needed clear information about the increased charges for their individual insurance policies and that insurance companies should review and improve their inquiry and complaints handling systems to help consumers who want to query increases.⁶³

6.82 The Committee endorses the views of Professor Fels. However, it is also evident that members of the public are not generally aware of the roles of the regulators in the general insurance market.

Committee's view

6.83 The Committee understands that the transfer of consumer protection responsibility in relation to financial services to ASIC was to ensure that ASIC would be concerned with all aspects of financial products. Thus, consumers would know that they could approach ASIC on any matter related to financial products. Despite this transfer of power from the ACCC to ASIC, the line separating them in their respective roles in consumer protection is not widely understood.

6.84 The Committee believes strongly that the roles of the ACCC and ASIC in relation to these matters must be placed beyond doubt.

61 *Committee Hansard*, 9 July 2002, p. 123.

62 *Committee Hansard*, 9 August 2002, p. 384.

63 ACCC, Media Release, *Consumers Need Clear Insurance Information*, 26 March 2002.

Recommendation 13

The Committee recommends that, in close consultation, the ACCC and ASIC review and report publicly on their respective statutory obligations in regard to consumer protection and market integrity in the insurance industry with a view to:

- **clarifying their respective responsibilities, giving particular attention to whether there is any unnecessary overlap; and**
- **establishing whether, in their opinion, the legislation provides adequate and appropriate consumer protection in the insurance industry and, if not, identifying the gaps or weaknesses in consumer protection, including the prices and insurance coverage that are being offered to consumers.**

The Committee further recommends that the ACCC and ASIC actively promote their roles in consumer protection for all financial products, including general insurance.

ASIC

6.85 ASIC is an independent statutory body with the responsibility to enforce company and financial services laws to protect consumers, investors and creditors.⁶⁴

6.86 The *Australian Securities and Investments Commission Act 2001* states clearly that ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.⁶⁵ ASIC also has powers conferred on it by a number of other acts including the *Insurance Contracts Act 1984*.⁶⁶

6.87 Under this Act, ASIC has the power to do all things that are necessary or convenient to be done in connection with the administration of the legislation. The Act is intended to ensure that ‘a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly, and for related purposes’.

6.88 Without limiting the generality of that power, ASIC has power *inter alia*:

- to promote the development of facilities for handling inquiries in relation to insurance matters;
- to monitor complaints in relation to insurance matters;

64 For more details see: <http://www.asic.gov.au/asic.nsf/byheadline/ASIC+at+a+glance?open> document (25 August 2002).

65 Section 12A(3), *Australian Securities and Investment Commission Act 2001*.

66 Section 12A(1), *Australian Securities and Investments Commission Act 2001*.

- to monitor legal judgments, industry trends and the development of community expectations that are, or are likely to be, of relevance to the efficient operation of the Act; and
- to promote the education of the insurance industry, the legal profession and consumers as to the objectives and requirements of the Act.⁶⁷

6.89 The Act clearly states that 'a contract of liability insurance is a contract of general insurance that provides insurance cover in respect of the insured's liability for loss or damage caused to a person who is not the insured'.⁶⁸ These responsibilities are consistent with ASIC's powers as defined in the *Financial Services Reform Act 2001* (FSR Act).

6.90 The new licensing and product disclosure regimes introduced under the FSR Act apply to insurance companies and insurance agents and brokers. ASIC informed the Committee that under the new legislation, an insurance company will need to hold an Australian financial services licence if it carries on a financial services business otherwise than as a representative of a licensee.⁶⁹ By the end of the two-year transition period, agents and brokers will need to be appropriately authorised as representatives of an Australian financial services licensee or need to hold an Australian financial services licence.

6.91 General insurance policies are deemed to be 'financial products'. Part 7.9 of the Corporations Act contains a number of requirements relating to financial product disclosure and the issue and sale of financial products. Most important is that 'regulated persons' are required to give a Product Disclosure Statement (PDS) to retail clients in certain situations, including where personal advice recommending the acquisition of a particular product is given, or where a person offers to issue or arrange for the issue of a financial product.

6.92 The PDS must contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product. The statement is to include information about fees payable in respect of a financial product, the risks and benefits of a financial product, and significant characteristics of a financial product.⁷⁰

6.93 It does not appear, however, that public liability and professional indemnity insurance is subject to the disclosure provisions.⁷¹

67 Section 11B, the *Insurance Contracts Act 1984*, compiled 11 March 2002.

68 Section 11.

69 Exemptions do apply such as bodies regulated by APRA if the service is one in relation to which APRA has regulatory or supervisory responsibilities and the service is provided only to wholesale clients.

70 Part 2, subdivision 2 C and D, *Australian Securities and Investments Commission Act 2001*.

71 See Appendix 7, additional information from ASIC, 2 October 2002.

Statutory dispute resolution procedures

6.94 Under the *Financial Services Reform Act 2001* (FSR Act) a licensee has certain obligations. Section 912A directs a licensee, if those financial services are provided to persons as retail clients, to have a dispute resolution system that complies with specified conditions set down in the legislation.⁷² A dispute resolution system must consist of

- a) an internal dispute resolution procedure that
 - i) complies with standards, and requirements, made or approved by ASIC; and
 - ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
- b) membership of one or more external dispute resolution schemes that:
 - i) is, or are, approved by ASIC.

6.95 Under section 915, ASIC may suspend or cancel the licence if the licensee has not complied with, or ASIC has reason to believe it will not comply with, its obligations which, as noted above, includes having a dispute resolution system.

6.96 Policy Statement 139, issued by ASIC, provides advice on how it approves external complaints resolution schemes operating in the financial system. It contains 'a common set of guidelines developed for broad application'. In accordance with this statement, ASIC approved a scheme in August 2000, known as the General Insurance Enquiries and Complaints Scheme, operated by Insurance Enquiries and Complaints Ltd (IEC), as an approved dispute resolution scheme.⁷³ IEC is an independent company funded by participating insurers. It receives about 90,000 to 100,000 inquiries per year.⁷⁴

6.97 The Committee is concerned that both the disclosure requirements and dispute resolution provisions of the FSR Act do not effectively address the insurance problems revealed in the inquiry. Firstly, a dispute resolution scheme applies only to 'retail clients' as defined in the FSR Act. The definition is limited to individuals and small businesses, and is limited to their dealings in respect of certain listed classes of

72 *Financial Services Reform Act 2001*, schedule 1 inserting s912A in the *Corporations Act 2001*.

73 PS 139.13, ASIC, Policy Statement 139, Approval of external complaints resolution schemes, issued 8/7/1999, obtained from ASIC's website, 23 September 2002. See also ASIC <http://www.asic.gov.au/asic/fido/fido.nsf/byheadline/General=Insurance+Code+of+Practice> (22 September 2002). See also Mr Peter Kell, ASIC, *Committee Hansard*, 9 August 2002, p. 379.

74 pers. comm. P. O'Connor, Public Affairs Manager, Insurance Enquiries and Complaints Ltd, September 2002.

insurance. The listed classes do not include public liability or professional indemnity insurance (though the list can be enlarged by regulation).⁷⁵ ASIC has advised the Committee that no regulations have been made under this section to include public liability and professional indemnity insurance.⁷⁶ Secondly, it is unclear whether a complaint about price exploitation in a proposed policy renewal is within scope; and if so, it is unclear whether IEC (which currently handles only disputes over claims) is equipped to deal with it.

6.98 The concerns about the possible inadequacy of the legislation are reflected in the terms of reference of the General Insurance Enquiries and Complaints Scheme. The terms identify certain classes of insurance, which includes professional indemnity insurance, that are outside the terms of reference. The omission of public liability from the insurances covered by the terms of reference suggest that this class of insurance is also excluded from coverage. Not only are the classes of insurance limited but those actually entitled to refer a dispute to the Scheme are also confined to include natural persons and parties who conduct a small business. The definition of small business is narrower than that given in the ASIC Act.⁷⁷

6.99 Mr Peter Kell, ASIC, told the Committee that under the FSR Act, ASIC had asked IEC to reconsider their coverage of that scheme to ensure that it is compliant with the new regime. In particular, according to Mr Kell, they will have to ensure that they can deal with complaints about arguments about disclosure of premiums or costs, or arguments about incorrect information recorded about details that lead to disputes down the track when claims arise.⁷⁸

6.100 The Committee, however, would like to see the matter given urgent attention. It believes that the scheme, as it now stands and approved by ASIC, fails to offer adequate consumer protection to a range of insureds.

75 *Financial Services Reform Act 2001*, schedule 1 inserting s761G in the *Corporations Act 2001*. Section 761G—Meaning of retail client and wholesale client—specifies the classes of general insurance covered under the term retail client. Although public liability and professional indemnity insurance is not listed, subsection (viii) provides for the inclusion of a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph.

76 See answer to question 1, Appendix 7, additional information from ASIC, 2 October 2002.

77 Section 1.2, the General Insurance Enquiries and Complaints Scheme, Terms of Reference, 1 May 2002. Section 761G(12), *Financial Services Reform Act 2001*, defines small business as a business employing less than 100 people if the business is or includes manufacture of goods, otherwise 20 people. The General Insurance Enquiries and Complaints Scheme defines small business as an individual, a partnership of natural persons or a corporation whose shareholders are natural persons; and which has no more than 5 employees (including working proprietors) at any one time; and has an annual turnover not exceeding \$400,000.

78 Mr P. Kell, *Committee Hansard*, 9 August 2002, p. 379.

Committee's view

6.101 The Committee regrets that the statutory complaint-handling procedures now in place do not meet the needs of the groups most affected by the insurance crisis, particularly not-for-profit organisations. The Committee acknowledges the policy intent of the FSR Act that the complaint-handling procedure should be an additional protection available to retail but not wholesale clients.⁷⁹ However it is regrettable that not-for-profit organisations have been excluded from the definition of 'retail clients'. Furthermore, the Committee sees no logic in limiting the classes of insurance to which disclosure provisions or complaint-handling procedures apply.

Recommendation 14

- **The Committee recommends that the Government amend the FSR Act to allow not-for-profit organisations to be included in the definition of 'retail clients'.**
- **The Committee recommends that the Government, by regulation, include public liability insurance and professional indemnity insurance in the classes of insurance covered by the dispute resolution provisions of the FSR Act.**
- **The Committee recommends that ASIC monitor the effectiveness of the dispute resolution provisions and report on this annually to the Parliament.**
- **The Committee recommends that ASIC review, as a matter of urgency, the General Insurance Enquiries and Complaints Scheme and in consultation with the Insurance Council of Australia ensure that it covers adequately public liability and professional indemnity insurance and not-for-profit organisations. Further that it re-examine definitions in the terms of reference, such as small business, to ensure that they are consistent with definitions in Commonwealth legislation.**

General Insurance Code of Practice

6.102 Before changes to the *Australian Securities and Investments Commission Act 1989*, under section 12FA ASIC had the function of promoting the adoption of, and approving and monitoring compliance with, industry standards and codes of practice (including standards and codes in relation to the resolution of disputes between the providers of financial services and consumers).⁸⁰

79 Financial Services Reform Bill 2002, explanatory memorandum, par. 6.10.

80 Australian Securities and Investments Commission Act 1989, compiled 19 July 2001.

6.103 Section 113 of the *Insurance Act 1973* also provided for ASIC to approve a code of conduct.⁸¹ This section was repealed by the *Financial Services Reform (Consequential Provisions) Act 2001*.

6.104 Provisions to allow ASIC to approve codes of conduct have now been included in the *Financial Services Reform Act*.⁸²

6.105 The General Insurance Code of Practice appears to offer another avenue for improving consumer protection. IEC is responsible for the administration of the code, which was approved by ASIC in August 2000. It is a self-regulatory code of practice to promote good relations between insurers, agents and consumers and good insurance practice by describing standards of good practice and service. The code requires participating insurers to establish internal and external dispute handling procedures and insurers may be penalised if they fail to meet the code's requirements.⁸³

6.106 The Committee notes the principles espoused in the code, which include having regard to the duty of utmost good faith and the need for effective competition and cost efficiency being promoted in the general insurance industry. As well, the code directs insurers prior to each renewal 'to provide to consumers information on any changes to the policy being renewed in plain language and in a format aimed to assist comprehension by consumers'. The code states further that:

Where an insurer declines cover or refuses to renew a policy because of factors that do not relate to the assessment of the particular risk (For example, the insurer has ceased to offer the cover) then the insurer shall notify the consumer of that fact.⁸⁴

6.107 The code, however, is narrow in focus and has the same shortcomings as the General Insurance Enquiries and Complaints Scheme. The present Code of Practice is expressed to apply only to individuals, and only relating to insurance for private or

81 *Insurance Act 1973, compiled 15 July 2001*, section 113, Compliance with codes of insurance practice, read:

(1) If:

- a) a code or codes of practice have been approved by ASIC in relation to the carrying on of a class of insurance business prescribed for the purposes of this section; and
- b) a person carries on that class of insurance business on a day when the person is not a party to an agreement to comply with the code or one of the codes; the person is, in respect of that day, guilty of an offence punishable on conviction by a fine of not more than:
- c) if the person is a body corporate—200 penalty units; or
- d) if the person is a Lloyd's underwriter and is not a body corporate—20 penalty units.

82 Section 1101A, Approved codes of conduct, *Financial Services Reform Act 2001*.

83 General Insurance Code of Practice, <http://www.ica.com.au/codepractice/introduction.asp> (10 August 2002).

84 General Insurance Code of Practice, <http://www.ica.com.au/codepractice/policy.asp> (10 August 2002).

domestic use. This excludes not-for-profit-organisations and small businesses. The classes of insurance covered exclude public liability and professional indemnity.⁸⁵ There are no provisions for dealing with complaints about price exploitation in proposed policy renewals. Any one of these points would prevent the Code from being useful to the groups suffering most from the insurance crisis. The Committee sees no logical reason for these exclusions.

6.108 The code is subject to review every three years and a new exposure draft is expected to be released soon.⁸⁶ The Committee considers that the new code should address the above concerns. In particular, the Committee suggests that definitions in the code be expanded to ensure a more comprehensive coverage of insurance business. The definition of the business covered should be broadened to specifically include public liability and professional indemnity insurance.

6.109 The Law Council of Australia suggested that insurers ought to put into their voluntary code of practice some obligation to provide proper notification of substantial increases as well as a possible obligation not to increase premiums by more than a certain percentage unless there is a good underwriting reason.⁸⁷

6.110 Actuarial advice provided by Cumpston Sarjeant Pty Ltd contained more specific suggestions. It recommended that the code include an objective that would 'require insurers to provide reasonable premium stability to existing clients, and to accept new clients at reasonable premiums'. It further suggested that a new section be inserted to the effect that:

Insurers shall renew the insurance of an existing client, at a premium not more than 50% higher than the previous premium, unless there is evidence that the risks under the policy have materially changed, or there has been significant past misrepresentation.

Insurers shall accept a new client, previously insured by another insurer, at a premium not more than 100% of the previous premium, unless there is evidence that the risks under the policy have materially changed, or there has been significant past misrepresentation.

Insurers shall contribute underwriting and claims data to statistical schemes intended to provide reasonable claim cost estimates for different risks.⁸⁸

85 Other classes may be covered optionally by participating insurers (clause 2.1, definition of 'insurance business', item (c)). However the Committee understands that few if any participants take advantage of this clause, since most public liability or professional indemnity insurance buyers would in any case be excluded as not being individuals buying for domestic use.

86 Insurance Council of Australia, *Senator welcomes new code to improve insurance customer service*, media release 22 August 2002.

87 Mr Tony Abbott (Law Council of Australia), *Committee Hansard*, 8 August 2002, p. 269.

88 Submission 132, Law Council of Australia, attachment: Actuarial Advice by Cumpston Sarjeant Pty Ltd to Mr Tony Abbott, pp. 8–9.

Committee's view

6.111 The Committee does not adopt any particular detailed view on these points. It suggests, however, that the insurance industry and ASIC use such recommendations as a starting point to review the code.

Recommendation 15

- **The Committee recommends that the General Insurance Code of Practice be revised so that it provides remedies for community groups and small businesses that are affected by price exploitation in relation to public liability or professional indemnity policies.**
- **The Committee recommends that Insurance Enquiries and Complaints Ltd submit the revised code for ASIC's approval under the FSR Act.**

Insurance Ombudsman

6.112 Our Community recommended that 'serious consideration be given to the appointment of an Independent Insurance Industry Ombudsman with the power to investigate and decide on cases referred to it.' It suggested that such a measure would 'assist in ensuring that the introduction of tort reform by States leads to lower premiums.'⁸⁹

Committee's view

6.113 The Committee believes that the establishment of an Insurance Ombudsman would add another level of bureaucracy to an already unclear situation. The Committee has already recommended that the ACCC should have increased powers to control price exploitation (see paragraph 6.45). This should include the collection of consumer complaints in regard to price and coverage. The Committee has also recommended the promotion of the respective roles of the ACCC and ASIC in the insurance market (see paragraph 6.84). These measures should significantly improve consumer protection and market integrity for all consumers.

SENATOR JACINTA COLLINS
Chair

89 Submission 71, pp. [4, 5].

Parliament of the Commonwealth of Australia

SENATE ECONOMICS REFERENCES COMMITTEE

**SUPPLEMENTARY REPORT INTO THE NATIONAL
INSURANCE CRISIS**

**Senator Aden Ridgeway
Senator for New South Wales**

October 2002

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 individual's 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 given to 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 minors¹ 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 on². 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

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 sue 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. An effective insurance industry complaints mechanism

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 consumers³. The means by which consumers can have their complaints addressed should be promoted⁴. 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.

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 practice⁵, however, the code appears far weaker than the code of conduct administered by the banking industry⁶. 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 practice⁷ 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

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 administering⁸. 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

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 area⁹. This has led to increased premiums and stricter scrutiny over whom and what gets insurance cover. However, public liability underwriting only accounts for around 5% of total underwriting¹⁰, so arguably insurance companies have used this opportunity to flaunt

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 events¹¹. 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

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 merge¹².

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 year¹³.

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 Report¹⁴ 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 country¹⁵. As the United States experience shows,

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 policyholders¹⁶. 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.

¹⁶ Doroshov 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 discuss 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 whichever 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 a 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 release¹⁷, 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;

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 release¹⁸ 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);

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 \$2.2 million;
- 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 announced¹⁹ 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 changes²⁰ 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:

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 billion²¹. This begs the question whether a reduction in stamp duty (which has been

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 year²².

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 misrepresentation²³. 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

Appendix 1

List of submissions

Number	Submittor
59	ACROD Limited
27	ACSIS Limited
116	Aged and Community Services Australia
20	Agricultural Societies Council of NSW Inc.
58	Anglican Church of Australia Diocese of Tasmania
25	Anglican Church of Australia, the
137	Association of Apex Clubs of Australia, the
54	Association of Consulting Engineers, the
28	Association of Consulting Surveyors New South Wales Incorporated
85	Association of Independent Schools of South Australia
24	Association of Independent Schools of Victoria Incorporated
164	Association of Needle & Syringe Programs Inc.
48	Association of Professional Engineers, Scientists and Managers, Australia and Associated Bodies
112	Australia Council
78	Australian Amusement Leisure And Recreation Association Inc (AALARA)
16	Australian and New Zealand College of Anaesthetists
22	Australian Ballooning Federation Inc.
64	Australian Breastfeeding Association
115	Australian Business Limited
90	Australian Chamber of Commerce and Industry
117	Australian College of Midwives Incorporated
55	Australian Council of Professions Ltd
96	Australian Council of Social Service
100	Australian Cricket Board
74	Australian Cycling Federation Incorporated
162	Australian Federation of AIDS Organisations
75	Australian Horse Industry Council

Number	Submittor
157	Australian Hotels Association
49	Australian Industry Group
165	Australian Injecting and Illicit Drug Users League
146	Australian Institute of Building Surveyors
142	Australian Institute of Quantity Surveyors, the
145	Australian Local Government Association
111	Australian Medical Association Limited
70	Australian Nursing Federation
61	Australian Plaintiff Lawyers Association
68	Australian Private Hospitals Association Limited
122	Australian Property Institute
127	Australian Prudential Regulation Authority
82	Australian Rugby League Limited
130	Australian Securities & Investments Commission
43	Australian Swimming Inc.
161	Australian Ultralight Federation Inc.
161A	Australian Ultralight Federation Inc.
121	Australian Volleyball Federation
31	Brooks, Ms Rhonda
34	Bucknell, Mr Nigel
86	Cancer Council New South Wales, the
57	Catholic Church Insurance Limited
119	Catholic Health Australia
107	Chiropractors' Association of Australia (National) Limited
7	Clarke, Mr Brian
2	CONFIDENTIAL
21	CONFIDENTIAL
53	CONFIDENTIAL
139	CONFIDENTIAL
141	CONFIDENTIAL
132A	CONFIDENTIAL
88	Council of Australian Museum Directors

Number	Submittor
113	Council of Small Business Organisations of Australia Ltd
13	Country Women's Association of New South Wales
38	Country Women's Association of Victoria Inc.
84	Country Women's Association of Western Australia (Inc.), the
125	CPA Australia
154	Cumpston Sarjeant Pty Ltd
108	Department of Industry, Tourism and Resources
120	Department of Sport and Recreation (Western Australia)
152	Department of the Treasury
52	Doctors' Reform Society
101	Environment Institute of Australia
6	Equestrian Federation of Australia, the
46	Family Planning Tasmania
41	Federation of Australian Historical Societies Inc.
94	Financial Planning Association of Australia Limited
147	Fire Protection Association Australia and Fire Contractors Federation
60	Freehills
76	Gecko - Gold Coast and Hinterland Environment Council
140	Gerling Australia Insurance Company Pty Limited
156	Girls' Brigade Australia Incorporated, the
134	Grimmett, Mr Jonnathon
160	Guides Australia
45	Hang Gliding Federation of Australia
15	Hawting, Mr Paul
93	Heeley, Mr Peter
148	Herman, Mr John
126	Home based Business Association (Australian Capital Region)
29	Illawarra Bird Observers Club Inc.
51	Illawarra Speleological Society
103	Institute of Actuaries of Australia
95	Institute of Chartered Accountants in Australia, the
63	Institute of Consulting Valuers

Number	Submittor
81	Institute of Engineers, Australia
143	Insurance Australia Group Limited
67	Insurance Council of Australia
118	Jobsupport Inc.
138	Lake Macquarie Pack & Trail Horse Riders Inc.
132	Law Council of Australia
135	Link Disability Magazine
8	Lions Australia
23	Local Government and Shires Association of NSW
109	Local Government Association of Tasmania
92	Logikal Health Products
166	Lord, Mr John
9	Macleay Shire Council
1	Marshall, Mr Jack
149	Martin, the Hon Dr Stephen, Shadow Minister for Trade and Tourism and Federal Member for Cunningham
11	McKechnie, the Hon Peter
144	McMullan, the Hon Bob and Ellis, Ms Annette
5	Medical Indemnity Protection Society
5A	Medical Indemnity Protection Society
105	Motor Trades Association of Australia
136	Museums Australia
114	National Association of Specialist Obstetricians and Gynaecologists
106	National Council of Independent Schools' Associations
123	National Farmers' Federation Limited
10	National Insurance Brokers Association
83	National Rugby League Limited
131	Northern Territory Government
40	NSW Department of Sport and Recreation
26	NSW Golf Association Limited
33	O'Connell, Ms Carol
71	Our Community Pty Ltd
73	Outdoor Recreation Council of Australia Incorporated

Number	Submittor
129	Outdoors WA
12	Piper, Mr Bill
158	Police and Community Youth Clubs
66	Ponyland Equestrian Centre
150	Premier of New South Wales
99	Professional Standards Council
32	Professional Surveyors Occupational Association
159	Qual-med
79	Queensland Government
47	Queensland Outdoor Recreation Federation
97	Queensland Tourism Industry Council
153	Ramsay Health Care Australia Pty Limited
91	Real Estate Institute of Australia
91A	Real Estate Institute of Australia
104	Real Estate Institute of South Australia
19	Riding for the Disabled Association of Australia Inc.
50	Robinson, Mr Lloyd
30	Rolfe, M r PB
36	Rope, Mr Brian
42	Royal Agricultural Society of Tasmania
128	Royal Australian and New Zealand College of Obstetricians and Gynaecologists, the
80	Royal Australian College of General Practitioners
155	Royal Australian College of Physicians
102	Royal College of Nursing, Australia
110	Royal College of Pathologists of Australasia, the
3	Royal Life Saving Society
14	Royal Life Saving Society Australia
124	Rural Doctors Association of Australia
69	SA Tourism Alliance
4	Sandell, Mr Geoffrey
35	Sexual Health and Family Planning
72	Shopping Centre Council of Australia

Number	Submittor
37	Soccer Australia
17	South Australian Country Women's Association Incorporated, the
133	Spear, Mr Paul
39	Sport and Recreation Victoria
44	Sport Industry Australia
65	St John Ambulance Australia
87	Structured Settlement Group, the
18	Surf Life Saving Australia Limited
89	Tap Oil Limited
163	Taylor, Mr Brenton (Alby)
62	Uniting Church in Australia Nationally
98	Victorian Employers' Chamber of Commerce and Industry
77	Volunteering Australia
56	Wollongong City Council
151	YWCA of Sydney, the

Appendix 2

Public hearings and witnesses

Monday, 8 July 2002, Canberra

Australian Medical Association

Bain, Dr Robert, Secretary General

Burton, Ms Pamela, Legal Counsel

Sedgley, Dr Michael, Chairman of Council

ACROD Ltd

Baker, Dr Kenneth, Chief Executive Officer

Regan, Dr Sean, Senior Policy Adviser

Australian Dental Association Inc.

Butler, Dr Robert John Francis, Executive Director

Local Government and Shires Association of New South Wales

Clark, Mr David, Legal Officer

Insurance Council of Australia Ltd

Drummond, Mr Robert, General Manager, Regulation

Jamvold, Mr Peter, Group Manager, Southern Division

Jones, Mr Raymond Lloyd, President

Professional Standards Council

Marden, Mr Bernie, Secretary

Wilkinson, Mr Warwick AM, Chairman

Surf Life Saving Australia

Nance, Mr Gregory John, Chief Executive Officer

Australian Business Ltd

Orton, Mr Paul, General Manager Policy

Audiological Society of Australia Inc.

Persson, Ms Monica, Executive Manager

Australian Council of Professions Ltd

Stephens, Dr David Hector, Policy Consultant

Tuesday, 9 July 2002, Canberra

Australian Competition and Consumer Commission

Antich, Mr Robert, General Manager, Compliance Strategies
Cassidy, Mr Brian, Chief Executive Officer
Chisholm, Mr James Donald, Solicitor
Kelleher, Mr Brian Thomas, Project Officer

National Insurance Brokers Association

Ball, Mr Stephen John, Director
Hanks, Mr John Anthony, Consultant
Pettersen, Mr Noel, Chief Executive Officer

Australian Plaintiff Lawyers Association

Davis, Mr Robert, National President
Gordon, Mr John, National Vice-President

Sport Industry Australia

Lucas, Ms Sarah Katherine, Chief Executive Officer

Council of Small Business Organisations of Australia Ltd

Potter, Mr Michael, Chief Executive Officer

Australian Prudential Regulation Authority

Roberts, Dr Darryl Milburn, General Manager, Central Region
Thomson, Mr Robert Ian, Senior Actuarial Adviser

Wednesday, 10 July 2002, Melbourne

Volunteering Australia

Bates, Ms Kylee Michelle, Development Manager
Cordingley, Ms Sha, Chief Executive Officer

Medical Indemnity Protection Society

Browning, Dr Anthony Troy, Manager
Dickens, Dr Robert, Claims Manager
McVey, Dr Ian Lumsden, Chairman

Royal Australian and New Zealand College of Obstetricians and Gynaecologists

Campbell, Dr John, President

Victorian Employers Chamber of Commerce and Industry

Coulson, Mr Neil, Chief Executive Officer
Curtis, Ms Karen, Director, Industry Policy

Association of Independent Schools of Victoria

Devine, Mr Peter Edward, School Operations Officer

Robertson, Mr David Harold, Executive Director

CPA Australia

Edney, Mr Gary Neil, Corporate Counsel
Larsen, Mr Gregory James, Chief Executive

Our Community Pty Ltd

Galbally, Dr Rhonda, Chief Executive Officer
Moriarty, Mr Patrick Thomas, Director, Business Development and Insurance

Australian Horse Industry Council

O'Callaghan, Dr Paul Andrew, President

Australian College of Midwives Inc.

Street, Mrs Alana Dawn, Executive Officer

Royal Australian College of General Practitioners

Watts, Mr Ian Thomas, National Manager, Work Force and Finance

Thursday, 8 August 2002, Sydney

Law Council of Australia

Abbott, Mr Anthony Norman, President
Greentree-White, Mr James Russell, Legal Officer
Heinrich, Mr Ronald Kenneth, President Elect

Department of the Treasury

Allan, Ms Lorraine Jeanette, Acting Manager, Financial Systems Division,
Curran, Ms Lynne, Specialist Adviser, Department of the Treasury
Paine, Mr Bruce, Manager, Medical Insurance Unit
Ray, Mr Nigel, Acting Executive Director
Temperley, Mr Raymond Thomas, Specialist Adviser, Competition and Consumer
Policy Division

Institute of Actuaries of Australia

Beall, Ms Catherine, Chief Executive Officer
Buchanan, Mr Robert Andrew, Member, Public Liability Task Force
Playford, Mr Michael James, Convenor, General Insurance Practice Committee

Association of Consulting Engineers Australia

Charles, Ms Therese Anne, Chief Executive

Institute of Chartered Accountants in Australia

Earl, Mr Leonard Francis, Member, Public Indemnity Insurance Panel
Harrison, Mr Stephen Barry Morgan, Chief Executive Officer
Malins, Mr James Peter, Manager, Government Affairs
Simmons, Mrs Lesley, Professional Standards Consultant

Department of Industry, Tourism and Resources

Murphy, Ms Janet, General Manager, Market Access Group

Weston, Ms Sue, General Manager, Office of Small Business

Friday, 9 August 2002, Sydney

Country Women's Association of New South Wales

Brown, Mrs Margaret Mary, Chairman, Study and Investigation Committee

Structured Settlement Group

Campbell, Ms Jane Caroline, Manager

Shopping Centre Council of Australia

Cockburn, Mr Milton Roy, Executive Director

Property Council of Australia

Cundall, Mr Peter, Member, National Risk Committee

AMP Henderson Global Investors

Cundall, Mr Peter, Strategic Sourcing Manager

Australian Securities and Investments Commission

Hughes, Mr Sean, Director, FSR Regulatory Operations

Kell, Mr Peter, Executive Director, Consumer Protection

Kirk, Mr Greg, Director, Consumer Protection

Australian Consulting Surveyors Insurance Society

Marler, Mr Ian George, Chairman and Managing Director

Royal and SunAlliance Insurance Australia Ltd

West, Mr Duncan Gerald, Chief Executive Officer, General Insurance

Hang Gliding Federation of Australia

Worth, Mr Craig Dennis, General Manager

Appendix 3

Additional information

Additional information accepted as public evidence of the inquiry.

- A. Answers to questions put by the Committee
- B. Replies to adverse comment
- C. Miscellaneous further comment
- D. Miscellaneous documents

date	type	from	description/topic
12/6/02	B	Baker Johnson Lawyers	reply to adverse comment
27/6/02	C	Australian Plaintiff Lawyers Association	correction to submission
tabled at hearing 9/7/02	D	Australian Plaintiff Lawyers Association	<ul style="list-style-type: none"> • R. Davis, <i>Exploring the Litigation Explosin Myth</i>, APLA public position paper, 8 January 2002 • submission to national ministerial summit into public liability insurance, 20 March 2002 • letter to Senator Coonan, 29 May 2002 • submission to medical indemnity forum, 23 April 2002 • APLA, preliminary analysis of 'Public Liability Insurance - practical proposals for reform' by Trowbridge Consulting, 29 May 2002 • Centre for Justice and Democracy, <i>Shakedown: How the insurance industry exploits a nation in times of crisis</i>, white paper 5.1, April 2002 • 'Lack of obstetricians worry' <i>Otago Daily Times</i>, 5/7/02, p6
tabled at hearing 10/7/02	C	Royal Australian College of General Practitioners	additional information
tabled at hearing 10/7/02	C	Association of Independent Schools of Victoria	additional information
17/7/02	A	Australian Council of Professions	Professional Standards Acts vis-à-vis Trade Practices Act
25/7/02	D	Australian Plaintiff Lawyers Association	various additional information
tabled at hearing 8/8/02	C	Law Council of Australia	<ul style="list-style-type: none"> • supplementary submission • letter from Cumpston Sergeant
tabled at hearing 9/8/02	D	ASIC	Insurance Enquiries & Complaints Ltd: annual report
5/9/02	A, C	Association of Consulting Engineer Australia	various further comment

date	type	from	description/topic
16/9/02	A	Australian Competition and Consumer Commission	answers to questions at hearing 9/7/02
23/9/02	A	Dept of the Treasury	answers to questions at hearing 8/8/02
27/07/02	C	The Association of Consulting Engineers Australia	Public Liability Insurance Survey
02/10/02	A	Australian Securities & Investments Commission	various answers to questions

Appendix 4

Examples of premium increases

Extracts from submission 40, New South Wales Department of Sport and Recreation

Insurance Register		
Date	Organisation	Issue
25-Jan-02	Surf Life Saving Central Coast	24% Public Liability Insurance increase
26-Jan-02	Snowy Mountains Fly Fishing Advent	Rise in Public Liability from \$600 to \$2500 - 317% increase
26-Jan-02	The Big Banana	Rise in Public Liability from \$39,900 to \$140,000 in one year
22-Jan-02	AFL	Premiums Soared - Community Football Clubs crippled by hefty increases
22-Jan-02	Melbourne Show	Public Liability increase 300% in three years
21-Jan-02	ANZ Championship Golf Tournament	100% Public Liability Insurance Increase from \$15,000 to \$30,000
22-Jan-02	ANZ Championship Golf Tournament	Reduction of insurers from 19 globally to 5 globally for sporting events
21-Jan-02	Brisbane Cricket Ground	Public Liability increase 70% in three years
11-Jan-02	NSW Dept of Education	Public Liability increase from \$25mil to \$44mil in one year
01-Jan-02	Australian Water Ski Association	Cancellation of Speed and Marathon Water Ski Race on Lake Jindabyne after insurance jumped from \$300,000 to \$1.2million
22-Jan-02	Moore Park Riding Stables	Private Coaching, coaches must pay own public liability insurance. No cover provided by Equestrian Federation
14-Jan-02	Skateine Roller Rink - Newcastle	Closed after Public Liability Insurance rose from \$8000 to \$86,000
02-Jan-02	Oakdale Farm - Port Stephens	Forced to stop offering Pony Rides after Public Liability Insurance increased from \$7,500 to \$20,000. This was decreased to \$13,000 if pony rides were withdrawn.
02-Jan-02	Tomteland - Port Stephens	Increase in Public Liability from \$7,800 to \$54,000 increasing entry costs
02-Jan-02	Annual Billy Cart Derby - Parkes	Cancelled due to high insurance costs
02-Jan-02	Wheelbarrow Race - Forbes	Cancelled due to high insurance costs
02-Jan-02	Toronto Boat Hire	Forced to withdraw catamarans, canoes and row boats from Lake Macquarie due to rising insurance costs.
02-Jan-02	Parasailing	Operators on the NSW coast forced to drop Parasailing because of insurance costs
02-Jan-02	Country Rugby League	Fees increased from \$150 to \$200 as result of increased insurance costs
09-Dec-01	Mudgee Carols by Candlelight	Cancelled due to high insurance costs
09-Dec-01	Gymnastics Clubs	Increase in Public Liability from \$110 to \$900 for clubs -small clubs cannot afford the rise
09-Dec-01	Epilepsy Association	Told to make camps non participatory (no activities) to be insured
19-Dec-01	Bicycle NSW	Increase in fees from \$38 to \$69 to cover Public Liability Insurane increase
19-Dec-01	ORIC	Premiums increased for operators of up to 400% in 12 months
04-Feb-02	Muskerry Moto Park	Closed after unable to get Public Liability Insurance.
01-Feb-02	Canberra Soccer	Public Liability increased from \$18,000 to \$77,000 in one year. Personal Accident Insurance increased from \$53,000 to \$78,000 in one year.
01-Dec-01	NSW Wrestling	Unable to get Public Liability Insurance due to perceived dangers
13-Jan-02	Central West Horse & Trail Riding	Public Liability increase \$12,265 for a 5 million dollar cover, \$18,315 for a 10 million dollar liability cover
29-Jan-02	Cronulla Sharks	Public Liability increased from \$247,000 to \$347,000 in one year.
26-Jan-02	NSW Waterski	Cancelled the Annual Hawksbury Bridge to Bridge
05-Feb-02	Surf Life Saving Aust	Urges Federal gov to protect clubs from being sued. 284 clubs Public Liability premiums over 5 yrs at \$600,000 per an
05-Feb-02	Bondi Cole Classic	Massive increase in Public Liability costs due in June 02 may cancel the event
06-Feb-02	Country Rugby League	Reported 300% increase in liability insurance to \$800,000
11-Feb-02	Moama Water Sports Club	Raised insurance costs for this years Southern Eighty Ski Race
11-Feb-02	Bathurst Council	Advised by broker that they will no longer be able to provide cover for sporting or community organisations
12-Feb-02	Wollongong Sea, Surf and Sail Festival	Cancelled unable to pay Public Liability increase cost
15-Feb-02	Shoalhavens horse riding instructor	May be forced to close because of massive public liability insurance
20-Feb-02	Australian Parachute Federation	Premium rise from \$127,000 to \$1.1 million
20-Feb-02	Gymnastic Clubs - SA	Four Clubs closed due to inability to pay Public Liability Insurance
20-Feb-02	Combined Pensioners and Superannuants Association	May have to cut staff to pay for premium rise from \$6,700 to \$76,000
20-Feb-02	Triathlon Australia / Illawarra Academy of Sport	Wollongong Traffic Services Unit (NSW Police) requested \$25 mil in PLI for event in Wollongong. Reply was that the \$10 million PLI in place was the standard for a triathlon event. Traffic Authority were happy with the standard.
23-Feb-02	Pambula Show	Cancelled - unable to afford \$5000 Insurance for one off event
23-Feb-02	Tilba Festival	Cancelled festival due to Insurance bill jump of 600% to \$8000
23-Feb-02	NSW Waterski	2 Up Championship - Lake Illawarra cancelled - could not pay \$50,000 for one day event

Insurance Register		
23-Feb-02	Collegians Rugby League	First Grade trial match against NZ expatriate side cancelled due to one side being unable to guarantee insurance and standard cover did not apply.
18-Feb-02	Martis Balloon Festival - Canowindra	Insurance increase from \$13,000 to \$30,000 for annual event
20-Feb-02	Cirkus Elixir	Unable to perform as they cannot afford the increase of Public Liability Insurance to \$2,000 pa. The troupe has a total income of \$2,500 pa
23-Feb-02	AFL	Insurance Companies refuse to insure a player with a congenital neck problem even though experts have cleared him to play.
19-Feb-02	Councils	Problems with PLI for community facilities and small community groups that utilise these facilities. Is it possible for these groups to come under an umbrella policy to ensure their survival.
25-Feb-02	Council Rock Pools	May face closure unless life guards are in place 24 hours a day
04-Mar-02	BMX	Tracks closed in Canberra due to organisations not being able to get PLI.
06-Mar-02	NSW Sports Council for the Disabled	Increase of \$5000 this year for Public Liability Insurance
06-Mar-02	NSW Hockey	Trouble securing PA and PL Insurance - Current underwriter not willing to quote. Quotes from other insurance companies are up 400% on last year. Thus the cost per player for PLI is up from \$1 to \$4 per player.
06-Mar-02	Skydiving	Premiums have risen from \$127,836 in 1999 to \$420,000 in 2001 and are facing not being able to get insurance cover at all this year. One major problem is large payouts such as one woman with over 50 jumps, who broke her back. Her payout was over 1 million dollars but she has since walked the himalayas and had a child.
06-Mar-02	Judo NSW	Looking at the possibility of obtaining national coverage rather than State by State. Looking at possibilities due to large increase in cost in Qld on renewal and expecting same in NSW when renewal due.
06-Mar-02	Rugby League	Sydney Roosters are unable to find an underwriter for general and professional indemnity for their coaches and assistant coaches. This is not a problem at Junior level.
06-Mar-02	Swimming	Underwriter included an exclusion relating to diving to PLI policy upon renewal. This exclusion stipulated that no diving was permitted from the shallow end of the pool. No definition of shallow end was applied, thus excluding diving from the shallow end at the Sydney Aquatic Centre despite the depth of the shallow end being considerably deeper than minimum requirements for diving. It is believed that the exclusion was in response to an interstate claim.
06-Mar-02	Equestrian	PA has gone from \$7 to \$34 per person and they are unable to get PLI
06-Mar-02	Shoalhaven Soccer Association	Increased PA Cover for all ages plus the Soccer Australia Levy may prove to be a problem
06-Mar-02	Shoalhaven Rugby Association	Problem with ARU coverage - doesn't really cover the players that well. Extra PLI is taken out at a local level. Cost increase up 12-13%.
06-Mar-02	Snowy Mountains Muster	Cancelled due to high personal accident insurance costs for riders.
07-Mar-02	South West Dance Club	GIO will not reinsure them
07-Mar-02	Regional Academies	Increased cost in Work Cover Payment due to sport being classified high risk. Many sport administrators are desk jockeys and thus the cost is excessive for this category.
08-Mar-02	Triathlon ACT	Cost of coverage increased 10 times from \$180 per event to \$2000 per event
05-Mar-02	Netball	Kevin Humphries - Called re public liability insurance increase - directed to NSW Netball
12-Mar-02	SANFL (AFL)	Meeting with AFL to discuss blanket policy as premiums are up from \$15,000 to \$33,000
12-Mar-02	Australian Horse Riding Centres NSW	Trail riding and Lessons will be too dangerous to offer under the current climate
12-Mar-02	High Adventure Air Park Laurieton	If insurance problem is not sorted out within 12 months many small tourist operators will close
12-Mar-02	Blue Light Discos	400% price hike on Public Liability Insurance
12-Mar-02	Inverell Scottish County Dancers	Disbanded due to Public Liability Insurance Costs
09-Mar-02	Anzac Day March - Picton	Insurance for Parade up from \$80 to quoted between \$757 and \$2500
07-Mar-02	Gundagai and District Sport and Recreation Club	Forced to close it's doors due to brokers not being able to obtain a quote for insurance
09-Mar-02	Kiama Jazz and Blues Festival	Broker cancelled insurance due to underquotation 45 minutes prior to the first event. A new broker had to be found immediately and the cost rose from \$600 to \$8000 for the event to go ahead as planned. The organisation did not have the \$8000 to cover the cost but asked the public to chip in to assist.
09-Mar-02	Tumbarumba Show	2002 last year due to increase cost of Public liability insurance.
09-Mar-02	Tooma Gymkhana	Cancelled
09-Mar-02	Tumbarumba District Horse Riding Schools	Blamed skyrocketing insurance premiums for their demise
13-Mar-02	Scone Shire Council Pool	Possible forced closure due to broker not renewing the policy. Management structure changed to cover pool lessee under Council Policy temporarily. Pool may not be able to reopen next season if insurer is not found.
15-Mar-02	Council Pools - Hunter Region	Councils who contract their pool management out are finding it hard to get public liability insurance. Council who do not contract management out are covering under the PLI for assets (including roads and parks)
15-Mar-02	Coughlins Swim Centre Warners Bay	Increased PLI from \$13,000 to \$16,500

Insurance Register		
15-Mar-02	Arnolds Swim Centre - The Junction	PLI tripled to \$17,000 this year.
15-Mar-02	Coolamon Chamber of Commerce	Folded due to increase of PLI
15-Mar-02	Tumalong Hall Committee	Insurance rise to \$2000. Double the annual income of the hall.
15-Mar-02	Deniliquin Stampede	Events cancelled due to increased PLI costs
15-Mar-02	Deniliquin Sport and Entertainment Centre	May close due to PLI Increase - Met with local swim centre to discuss future of both venues.
15-Mar-02	NSW Cycling	Aspiring Olympians may be left without venues to train if a solution to the public liability insurance dilemma is not found. The Race of the Future(Canberra to Goulburn) - cancelled due to rising cost of PLI.
15-Mar-02	Peninsula Chamber of Commerce	Insurance costs have increased from \$1000 to \$8000. Outside event coordinators may have to be brought to transfer the liability from themselves to the event coordinators.
//DSRCluster 1 Participate/ IDU/MISC/ Organisational Development/Insurance Register/Insurance Register		



Appendix 5

Commonwealth, State and Territory Legislative initiatives as at 30 September 2002

Commonwealth

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

This Bill permits companies who supply recreational services to consumers to exclude their implied contractual liability for death or personal injury where services are supplied without due care and skill.

Taxation Laws Amendment (Structured Settlements) Bill 2002

This Bill exempts from income tax monies received from certain annuity and lump sums that are received as part of a structured settlement for personal injury claims.

New South Wales

Civil Liability Act 2002

This Act provides, among other matters:

- a limit on the amount of damages that may be awarded in respect of past and future economic loss and gratuitous attendant care services;
- a threshold and a cap on damages for non-economic loss;
- a limit on the amount of costs that can be awarded for legal services; and
- restrictions on solicitors and barristers acting for parties in unmeritorious claims.

Legal Profession Amendment (Advertising) Regulation 2002

This regulation restricts the manner in which barristers and solicitors can advertise personal injury services.

Civil Liability Amendment (Personal Responsibility) Bill 2002

This draft Bill, which was recently released for discussion, deals with the following matters:

- the principles that are to be applied in determining what is reasonably foreseeable and the standard of care for risk avoidance. The principles will apply to liability in tort and contract;
- no civil liability for a failure to take reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider to be an inherent or obvious risk;

- limited liability for damages for personal injury or damage to property arising from recreational activities;
- proportionate liability in respect of claims involving economic loss or property damage in non-personal injury matters;
- introduction of a peer acceptance defence in connection with civil liability of professionals in tort or contract;
- limited liability in tort of a public or other authority;
- limitation on damages for injuries suffered by a person while intoxicated;
- limited liability for injury or death or damage to property resulting from self-defence or arising from criminal conduct; and
- protection from liability for ‘Good Samaritans’ and volunteers who act in good faith.

Victoria

Wrongs and Other Acts (Public Liability Insurance Reform) Bill

This bill covers the following matters:

- caps on loss of earnings at three times average weekly earnings;
- caps non-economic loss at \$371,380, indexed to the CPI;
- sets a discount rate of 5% with the rate being adjusted from time to time to reflect actual real investment returns;
- provides for structured settlements;
- allows people who partake in risky activities to waive their right to sue;
- in determining whether a plaintiff has established a breach of the duty of care owed by a defendant, courts will be required to take account of the fact that a plaintiff may have been affected by alcohol or drugs or was engaged in a criminal activity;
- protection of volunteers and Good Samaritans;
- ensuring saying ‘sorry’ does not represent an admission of liability;
- protecting food donors from liability where they have donated food to charities in good faith;
- requiring insurers to account clearly for the collection and remission to the fire brigades of amounts the insurers collect from insurance policy as ‘fire services levies’; and
- the appointment of a special Insurance Commissioner to the Essential Services Commission, with responsibility for collecting insurance data to ensure transparency and fairness in the pricing of premiums.

Queensland

Personal Injuries Proceedings Act 2002

This Act:

- provides procedures for speedy resolution of claims for damages for personal injury;
- establishes procedures which promote early settlement of claims;
- provides mechanisms to ensure that a person cannot start court proceedings unless they are fully prepared for resolution of the claim by way of settlement or trial;
- limits damages in respect of gratuitous services;
- limits the amount of legal costs that can be awarded in specified circumstances;
- excludes jury trials in personal injury claims;
- provides for structured settlements; and
- restricts advertising by lawyers of personal injury services and touting.

South Australia

Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002

Recreational Services (Limitation of Liability) Act 2002

Statutes Amendment (Structured Settlements) Act 2002

These Acts covers the following matters:

- capping damages for non-economic loss;
- capping damages for future economic loss;
- capping payments in respect of gratuitous services;
- reducing damages where the injured party was intoxicated and this contributed to the accident;
- excluding award of damages for injuries suffered by a person engaged in a criminal activity;
- providing protection for ‘Good Samaritans’;
- strengthening the protection to volunteers;
- protecting landowners from liability where they allow free access for recreational purposes;
- allowing people who partake in risky activities to waive their right to sue;
- providing for structured settlements.

Western Australia

Civil Liability Bill 2002

This Bill:

- imposes a threshold in respect of damages for non-economic loss;
- caps damages for economic loss;
- caps damages for gratuitous services;
- provides for structured settlements; and
- places restrictions on advertising by lawyers of personal injury services.

Insurance Commission of Western Australia Amendment Bill 2002

This Bill amends the *Insurance Commission of Western Australia Act 1986*. It allows for the public liability insurance cover provided by RiskCover to be extended to not-for-profit organisations. Before cover can be granted an organisation must first be assessed and approved by the Treasurer.

Volunteers (Protection from Liability) Bill 2002

This bill will give volunteers qualified immunity from personal liability and transfer that liability to the organisation for which the volunteer is working.

Tasmania

Tasmania has implemented a range of measures including:

- a discount rate of 7 per cent;
- no provision for pre-judgment interest;
- no damages in respect of gratuitous attendant care;
- a three year statute of limitations for personal injury claims;
- the abolition of stamp duty on public liability insurance policies from 1 July 2002.

The second phase of reform, announced on 11 September, includes:

- restricting the level of damages for those injured where the use of recreational drugs, including alcohol, has contributed to the injury;
- restricting people from being able to claim damages if injured while engaging in criminal activities;
- the use of structured settlements; and
- ensuring that saying ‘sorry’ is not an admission of liability.

Australian Capital Territory

Civil Laws (Wrongs) Act 2002

Adventure Activities (Liability) Bill 2002 (private member's bill)

Legal Practitioners Amendment Bill 2002 (private member's bill)

These deal with:

- regulating compensation in relation to the death or injury of people taking part in certain adventure activities;
- introducing a regulatory regime for adventure activity operators;
- providing for structured settlements;
- abolishing rules preventing a court from making a determination of liability separate from an order of damages;
- protecting 'Good Samaritans' and volunteers, including bushfire volunteers;
- establishing new presumptions in regard to contributory negligence;
- replacing the common law rules regarding standard of care an occupier of premises must show to people entering on the premises in relation to dangers to them;
- capping the legal costs in personal injury cases where the award of damages is \$100,000 or less;
- prohibiting lawyers from prosecuting a civil claim where there are no reasonable prospects of success;
- establishing a regime for neutral evaluation of cases, with a view to quicker and cheaper resolution of disputes;
- prohibiting lawyers advertising 'no win, no fee' services; and
- requiring market participants (whether offering insurance or insurance-like products such as mutuals) to provide, in relation to the ACT market, annual returns indicating the quantum of premium taken, claims made, claims paid and claims refused.

Northern Territory

Personal Injuries (Liabilities and Damages) Bill 2002

This draft bill has been released for public comment. It includes:

- an indexed cap of \$250,000 for general damages;
- a cap on damages for past and future loss of earnings of three times average weekly earnings;
- a threshold for non-economic loss of \$15,000;
- prohibiting recovery of damages for those engaged in criminal activity;

- providing that the use of recreational drugs and alcohol be taken into account when assessing contributory negligence;
- exempting volunteers from being sued when undertaking work for their volunteer organisations;
- protection for good samaritans;
- setting standard, commercially realistic interest rates for past damages and discount rates for future damages;
- tightening the provisions where compensation is payable for voluntary or family carers;
- allowing courts to make orders for structured settlements; and
- a provision allowing people to say ‘sorry’ without this being an admission of liability.

Proposed amendments to the *Legal Practitioners Act* will also limit legal fees in ‘no win, no fee’ cases.

Appendix 6

Suggestions for a liability insurance database

Extract from from submission 103, Institute of Actuaries of Australia, pp 24-25.

The main items required in a liability insurance database are:

- Exposure Details - for each policy and, for diverse exposures, for each risk:
 - type of risk;
 - location;
 - period of exposure;
 - an objective measure of size of the exposure base (dependent on type, for example turnover or payroll);
 - selected underwriting criteria (dependent on type);
 - premium charged;
 - sum insured and excess:
 - per claim;
 - per event;
 - aggregate;
 - premium adjustment basis (if any);

(The above information would be required for any sub-components of a policy with different details, for instance if property damage coverage had a different policy limit. For highly standard policies, such as the Public Liability component of house policies, aggregated details would be acceptable.)

- Claim Details - for each claim/incident report within each event (and within each policy period for aggregate sum insured policies):
 - link to policy (or copy of policy details);
 - types of claim (physical damage/bodily injury/suffering);
 - date of incident;
 - date of incident report by insured to insurer;
 - date of claim to insured;
 - date of claim to insurer;
 - date of settlement and type (verdict, arbitration, etc.);
 - date finalised;
 - location of incident;
 - jurisdiction (location, court/unlitigated);
 - details of loss;
 - details of payments, deductions and recoveries (other than reinsurance):
 - date;
 - amount;

- type;
- details of incident costs not covered by policy, for example costs under the insured's excess or over the policy limits;
- estimate details;
- estimate history (totals only).

Where the insurance is placed with an Australian licensed insurer, collection should be relatively straightforward. In some cases, systems may not exist. While such systems should be a benefit rather than a burden to the insurer, some reluctance may be encountered, which could have an impact on the quality of the data.

A significant volume of large corporate business is, in effect, self-insured, with large deductibles and placement direct into what is effectively the international reinsurance market. If this data is not to be lost, it may be necessary to capture it directly from the insured corporation.

Deductibles, generally, are likely to prove a problem, since larger insureds vary in whether they report smaller claims to the insurer, and insurers vary in whether they regard reports as claims if the cost is unlikely to exceed the deductible. There is also the question of incident reports, where an injury has occurred, but no claim has been lodged. These, too, are treated differently by different insurers.

Appendix 7

Extract from additional information provided by ASIC

1. Under 761G(5)(b)(viii) have regulations been made that cover PI and/or PL?

No regulations have been made for the purposes of section 761G(5)(b)(viii).

2. Are there any provisions in FSRA that cover sale of PI and/or PL? (Could also consider ASIC Act provisions here)

Most types of PI and PL insurance will be financial products regulated under FSRA. However they will not be subject to the prescribed disclosure regime and requirements for training of representatives, dispute resolution schemes and compensation arrangements under the Act. The later requirements are applicable only where the transaction is with a retail client. For the reasons set out below, PI and PL insurance do not satisfy the requirements to be classified as products issued to retail clients under the Act.

The principal provisions applicable to PI and PL insurance will thus be the market misconduct provisions that prohibit misleading or deceptive conduct (for example s1041H).

FSRA regulates "financial products". Generally, a product is a financial product if it falls within either the general definition of financial product in s763A or a specific category of financial product in s764A. However, certain products are specifically excluded from these definitions under s765A.

Under FSRA the level of regulation is largely determined by whether the product or service is directed to retail or to wholesale clients. In relation to general insurance products FSRA provides a distinction between 'wholesale' and 'retail' clients as outlined in section 761G(5).

This provides that in order for a consumer to be considered a 'retail' client for the purposes of FSRA the purchaser must be an individual or small business and be purchasing one of the general insurance products listed under 761G(5)(b) being:

- i. A motor vehicle insurance product
- ii. A home building insurance product
- iii. A home contents insurance product
- iv. A sickness and accident insurance product
- v. A consumer credit insurance product

- vi. A travel insurance product
- vii. A personal and domestic property insurance product
- viii. A kind of general insurance product prescribed by the regulations made for the purposes of this paragraph.

Public liability and professional indemnity insurance products do not fall within these listed classes of insurance products and will be categorised as 'wholesale' products for the purposes of FSRA.

In relation to licensing under FSRA an exemption applies under s911A(2)(g) if all of the following apply:

- i. The person is a body regulated by APRA ;
- ii. The service is one in relation to which APRA has regulatory or supervisory responsibilities;
- iii. The service is provided only to wholesale clients.

Insurers or product issuers who meet the above criteria will not be required to obtain an AFS license for wholesale business they provide. However, as noted above the more general market misconduct provisions in FSRA that prohibit misleading or deceptive conduct in regard to financial services or products more generally will continue to apply.

In addition, the provisions of the Insurance Contracts Act 1984 will continue to apply to govern the relationship between insurer and insured for PI and PL insurance

ASIC understands that NIBA have recently made a submission to Treasury outlining their concerns in relation to the licensing requirements for intermediaries involved the distribution of wholesale products. A copy of this submission is attached.

3. How are "not for profit" organisations covered under 761G(5)(a)?

If the not for profit organisation falls within the small business definition under 761G(12) and the product offered is one of the products listed under 761G (5) the not for profit organisation may be a retail client in relation to the purchase of that product. Many, but not all, not for profit organizations will fall within the small business definition. ASIC considers that a business need not exist solely or primarily to make a profit but must involve system, repetition and continuity. When considering whether the activities of a not for profit organization qualify it as a "business" for the purposes of the section 761G(12) definition of "small business", previous legal decisions on the question of what is a "business" may be relevant. Those decisions highlight the following points:

* Anything which is an occupation, trade, profession, vocation, calling or duty that requires attention, as distinguished from a pleasure or social activity, or a purely domestic activity, is likely to be a business;

* Whether a particular activity is a business is a question of degree and depends largely on the character of the activity. For example, purely recreational activities or hobbies would not normally be considered a business. However, such an activity that has a commercial element to it, or that is carried on as a serious undertaking, with a high degree of system, repetition and continuity, pursued for the purpose of fulfilling a social obligation, may constitute a business (even if not undertaken for profit).

As outlined above even if the organization meets the requirements of being a small business, if the insurance product class is not one of those listed under 761G(5) the organization in purchasing it will be classed as a wholesale client.

4. How did the code provision of the Insurance Act (s113) previously operate?

Section 113 (1) of the Insurance Act provided that if

- a) a code or codes of practice have been approved by ASIC in relation to carrying on a class of insurance business prescribed for the purposes of this section; and
- b) a person carries on that class of business on a day when the person is not a party to an agreement to comply with the code or one of the codes
- c) the person is, in respect of that day, guilty of an offence punishable on conviction by a fine of not more than:
- d) if the person is a body corporate – 200 penalty units
- e) if the person is a Lloyd's underwriter and is not a body corporate – 20 penalty units.

The General Insurance Code of Practice (GI Code) was approved by ASIC in August of 2000.

The GI Code applied to general insurers who write certain domestic and personal classes of insurance, such as home, home contents, motor and consumer credit insurance. Prior to FSRA commencement insurers were required by law to be members of an industry based Code of Practice that was approved by ASIC. FSRA repealed s113(1) on 13 March 2002.

The Code did not relate to classes of business such as professional indemnity and public liability insurance.

Insurance Enquiries and Complaints Ltd (IEC) had responsibility for monitoring and administration of the GI Code and report annually on the operation of the Code.

5. Were there problems in ensuring industry participants complied with the General Insurance code under the previous s113 arrangements?

One instance of alleged non-compliance was raised with ASIC, however s113 was repealed prior to action being taken in that instance. Legislative adoption of a Code of Practice is no longer required.

Monitoring of compliance with the Code is administered by IEC Ltd and reference to the IEC's annual report should be made for issues relating to compliance concerns.

6. Can ASIC pls provide its policy statement on code approval?

There is a provision under s1101A of Corporations Act 2001 for financial services industry participants to seek ASIC approval of a Code of Practice, however no such approval has been sought to date.

In June 2001 ASIC released PPP No 9 – 'Approval of Codes' for comment. The period for public

comment on the PPP ended on 5 July 2001. We received few submissions on the PPP. These submissions indicated no fundamental concerns with the proposals in the PPP. Accordingly, the proposals in the PPP stand as our interim policy.

A copy of PPP No 9 is attached. The issue of the enforceability of codes is addressed at clause A2 (discussed at paragraph 6 and 7 on page 10), at clause B4 (discussed at paragraphs 3 to 7 on page 16) and at clause C9.