



ENVIRONMENT
INSTITUTE
OF AUSTRALIA

ENVIRONMENT INSTITUTE OF AUSTRALIA
SUBMISSION- SENATE ECONOMIC REFERENCES COMMITTEE INQUIRY-
PUBLIC LIABILITY AND PROFESSIONAL INDEMNITY INSURANCE

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The Environment Institute of Australia welcomes the opportunity to make a submission to this inquiry and is prepared to provide further information at committee hearings. The Institute has a particular interest in indemnity insurance as it affects professionals therefore our submission mainly addresses terms of reference (b), noting that very many professionals are located in small businesses and terms of reference (c), (d) and (e). The submission draws upon comments received by members dealing with the spiralling fees.

1. The Environment Institute of Australia

The Environment Institute of Australia assists in providing a benchmark of performance for Australian environmental practitioners. EIA members whose work activities are related to environmental protection, natural resources conservation or environmental education, communication and research, are acknowledged in both Industry and Government.

The Environment Institute of Australia (EIA), is the peak representative organisation specifically formed to meet the needs of the growth area of environmental practitioners from every sector, field and industry - scientists, planners, engineers, educators, architects, lawyers, landscape architects, foresters, geologists, nature-based tourism operators, academics, consultants, and government officers. We have approx. 1800 members in Australia with an underlying growth factor since 2000, of 40% p.a.

The Institute is a not-for-profit non-political organisation that serves the needs of practitioners as specialists and as contributors within the broadest sphere of environment.

Within the environment professional, there are numerous functional areas of work as reflected in our membership. EIA has up to 40% of its members participating in the field of consulting to the wider community.

1.1 Functional Areas:

Policy development and implementation

Land, water, air and related ecosystem management

Natural resource management including energy

Urban environment management including community issues

Baseline studies, monitoring and reporting

Operation management

Design and construction

Scientific and other research,

Education and community awareness

Planning and assessment

Legislation regulation and enforcement

Corporate environmental management systems auditing and reporting

One of EIA's member services is Professional Indemnity and Optional Public Liability Insurance for the Members of the Institute. This group facility now has an exclusion for PI – 34 Environmental Consultants Exclusion. Note: our advice has been that this clause is attempting to exclude public liability insurance from the professional indemnity insurance, not that it precludes insurance of those activities – it means therefore that we need both PI and public liability, which I'm sure all consultants have anyway.

1.2

PI - 34 Environmental Consultants Exclusion

The Company shall not be liable in respect of any claim for personal injury or damage to property including costs and expenses incurred in respect of:

- a) any activities of Insured outside Australia, or
- b) Pollution control (including design, supply, installation or commissioning of equipment), or
- c) Pollution consultancy (whether including site clean up, or not), or
- d) Waste management (including design, supply, installation or commission of equipment), or
- e) Waste management consultancy (whether including site clean up, or not),
- f) Work involving asbestos or other waste of a hazardous nature.

This exclusion is creating an exceptional situation where we have an example of at least one business, outsourcing this element of work in order that their premiums are such to allow their business to continue to operate. Other of various businesses within the Environment sector do not have this option and are under extreme fiscal pressure which will be severely exacerbated with expected upward pressure on interest rates

The group facility is now not operative.

2. Professionalism and professional indemnity insurance

The EIA adheres to an integrated concept of professionalism as defined by the Council of Professions, within which robust and viable professional indemnity insurance arrangements play an essential part. The Council of Professions' agreed *Definition of a Profession*, adopted in 1997, is as follows:

A profession is a disciplined group of individuals who adhere to ethical standards and uphold themselves to, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level and who are prepared to exercise this knowledge and these skills in the interest of others.

It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual.

They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues.

Further, these codes are enforced by the profession and are acknowledged and accepted by the community.

The Council of Professions' *Policy on Risk Management*, also adopted in 1997, places indemnity insurance within the context of the relationship between professionals and the community they serve. The italicised sections stress the importance of insurance and

The Australian Council of Professions recognises that the professions have a responsibility to provide services to the community, which encompass the highest standards of quality and competence. This responsibility includes the need for professional associations and statutory licensing authorities to maintain standards of entry to ensure that only fully qualified professionals are able to practise in areas where professional skills are required.

The community has a right to expect competence and attention to the management of risks where they might occur in the provision of professional services.

However, it is necessary for the community:

1. *to improve its understanding of the nature of risk;*
2. *to manage expectations; and*
3. *to have available a system for reasonable compensation for any loss due to action or omission by professionals.*

To achieve this, the Australian Council of Professions recommends that professionals should:

1. at all times exercise their knowledge and skills in the interest of others, be they client, patient, the community or its institutions;
2. practice only in their areas of competence, save in exceptional circumstances for an emergency;
3. continue their professional development throughout their careers and actively encourage and promote the extension of knowledge to all members of the profession especially those under their direction;
4. exercise judgment based on experience, technology and understanding of the needs of their clients;
5. *identify likely risks inherent in their practice, take action to minimise them and, where possible, make provision for unsatisfactory outcomes;*
6. *apprise the client of any risks likely to prove significant, either to the client or the community and of their consequences; and*
7. *contribute, where appropriate, to the processes whereby:*
 - a. *risk can be managed;*
 - b. *the understanding within the community of the nature of risk (including the managing of expectations) can be improved; and*
 - c. *a system for reasonable compensation for loss due to action or omission by professionals can be established.*

Given the importance of indemnity insurance to the role of professionals, if adequate insurance is not available at reasonable rates, there is a threat to the capacity of professionals to provide the services that the community expects of them. There are strong signs in some professions that Australia is moving towards this unwelcome situation. There is a notion that the risk is not that there will be entirely no service - but that there will only a limited number of larger companies offering the service.

3. The impact of professional indemnity insurance, including Directors and Officers Insurance, for small business: Terms of Reference (b)

As noted above, EIA recognises that professional indemnity insurance is an essential element of professionals' relationship with the community. Nevertheless, insurance can be a considerable burden where professionals are located in small businesses. The EIA supports the view of Mr Don Armstrong, Chair of the Small Business Coalition (SBC), in a letter to the Assistant Treasurer on 19 March 2002, that 'spiralling liability premiums is one of the most critical issues facing small businesses today'.

Although statistics are difficult to obtain, the great majority of professionals have professional indemnity insurance. They accept that professional indemnity insurance is both an integral part of professionalism and sound commercial sense and accordingly take out appropriate cover.

4. The cost of professional indemnity insurance: Terms of Reference (c)

The EIA has sought information from its members on a needs basis. The following examples are presented as a sample of current comments from members and mostly refer to costs and recent increases:

"The base premium for \$5mil (cover) with EIA discounts is \$11,605 total (including stamp duty, GST etc). This compares to a total of \$3,500 last year - with a similar turnover and staff size figures. We are a planning consultancy and not involved in any areas of hazardous materials"

"Your e-mail was timely as I have just received my PI quote that is 3x last years"

"My best quote this year was for a premium of \$2,500 (through a broker), so I am not covered at present, but I will look forward to hearing from you."

"It would seem that there are only a few (3-4) companies taking on PI for consultants in this field (environment/agriculture)."

"We have recently received our Professional Indemnity and Public Liability Insurance renewal notice which has increased by in excess of 100% on the previous years."

When hazardous waste cover is necessary, premiums have been known to increase by 500-600%. It is clear that the Environment Profession is suffering from the known PI Insurance issues as well as the additional responsibility of working with difficult projects.

Often issues related to hazardous waste and contaminated sites are the responsibility of government and thus the associated increased insurance costs will be passed on. It is anticipated that the increase in insurance premiums in this area will lead to less competition in the supply of these services and this will also result in increased costs to government.

5. Reasons for the increase in premiums for professional indemnity insurance: Terms of Reference (d)

Like others, the EIA has followed the debate in this area and we can offer comment upon a couple of explanations that have been advanced by others. Material from members suggests that premiums are not being driven by increases in claims. Overseas there have been many extremely large claims in the contamination and hazardous waste areas. They may instead suggest that premiums have risen for reasons internal to insurance providers rather than because of claims history.

Another Professional Association survey (IEAust), found that the steady premium increases over the years 1996-97 to 2000-01 (average of 9 per cent annually) did not reflect an increase in the proportion of those insured who made a claim or in the average number of claims being made. Only 5-7 per cent of IEAust members surveyed made a claim on their professional indemnity insurance in any one year. Whilst EIA has not proceeded with a similar survey it would be fair to say that EIA members would be similarly positioned.

On the other hand, it may be the case that professions with low numbers of claims are effectively cross-subsidising claims by other professions and by other insurance clients in sectors where claims and litigation are more common. The EIA supports the Australian Council of Professions comment of being unaware of whether this proposition can be supported by statistics but it believes it would be an appropriate subject for investigation by the Australian Prudential Regulation Authority (APRA) or other appropriate body.

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 responsibility for the damage or loss. This issue is discussed below under ‘*Tort Law reform and proportionate liability*’.

6. Schemes, arrangements or reforms that can reduce the cost of insurance and/or better calculate and pool risk: Terms of Reference (e)

The EIA supports the ACP's position that ACP offers a number of possible approaches here and suggests also that cultural changes in the community are necessary. We noted above that it is important not to look for a single cause for the current situation. We believe it is important also to state that no single solution will fully address the problem. Action will be needed on a number of fronts to deal with the complexities involved. This action will also need to proceed across jurisdictions, State and Commonwealth.

Further, it will be important to ensure that solutions are not confined to a particular profession or to a narrow aspect of the problem. The Institute welcomes the fact that the committee is simultaneously addressing public liability and professional indemnity insurance, as many factors are common to both areas. The EIA agrees with Mr Don Armstrong, Chair of the Small Business Coalition, that recent discussion on insurance issues has been too narrow and that all forms of business liability insurance – public liability, professional indemnity and product liability – need to be considered in conjunction.

Within professional indemnity insurance, too, it will be important not to see issues as affecting only one profession. Medical indemnity, for example, an area in sharp focus at present, is a sub-species of professional indemnity, not *sui generis*.

6.1 Professional Standards legislation and limits on liability

Any services received by the public are subject to human error, which may produce loss or damage for the recipient. Assets need to be available to cover compensation for such loss. Hence insurance, but insurance is becoming more expensive and, in some cases, may be unavailable. Some professionals have had to contemplate withdrawing their services.

The solutions offered need to ensure that high professional standards are promoted but that professional indemnity insurance is always available to satisfy claims against professionals up to a reasonable ceiling. New South Wales and Western Australia have found a well-balanced legislative solution in the form of Professional Standards Acts.

Under this legislation, professional associations commit to compulsory indemnity insurance, risk management programs and complaints and discipline procedures, in return for limitations on the liability of the service provider. Liability is limited to amounts, which cover virtually all consumer compensation claims but avoid catastrophic payouts by the provider. The health professions are currently excluded.

To be fully effective, such legislation needs to be enacted in every State and Territory and the Commonwealth Trade Practices and Corporations legislation needs to be amended to ensure complementarity. The Commonwealth has said that if a majority of States and Territories adopt professional standards legislation it will consider the enactment of appropriate Commonwealth legislation.

EIA supports ACP who believe that legislative changes along these lines should be a priority of all governments and should be considered at a 'summit' like those recently on public liability and medical indemnity. Any legislation should include the health professions.

These issues have been worked over since at least the New South Wales Attorney-General's Department discussion paper on limitation of professional liability for financial loss. This was in 1989. The issues have long since passed out of the realm of tardiness into that of failure of will – a situation that should be remedied as soon as possible.

6.2 Tort Law reform and proportionate liability

A suite of solutions also needs to ensure that professional liability is limited both as to amount and time and that joint and several liability is modified to allocate liability among multiple defendants in accordance with responsibility for loss. At present, joint and several liability of defendants can lead to the unjust situation where a professional, who may be only 10 per cent responsible for a plaintiff's loss, pays 100 per cent of the damages.

Professionals are frequently the main target in legal actions even where their involvement

funds while more blameworthy defendants (such as directors of collapsed companies) are either outside of Australia or bankrupt.

Legislation is needed to replace joint and several liability with proportionate liability, where the liability of defendants is apportioned according to their respective degrees of responsibility. This approach already exists in the USA and a joint study by the Commonwealth and New South Wales Governments has recommended that it should also apply in Australia. Model legislation to introduce proportionate liability has been prepared for some time and should be implemented by governments as a matter of high priority.

Because of the different State statutes of limitation, it is often unclear when the professional liability for a particular act or omission ceases. In some instances the liability remains indefinitely. In the interests of the community and of professionals, time limitations should be reasonable, uniform between jurisdictions and based on clearly ascertainable dates.

EIA's professional practitioners accept that they must be accountable for their actions. They also acknowledge that the community should have the right to recover reasonable damages where professionals are negligent. However, professional practitioners should not be asked, as they are now, to bare unlimited or disproportionate liability and for an indefinite period.

6.3 Cultural change

While evidence on cultural trends is notoriously hard to pin down, the EIA believes there are signs that there is a continually growing gap between the expectations people have of professional services and the capacity of those systems to deliver. There is an 'expectation gap'.

The expectation gap is widening and it underpins a resort to litigation, where historically large payouts are being obtained, leading in turn to an escalation in insurance costs and in some cases forcing the providers of goods and services to consider withdrawing them. Insurance, a key service, is under extreme pressure.

A public discussion might bring the expectation gap to attention and seek to reduce it to more manageable proportions. Such a discussion might bring out the following points:

- Actions often have unintended consequences; outcomes are unpredictable. Unmet expectations lead to increased litigation and pressure on the insurance system.
- The best defence against uncertainty is the pursuit of quality by the exercise of professional judgement. Lowest price competition destroys quality.
- Suppliers of critical goods and services may increasingly withdraw from the market because the insurance system is failing.
- If reforms like those outlined above (Professional Standards legislation, tort law reform, structured settlements, etc.) cannot be made to stick it may be necessary to invest significantly larger sums in insurance premiums or to recognise that individuals must carry a heavier burden of personal responsibility for unintended

- In any case, consumers need to recognise that professional expertise is not limitless and that consumers themselves must expect to bear some responsibility (and some risk). A realistic approach to risk management (like the Council's Policy on Risk Management – see above) distributes risk between professionals and consumers.

7. Conclusion

The EIA believes this inquiry addresses important questions. They are not new but they have become increasingly urgent. They affect all professions to some extent and they are particularly stressful for professions operating in small businesses, as most do. The issues affecting EIA members are that of other Professional Associations but have the additional load of the exclusion for hazardous waste consulting. Another complicating factor is the very different levels of insurance risk attaching to different activities and areas of practice. EIA for its part is undertaking a formal member survey, to gather further information on PI insurance.

The Environment Institute of Australia assists in providing a benchmark of performance for Australian Environmental practitioners. EIA members whose consulting activities are related to environmental protection, natural resources conservation or environmental education, communication and research, are acknowledged in Industry and Government. A strong consulting business is a key factor in delivering environmental outcomes. If Australia is going to be a leader and not a follower - and we are to press ahead with a window of opportunity for development of Australia's innovative technologies - and provide solutions to many environmental issues, then we need highly experienced practitioners to develop this growth through strong, financially stable, well resourced practitioners and consultants.

EIA commends the Senate for undertaking the inquiry and looks forward to positive outcomes and Government action.