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Public Liability Insurance

The past year has seen a significant increase in public liability insurance premiums for many businesses and community based events. The Queensland Government's Liability Insurance Taskforce Report has found that the causes of the current public liability insurance crisis are varied and interrelated. While the growing number of large damages awards are having some impact, they are not the sole reason for the current problems. There appears to be no simple and quick solution to the difficulties.

The Queensland Government, along with other governments, is attempting to develop strategies that can be implemented in the immediate future to assist bodies, such as not-for-profit community organisations, most affected. One approach that appears feasible as a first step is for governments to broker group insurance purchasing arrangements. Any moves for common law reforms are ones for the long-term and require further discussion at a national level.

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1 HARD TIMES FOR BUSINESS AND COMMUNITY GROUPS

The past year has seen a significant increase in public liability insurance premiums for many businesses and community based events. Public liability insurance protects the insured in the event of claims for compensatory damages made by members of the public who suffer injury or other loss as a result of the insured's negligence.

The rises are such that events such as community run Carols By Candlelight and agricultural shows may have to be cancelled because the organisers cannot afford the premium increases nor the potential risk of running the events without insurance. The Hervey Bay Air Show has already been cancelled. A Newcastle skating rink was recently forced to close when its premiums rose from \$8,000 to \$86,000. Even the Coffs Harbour tourist attraction, the Big Banana, has been hit with a \$140,000 premium this year (up from \$39,000 last year).¹ A range of organisations have been affected including RSL clubs, bed-and-breakfasts, shows, shopping centres, pony clubs and fun parks – in fact, potentially anything involving the public.

In Queensland alone, a major public swimming pool operator, Splash Leisure Pty Ltd, has received a considerable subsidy from the Brisbane City Council in order to keep running. Premiums have jumped from \$900 to \$9,000 for the Queensland Women's Amateur Sports Council, and from \$12,900 to \$42,000 for La Boite Theatre. The Queensland Rugby Union may face an increase of up to 300% in its premiums.² The Queensland Government has had to provide \$80,000 in emergency funding to ensure that the Blue Light discos run by the Queensland Police Service were not jeopardised by a 700% increase in premiums.³

Organisations offering adventure for participants – the 'adventure tourism' businesses – have been the hardest hit, some reporting rises in premiums of up to 1000% over the past year, even bodies who have never had a claim made against them. Others are finding that no insurance company is prepared to cover their business. An operator of a backpackers' hostel in the NSW Blue Mountains is selling the business after a 300% premium rise for the current year required him to cull white-water rafting from the adventure tourism schedule. The Victorian Government has claimed that around 25% of

¹ Kathy Lipari, 'Premium costs to force insurance overhaul', *Daily Telegraph*, 22 January 2002. Downloaded from <http://www.dailytelegraph.news.com.au>.

² Lachlan Heywood, 'Council hits compo ads by lawyers', *Courier-Mail*, 13 February 2002, p 11.

³ Peter Morley, 'Bulk-buy insurance to save charities', *Sunday Mail*, 17 February 2002, p 5.

the State's adventure tour operators have closed down or are soon to do so. It is not just the higher risk activity businesses ('the ropes, water or horses' sector) that have been affected. Even chairlift operators have been forced out of business. The Australian Competition and Consumer Commission (ACCC) is reviewing the large premium increases in this area, with a report due by March 2002.⁴ There is a danger that adventure tourism, which attracts many overseas tourists to Australia, may be so affected, coming on top of the Ansett collapse and recent world events, that there are few businesses left to offer it.

A number of general insurers have declined to offer public liability insurance for the future, with others considering rejecting new shopping centre applicants for public liability insurance.⁵

More disquieting is the impact on not-for-profit community organisations that provide vital services in the community. Many of these are operated by volunteers. Examples include Meals on Wheels, organisations that provide home-based family support programs for families in difficulties, and bodies that support homeless persons. If the existence of those organisations is compromised by crippling insurance costs, the Government, and taxpayers, would be left to fill the breach.

Impacts are beginning to be felt by community in terms of increased prices of tickets to venues such as theme parks, cricket, and football. In addition, well established society events that we have taken for granted as part of our way of life may be jeopardised if popular festivals, shows, air shows, fetes and dances disappear. As noted by the Federal Assistant Treasurer, the Hon Helen Coonan MP, outdoor activities and community functions that are part of our lifestyle are at risk, as is the 'great Australian volunteering tradition'.⁶

2 FACTORS INVOLVED IN PREMIUM RISES

There is considerable debate and casting of blame about the cause of the current 'crisis' and even if there is, in fact, a crisis. The insurance industry, and many in the community, blame Australians' growing willingness to sue businesses and event organisers,

⁴ Lyall Johnson, 'State funds for adventure tourism', *Age*, 26 January 2002. Downloaded from <http://www.theage.com.au>.

⁵ Chris Jones, Amanda Gearing, Matthew Hart, 'Insurance payout crisis', *Courier-Mail*, 8 January 2002, p 1'.

⁶ Andrew White, 'Our lifestyle "at risk": Minister calls national insurance crisis talks', *Australian*, p 1.

encouraged by ‘ambulance chasing’ solicitors. The solicitors, not surprisingly, have retaliated with claims that the insurance industry’s practices of the past decade have forced premiums upwards and that the industry seeks to profit from the community’s pain. The common ground is, however, that something needs to be done – and soon.

The major factors which appear to have had some impact on the current premium rises are considered below. Ultimately, it appears that there is no one clear significant cause but a myriad of factors that have been simmering away for some years and which recent world events and the collapse of HIH Insurance have brought to the boil.

2.1 INSURANCE INDUSTRY OPERATIONS

In 2002, premiums for all types of insurance are expected to increase from \$25 billion last financial year to \$30 billion.⁷ It is anticipated that public liability premiums will rise on average, at June 2002, by 32%.⁸ It is reported that while Australian insurers made a collective profit of \$1.4 billion in 2000 across all sectors, boosted by good investment returns, the public liability sector collectively lost \$539 million – its fourth consecutive year of recording a loss.⁹

It is understood that public liability insurance has not been profitable for about a decade, a situation exacerbated recently by the effects of the terrorist activities of September 11 and the collapse of HIH Insurance (one of Australia’s largest providers of public liability insurance) and subsequent Royal Commission. Suncorp Metway appears to agree that the insurance industry has had losses in the public liability insurance area for some years and has said that companies have had no choice but to raise premiums.¹⁰ The problem is not one confined to Australia.¹¹

It appears that the operations and practices of the insurance industry over the past decade have played some part (although there is disagreement about the extent of that part) in the current public liability insurance turmoil. Between 1992 and 1998, many new

⁷ Chris Jones et al; ‘Insurance payout crisis’.

⁸ Information taken from the Deloitte Touche Tohmatsu website at <http://www.deloitte.com.au>.

⁹ Darren Farrant, ‘The risk business becomes too risky’, *Age* online, 24 January 2002. Downloaded from <http://www.theage.com.au>.

¹⁰ Craig Spann, ‘Malled: Insurers shut out shops’, *Courier-Mail*, 4 January 2002, p 1.

¹¹ Mick Buckworth, ‘Govt responds to insurance crisis’, *7.30 Report*, 21 January 2002. Transcript downloaded from <http://www.abc.net.au/7.30>.

companies entered the insurance industry and competition was fierce. Customers were the beneficiaries of the lower premiums that resulted. On many occasions, the premiums were too low for the risk insured but they were, nevertheless, offered rather than losing customers to rival insurers. In the late 1990s it appears that public and product liability insurance was significantly cross-subsidised by other classes of business.¹² This situation was unsustainable. Reinsurance costs then rose, particularly with overseas reinsurers facing their own problems, and many companies had to raise premiums or lose higher risk customers to stay in business.¹³ The concurrent global economic downturn meant lower returns on investments and, thus, a reduction in profits. Some companies merged with others or folded completely.

During the same period, the insurance industry faced a growing number of personal injury claims. Sometimes the cost of investigating a claim can far exceed the amount of the premium that has been paid. Australian Prudential Regulation Authority (APRA) figures indicate that the number of claims lodged with public liability insurers has increased from 55,000 in 1998 to 88,000 in 2000 – a 60% jump. Premiums rose by only around 14% in that same period.¹⁴ Although the industry collected \$880 million in public liability premiums in 2000, it paid out \$1.18 billion in claims (representing a \$299 million loss).¹⁵

Claims expenses (made up of payouts and increase in provision for outstanding claims) have grown at about 22% annually since 1996. In 1996, claims expenses were only 71% of gross premium revenue for public and product liability insurance. By 1999, this had increased to 144% but improved slightly in 2000 to 134% of gross premium revenue. That may be partly due to better investment returns in 2000.¹⁶

¹² Queensland Government. *Liability Insurance Taskforce Report*, February 2002, p 9.

¹³ Linda Morris and Cynthia Banham, 'Risky Business', *Sydney Morning Herald* online, 26 January 2002. Downloaded from <http://www.smh.com.au>.

¹⁴ Brian Woodley and Andrew White, 'Insurance forces business to shut', *Australian*, 4 February 2002. Downloaded from <http://www.theaustralian.com.au>.

¹⁵ Chris Jones et al, 'Insurance payout crisis'.

¹⁶ Australian Prudential Regulation Authority, *Selected Statistics on the General Insurance Industry, December 1996, 1997, 1998, 1999 & 2000* cited in the Queensland Government, *Liability Insurance Taskforce Report*, February 2002, p 7. The Report noted that while the APRA data groups public and product liability into one class, it is understood that public liability premiums account for about 87% of the total.

The March 2001 collapse of HIH Insurance and other large insurers removed around 50% of the capacity in the local market for small and intermediate risks.¹⁷ There was then a sudden rise in worldwide reinsurance costs following the September 11 terrorist attacks. European and US reinsurers appear to have suffered the most from the estimated \$US70 billion (\$A139 billion) damages bill and have raised premiums to offset losses. They are also refusing to accept some classes of businesses meaning that, in turn, insurers cannot offer cover on certain risks, or their prices are crippling to customers.¹⁸

An insurance industry spokesman has regarded the events of the past year as a 'necessary wake-up call' where slack underwriting practices of recent years – such as insurers reducing prices to attract customers without properly checking risks – backfired. There is a more ruthless approach to underwriting now and the industry claims to be doing reasonably well and, overall, is expected to make a profit for 2001 on an asset base assessed by APRA at \$59 billion. Although there have been problems with public liability and professional indemnity insurance, it is considered that the legislative reforms of the industry to increase minimum capital requirement held by insurers (considered below) will help sustain growth.¹⁹ Some, particularly the legal profession, disagree that the industry has suffered significant losses in the 1990s and believe that APRA figures show that if public liability insurance premiums rose by an average of around 40%, companies would more than break even.²⁰

Whereas in the early 1990s there were over 20 major insurers, it is considered that there are now only 6 big players competing in the Australian market. That number may fall further given that some insurers may not be able to comply with the new APRA regulatory arrangements (considered in Section 2.2) soon to take effect.

¹⁷ Deloitte Touche Tohmatsu, *Queensland Events Corporation Event Insurance Review*, December 2001, p 7.

¹⁸ Brian Woodley and Andrew White, 'Insurance forces business to shut'.

¹⁹ Brian Woodley and Andrew White, 'Insurance forces business to shut'.

²⁰ *7.30 Report*, 21 January 2002, quoting Mr Ian Dunn from the Law Institute of Victoria.

2.2 RECENT LEGISLATIVE REFORMS

The recently enacted *General Insurance Reform Act 2001* (Cth) attempts to undertake the most significant reform to the *Insurance Act 1973* (Cth) since its inception.²¹ The new laws will commence on 1 July 2002, with a two-year implementation period.

The major change is that APRA has the power to make, vary and revoke prudential standards. There are four prudential standards covering liability valuation, capital adequacy, reinsurance arrangements, and risk management. Insurers underwriting higher risk insurance, such as reinsurance, will need to hold a minimum level of capital that will be greater than for companies that provide less risky insurance such as home and contents insurance. APRA will assess the adequacy of the prudential supervisory requirements on an ongoing basis, to ensure that they effectively address the risk profiles of insurers.

The legislation requires independent auditors to report to APRA in order to provide an independent check on the internal control processes of a general insurer. Among other tools APRA now has to anticipate and prevent problems and to require the entity to take appropriate action to protect policyholders, are –

- the ability to act more quickly to carry out investigations against insurers;
- greater power to make directions about freezing an insurer's assets where it has reasonable concerns about the financial viability of the insurer (as opposed to being satisfied that it is unable to meet its liabilities);
- the power to gain access to a wider range of documents to assist in its understanding of a company;
- more power to require reasonable assistance from individuals in carrying out its functions;
- the ability to accept enforceable undertakings under the Act which, in many circumstances, provides a more flexible alternative to the issuing of directions.

New provisions will enable an insurer to voluntarily transfer its policies to another insurer which will reduce costs in circumstances such as a restructure.²²

²¹ Hon J Hockey MP, Minister for Financial Services and Regulation, *General Insurance Reform Bill 2001* (Cth), Second Reading Speech, *Commonwealth Hansard*, House of Representatives, 28 June 2001, p 28814.

²² *General Insurance Reform Bill 2001* (Cth); *Supplementary Explanatory Memorandum*, pp 4-9.

2.3 GROWTH IN LITIGIOUSNESS

Increasing insurance costs have been attributed by many in the community, including business groups and insurers, and by politicians, to our increasing willingness to sue for damages for injuries suffered outside the home. There is a perception that new rules allowing greater advertising by the legal profession have encouraged litigation, and that some 'high-flying' legal firms have used the media to encourage class actions and to tout 'no-win-no-fee' services.

In June 2001, the High Court removed the immunity from negligence suits enjoyed by local governments for not acting to keep roads and other infrastructure in good repair. This led many councils to fear that they would be inundated with claims for damages and consequent insurance premium increases that they would struggle to afford.²³ Many have urged state governments to pass legislation limiting their exposure to liability.

In February 2002, a New South Wales woman who was left paralysed from the mouth down received damages totalling more than \$16 million after the NSW Supreme Court found the local council and a roadworks contractor liable in negligence for failing to remove gravel from a section of a road that was being resealed and to replace the 75 km/h road sign with a 55 km/h sign.²⁴

An Insurance Council of Australia (ICA) spokesperson has suggested that people getting hurt think that the big insurance company has plenty of money, so they sue and no company, no matter how large, can sustain large losses indefinitely.²⁵ QBE Australia's Managing Director is quoted as saying that "*people in Australia are more litigious, and any time someone gets slightly injured there is an assumption that it is pay day*".²⁶

The legal profession has hit back. Mr Joe Tooma, President of the Queensland Law Society (QLS), has argued that solicitors do not accept cases that lack any merit.²⁷ QLS accident compensation committee chairperson, Mr Gerry Murphy, is reported as stating that there was no evidence of a significant rise in the number or size of personal injuries

²³ 'LGAQ Proposals to Address Insurance Costs', *Media Release*, 21 January 2002. Downloaded from the Local Government Association of Queensland website at <http://www.lgaq.asn.au>.

²⁴ 'Injured woman awarded \$16m', *Age* online, 1 February 2002. Downloaded from <http://www.theage.com.au>.

²⁵ Linda Morris and Cynthia Banham, 'Risky Business'.

²⁶ Spann, 'Malled: Insurers shut out shops'.

²⁷ Chris Jones et al, 'Insurance payout crisis'.

claims and that the increase in premiums was more likely to be the result of the consequences of terrorist attacks and the collapse of HIH Insurance.

Queensland Attorney-General, the Mr Rod Welford MP, has commented that compensation awarded by Queensland courts was generally less than in southern states and rarely exceeded \$100,000. That was because claims were usually determined by a judge rather than by a jury.

In January 2002, the Federal Minister for Small Business and Tourism, the Hon Joe Hockey MP, suggested that reform of the present common law compensation framework and replacing it with a national scheme may reduce pressure on public liability insurers of large, often unpredictable, court-awarded damages. At that time, he suggested consideration of a scheme similar to that operating in New Zealand.

3 NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME

New Zealand has a 'no fault' accident compensation scheme administered by the Accident Compensation Corporation (ACC) that provides insurance for all New Zealand citizens, residents, and temporary visitors to the country. There is no common law right to seek damages for personal injury, other than for exemplary damages.²⁸ The scheme aims to eliminate the "*slow, costly and wasteful forces of using the courts for each injury*".²⁹ It also seeks to provide timely care and rehabilitation to get people back to work or to independence as quickly as possible.

The scheme had its genesis in the recommendation for a 'no-fault' scheme for personal injuries made by the 1967 Woodhouse Royal Commission, established in the wake of concerns about workers' compensation. The concept had strong resistance from the legal profession.

The national accident compensation scheme commenced on 1 April 1974, administered by the new ACC. The main piece of legislation governing the operations of the ACC is the *Accident Insurance Act 1998* (NZ). The Act provides a scheme to cover personal injuries, whether suffered in the workplace or not, funded by a levy on employers and the self-employed. Injuries arising out of motor vehicle collisions are also covered, funded by levies on owners of motor vehicles. As a trade-off for premium payments and not having

²⁸ Most of the information under this heading was found on the ACC's website at <http://www.acc.co.nz>.

²⁹ See the ACC Information Sheet 'The Accident Compensation Scheme' at <http://www.acc.co.nz> following the links 'about ACC' and 'the accident compensation scheme'.

to show any fault to make a claim, all rights to sue for damages in respect of personal injury ceased.

The ACC is a Crown entity which provides cover, injury prevention services, determines entitlements to compensation and makes payments, provides medical and other care and rehabilitation services, and advises the Government. It spends around \$1.4 billion annually on rehabilitation, treatment and compensation. This is funded through collection of premiums and income from investment of funds.

3.1 EXTENT OF COVER

The scheme generally covers 'personal injury' (ie a physical injury or a mental injury that is caused by a physical injury) resulting from an accident in the home, workplace or road; a work-related gradual process disease or infection; medical misadventure; sexual assault or abuse. It has recently been extended to cover nervous shock after sexual assault or abuse. Emotional effects (eg loss of enjoyment) are not covered.

3.2 ENTITLEMENTS

Claimants under the scheme are reimbursed their medical costs, hospital treatment, transport treatment, and are compensated up to 80% of their income for the duration of the injury, capped at \$NZ64,000 (\$A53,000). Under new legislative changes, considered in more detail below, lump sum payments can be made in respect of permanent impairment of greater than 10%. At present, a person with permanent impairment may be entitled to an independence allowance. If the injury results in death, funeral costs and survivor benefits may be payable.

Each claimant is assigned a ACC case manager to work out a rehabilitation plan together with the support services that will be required to assist recovery.

Financial assistance is provided for services such as artificial limbs, transport for independence and home modifications.

Decisions about cover and entitlements made by the ACC can be reviewed in any of four ways. Those are through independent ACC review, a District Court or High Court or Court of Appeal action. There is also a Complaints Investigation Office within the ACC which is independent of the ACC's other functions.

3.3 PREMIUMS

Premiums are paid by all New Zealanders (except for non-earners where the Government pays on their behalf) to cover current and future claims made each year. Levels of premiums are set by the Government on the basis of ACC recommendations following a formal public consultation process. When the system commenced in 1974, it operated on a fully funded basis but was altered in 1982 to the current 'pay-as-you-go' arrangement, which means that funds are collected to pay for costs as they arise. It is understood that premiums have dropped by 25% over the past two years and that they were consistently lower than Australian premiums, partly because of lower administration costs in having a single entity handling the country's compensation insurance.³⁰

The premiums are paid as follows –

- employers' premiums to pay for most work-related personal injuries but not for injuries suffered by the self-employed. Premiums paid by self-employed workers and private domestic workers fund work-related injuries suffered by those persons;
- taxpayers' premiums collected through the tax system to pay for non-work injuries (eg a fall at home) suffered by persons in paid employment. It does not cover motor vehicle accidents;
- premiums paid on behalf of non-earners (eg students, retired persons, and children) by the Government to compensate persons not in paid employment for injuries suffered;
- a tariff on petrol prices and funds from part of the motor vehicle licensing fees which are used to compensate people for motor vehicle accident injuries;
- funds from the 'Earners Account' and the 'Non-Earners' Account' for compensating people who suffer injury as a result of medical error or from rare and severe outcomes of procedures.

3.4 EXEMPLARY DAMAGES

Exemplary (punitive) damages are awarded against a defendant as punishment for some type of outrageous conduct rather than to compensate the injured person. The bar to pursuing court action for personal injury does not, therefore, apply to seeking exemplary damages, only to seeking compensatory damages for the injury. Although this avenue may be seen as a 'backdoor' means of pursuing common law actions in the courts, it

³⁰ See the ACC Information Sheet 'How the ACC is funded' at <http://www.acc.co.nz> following the links 'about ACC' and 'how the ACC is funded'. Christopher Niesche, 'All-in-one Kiwi scheme cheaper', *Australian*, 22 January 2002, p 3.

appears that the court-awarded damages to date have been reasonably modest, although the number of cases going before the courts has increased over the past two years.³¹

3.5 HISTORY OF THE SCHEME

The New Zealand scheme has experienced considerable restructuring and adjustment in its 28-year history, particularly with changes of Government. Many reforms were in response to perceptions about the growing costs of the system, particularly by employers. By 1992, changes to the system meant that employees, rather than employers, paid premiums to cover non-work injuries (employers still paid for work-related injuries) and lump sum entitlements were replaced by periodic payments (an independence allowance).

One significant phase was between 1 July 1999 and 30 June 1992 under the conservative National Government which introduced private competition among insurers for work-related accident cover. The change sought to respond to complaints about limited choice for the public, poor risk management and poor claims management.³² During this period, the ACC was excluded from the market except for providing cover to the self-employed. A regulating body was established to oversee the private market. The scheme otherwise remained the same. It is understood that premiums became cheaper for businesses with good risk management and employers were, according to the chief executive of the Insurance Council (NZ), generally in favour of privatisation. It is claimed that accidents also decreased because of incentives to improve workplace safety.³³ On the other hand, the New Zealand Council of Trade Unions compiled a list of ‘accident compensation horror stories’ on its website regarding the manner in which private insurers treated injured workers.

From 1 July 2000, the scheme was again nationalised by the new Labour Government and the ACC again returned to being the sole provider of workplace and non-workplace accident insurance. The Insurance Council (NZ) considers that workplace safety declined without the market discipline of having to pay higher premiums for a bad safety record.³⁴ A program was re-established whereby employers were offered financial

³¹ Andrew Holden, ‘Don’t take it personally: Kiwis take law out of the picture’, *Sydney Morning Herald* online, 22 January 2002. Downloaded from <http://www.smh.com.au>.

³² Editorial, ‘Hockey puts premium on risky business’, *Australian*, 22 January 2002, p 14.

³³ Tim O’Loughlin, ‘NZ way has its problems’, *Sydney Morning Herald* online, 26 January 2002. Downloaded from <http://www.smh.com.au>.

³⁴ Tim O’Loughlin, ‘NZ way has its problems’.

incentives to create safer work environments and undertake responsibility for managing workplace injuries.

It is understood that premiums for self-employed workers are now higher, prompting fears of broader increases.³⁵ There are also claims from business that the re-nationalised system is recreating 'a monopolistic, cost-plus anti-business state'.³⁶ However, there is a perception by others that some compensation payments are quite small in comparison with awards made in Australia.

From April 2002, things are set to change again. The *Injury Prevention Rehabilitation and Compensation Act 2001* maintains current entitlements but lump sum entitlements will be reintroduced (repealing the independence allowance) for permanent impairment of at least 10% resulting from injuries (with some qualifications in relation to certain injuries) that take place on or after 1 April 2002. Maximum payments will be \$100,000 for 80% or more impairment, adjusted annually in accordance with the CPI. The funeral grant has been extended.

The ACC will concentrate significantly on injury prevention and have greater focus on rehabilitation. More emphasis is to be given to dissemination of information regarding injury prevention.

A Code of claimant's rights and service standards for the ACC will be developed and approved by the Minister, following a formal process of wide public consultation. During the parliamentary debate on the new legislation, a Green Party member said that while that party applauded the overall direction of the reforms and the new Code, they did not go far enough and what was essentially required was a shift in culture within the ACC itself. Ms Bradford MP said that she had received letters from constituents complaining about being 'hounded over a protracted period' to get off compensation and had also sat through the hearing of submissions during Select Committee proceedings which indicated that the ACC did not have a helpful attitude towards claimants in their service delivery.³⁷

For the first time in 10 years, sexual abuse victims will be able to claim lump sum compensation for trauma. However, there is some concern that that there is potential for false claims to be made. That is because while claimants will have to go to a recognised

³⁵ Editorial, 'Hockey puts premium on risky business'.

³⁶ Editorial, 'Hockey puts premium on risky business' quoting an unnamed New Zealand businessman.

³⁷ Ms Sue Bradford MP, Green Party Gambling Spokesperson, Injury Prevention Rehabilitation and Compensation Bill 2001 (NZ), Second Reading Speech, 5 September 2001, *Green Speeches* at <http://www.greens.org.nz/docs/speeches>.

counsellor, they do not have to report the matter to the police and no prosecution action needs to occur in order to receive a payout. It has been argued also, that without a conviction, offenders are not required to help pay to compensate the victim.³⁸

3.5.1 National Compensation Scheme Proposal for Australia

The national compensation scheme envisaged by Mr Hockey would be similar to that operating in New Zealand – a no-fault system with capped payouts and the abolition of the common law right to sue.

Some Australian jurisdictions already have statutory compensation schemes in place for motor vehicle accident injury claims (eg Transcover in New South Wales) and workplace accident claims (eg WorkCover Queensland).

Initial support for a New Zealand type scheme has been offered by some business groups but the ICA has said that it considered that the New Zealand system had not worked as well as the insurance industry would have liked it to and that the burden had shifted to taxpayers.³⁹

One important obstacle to establishing a national compensation scheme is that, unlike New Zealand, Australia is a federation. The existing common law system is run by each state and territory as part of their constitutional responsibilities, so any significant alterations to the framework would require legislative change in each jurisdiction. While there are examples of intergovernmental cooperation, through the Council of Australian Governments (COAG), to achieve national uniform laws on important issues (eg model food safety laws; electronic transactions legislation), this usually comes after years of debate and after making concessions to state and territory governments. The urgency of the public liability insurance problem will not allow for protracted wrangling among governments.

Other Federal Government Ministers are uncertain about adopting the scheme envisaged by Mr Hockey. The Commonwealth Assistant Treasurer, Ms Helen Coonan, has suggested that capping payouts may not necessarily lead to more manageable premium costs and the New Zealand scheme had resulted in the New Zealand Government facing

³⁸ Opinion, 'New ACC legislation getting more than accidental going over', <http://www.stuff.co.nz>, 14 January 2002.

³⁹ Sharon Kemp and Annabel Crabb, 'Compensation scheme comes under fire', *Age* online, 22 January 2002. Downloaded from <http://www.theage.com.au>.

an unfunded liability of \$4.9 billion.⁴⁰ The New Zealand population is only 3 million. Senator Coonan said that the Federal Government had made no commitment to such a scheme and was considering a range of options. It is also unclear whether Mr Hockey remains a strong advocate of the New Zealand approach noting that there were schemes in other countries that could be looked at.⁴¹

The Queensland Premier, the Hon Peter Beattie, said the New Zealand type scheme mooted by the Federal Minister for Small Business, needs careful consideration to ensure that individuals are not disadvantaged and that the State Government was prepared to work with the Commonwealth to develop a national approach to appropriate solutions. He did, however, support the concept of some limitation on damages awards.⁴² The Queensland Opposition is understood to have suggested a ban on the current fashion of 'no-win-no-fee' advertising by the legal profession and a cap on personal injury payouts.⁴³

There is resistance from the legal profession. The QLS President, Mr Joe Tooma, has said that plans for a cap on insurance payouts were simplistic and unlikely to lower premiums.⁴⁴ The President of the Australian Plaintiff Lawyers Association, Mr Rob Davis, supports the current system of common law damages on the basis that it forces the negligent party to wear the costs whereas any statutory based compensation scheme would redistribute loss to the taxpayer.⁴⁵ There have also been suggestions that such schemes create disincentives for businesses to ensure that their risk management practices are appropriate. It appears that under the New Zealand scheme, premiums on employers are based on risk to employees.⁴⁶

Mr Davis argues that a right to bring a common law action is a feature of a democratic country and should not be abolished as a reaction to a short-term rise in premiums. The

⁴⁰ Editorial, 'Solving the public insurance crisis', *Courier-Mail*, 23 January 2002, p 14.

⁴¹ Chris Griffith and Sean Parnell, 'Insurance taskforce to look at payout cap', *Courier-Mail*, 24 January 2002, p 7.

⁴² Chris Jones, 'Liability costs to weaken business', *Courier-Mail*, 28 January 2002, p 3.

⁴³ Chris Griffith, Sean Parnell, 'Insurance taskforce to look at payout cap'.

⁴⁴ Chris Jones et al; 'Insurance payout crisis'.

⁴⁵ John Breusch, 'Insurance and the balance of payments', *Australian Financial Review*, 25 January 2001, p 10.

⁴⁶ Damien Carrick, 'The Law Report', *Radio National*, 19 February 2002. Transcript downloaded from <http://www.abc.net.au/rn/talks> on 1 March 2002.

common law is a way in which ordinary people can seek relief for wrongs caused by others and be fairly compensated for their losses. He also stated that the threat of litigation can be a powerful incentive for potential defendants to maintain acceptable standards in the conduct of their activities and that damages awards represent a penalty for those who fail to do so. Mr Davis commented that society is safe today because of our justice system. We now eat safe food, our children have safe toys, and we drive safe cars.⁴⁷

Any replacement system, Mr Davis argues, would need to have the same features of fairly compensating victims of negligent conduct and imposing a penalty on those who do not comply with acceptable minimum safety standards.⁴⁸ APLA's Queensland President, Mr Stephen Roche, argues that Queensland continues to have a bad safety record in the area of public liability and the current system reinforces responsibility.

It is understood that evidence from a 1999 United States study, undertaken by an insurance director for the Consumer Federation of America, showed that capping payouts and limiting the ability to bring common law actions had not resulted in reduced premiums. The study examined insurance rates and loss costs in all US states between 1985 (when the country was experiencing a liability crisis and limits on the ability to sue were introduced) and 1998. This was because the underlying problem was not escalating legal actions but the economic cycle of the insurance industry.⁴⁹

It also needs to be noted that not all claims on insurance companies result in legal action and, as the Queensland Insurance Taskforce has reported, it is actually difficult to ascertain from available data, the proportion of payouts that are an outcome of court awards. Also, many insurers consider that numerous smaller claims can impact on premiums, in which case, capping payouts would not really help.⁵⁰

3.6 FORMER AUSTRALIAN PROPOSALS FOR A NATIONAL SCHEME

The Commonwealth Minister for Small Business's suggestion in January for a national scheme is not the first time that Australian governments have considered the idea.

⁴⁷ Linda Morris and Cynthia Banham, 'Risky Business'.

⁴⁸ Rob Davis, 'Leave the common law alone versus hold a public inquiry', *Australian Financial Review*, 25 January 2002, p 62.

⁴⁹ Tanya Targett, 'UNCOVERED – The blame game's hidden cost', *Courier-Mail*, 12 January 2002, p 25, quoting Mr Rob Davis, APLA President.

⁵⁰ Queensland Government. *Liability Insurance Taskforce Report*, pp 32-33.

Former Australian Prime Minister, Gough Whitlam, regarded his failure to implement a national rehabilitation and compensation scheme as one of his greatest political disappointments. He believed that even 'Labor lawyers' resisted any moves to introduce such a scheme and raised many objections to a Senate Committee Inquiry that was established to consider the proposal. The Senate Committee's report queried the effect of the scheme on the insurance industry and suggested constitutional problems could surface. However, a bill to implement the proposal was ready for the November 1975 sittings – just before the demise of the Whitlam Government that month.⁵¹

The Hawke Labour Government again revived the nationalised compensation scheme idea when it came to power in 1983 but it faded out of the agenda until late last year after the HIH and September 11 events.⁵²

4 COMMONWEALTH GOVERNMENT REACTION

On 3 February 2002, the Federal Government announced that it was prepared to host a national forum of Ministers to gather data on premium increases and share information, and arrive at a range of proposals to be considered by COAG in March 2002. The forum will enable governments to consider the various reasons for the recent premium increases and, possibly, to develop a uniform agreement. While Assistant Treasurer, the Hon Helen Coonan, emphasised that the public liability insurance issue was one of State rather than Federal responsibility, she said that the Federal Government was willing to provide a forum to facilitate a coordinated approach across jurisdictions. However, reforms, such as those to the common law, would have to come from State and Territory legislation and any decisions, such as capping claims for compensation, must be made by those governments.

The proposed forum has received general support from State Premiers. Queensland Premier, the Hon Peter Beattie MP, has welcomed the offer but the Queensland Treasurer, the Hon Terry Mackenroth MP, has criticised the Federal Government's claim that the problem is solely one for the states and stated that a national approach is required, in which the Commonwealth must play a role. That sentiment is one echoed by the NSW Premier.⁵³

⁵¹ Editorial, 'Hockey puts premium on risky business'.

⁵² Editorial, 'Hockey puts premium on risky business'.

⁵³ Malcolm Cole, 'States hit insurance summit's agenda', *Courier-Mail*, 5 February 2002, p 6.

Many stakeholders want a broader inquiry comprising insurers, lawyers, and other interest groups.⁵⁴ The ICA wrote to the Prime Minister and to each State Premier and Territory Chief Minister in December 2001, suggesting that such a forum should look at a range of issues, solutions and involve all relevant stakeholder representatives. The President of the APLA considers that any inquiry into liability insurance must address common law reform issues, legal fees and access to justice as well as matters such as risk management and community education.⁵⁵

In addition, there have been suggestions from insurance, property and banking groups that the Commonwealth Government should underwrite a fund to protect against terrorist attacks. Since the 11 September 2001 terrorist attacks, insurers have been hesitant to cover acts of terrorism. The lobby groups propose that there be a pooled fund modelled on a British scheme, Pool Re, where owners pay levies and the Government guarantees any costs in excess of the amount raised in the event of a payout. The Department of Trade is a reinsurer of last resort. However, there are claims that the British scheme is losing money and is not commercially viable.⁵⁶

5 QUEENSLAND GOVERNMENT ACTION

The Queensland Premier, Mr Beattie, has been concerned that premium rises are threatening the existence of many non-profit community organisations. The Premier has also joined other governments in asking the insurance industry to justify those increases ahead of the national forum and has claimed that it was taking advantage of the September 11 terrorist attacks and the collapse of HIH Insurance.⁵⁷ It was important, the Premier said, that funds granted to non-government bodies to perform vital services were not diverted into paying insurance costs.⁵⁸

⁵⁴ Andrew White, 'Our lifestyle "at risk": Minister calls national insurance crisis talks', *Australian*, 4 February 2002, p 1.

⁵⁵ Rob Davis, 'Leave the common law alone versus hold a public inquiry'.

⁵⁶ Tanya Taggart, 'UNCOVERED – The blame game's hidden cost'.

⁵⁷ Jamie Walker, 'Beattie targets rip-off insurers', *Australian*, 11 February 2002, p 6.

⁵⁸ Hon Peter Beattie MP, Queensland Premier and Minister for Trade, 'Government Insurance Lifeline for P&Cs, Community Groups', *Ministerial Media Statements*, 17 December 2001.

5.1 THE QUEENSLAND SITUATION

A survey undertaken by Commerce Queensland of 1,400 mainly small to medium sized businesses revealed that around 25% had faced premium increases of around 50% in the past year.⁵⁹ Most of the impact appeared to fall on tourism operators (many of whom have never had any claims on their public liability insurance) and event organisers. Some businesses have considered raising prices or sacking employees to off-set these costs.⁶⁰

In September 2001, the State Government asked Queensland Events Corporation (QEC) to investigate the difficulties being experienced by event organisers. Deloitte Touche Tohmatsu undertook a survey of the industry and produced a report in December 2001. The survey indicated that 41.6% of respondents had faced increases in premiums of more than 50% in the past three years and that 21% would have to cancel or scale down their events due to the cost or lack of availability of insurance. The Deloitte survey noted that there is competition among insurers to cover major events (eg the Indy, Goodwill Games) and those are more likely to find cover at competitive rates than minor community festivals whose organisations often lack information to allow underwriters to properly assess the risks involved and whose scale of financial return does not warrant the use of international insurance agents.⁶¹

In terms of sport and recreation organisations, the outdoor recreation bodies, many of whom are community not-for-profit organisations, have been hit hard with some experiencing rises of between 40-900% and others not being able to obtain insurance for some of their 'high risk' activities.⁶²

As for the not-for-profit community sector, a Queensland Council of Social Services Survey of its 800 members, released in February 2002, reported that 60% of 52 respondents indicated that premiums had doubled in the past year, a third of whom reported rises of more than 100%. The average rise was between 41-50%.⁶³ In addition, the Council had been contacted by some organisations who could not find an insurer. A number of respondents experiencing premium rises said that the shortfall would be made

⁵⁹ Chris Jones, 'Liability costs to weaken business', *Courier-Mail*, 28 January 2002, p 3.

⁶⁰ Chris Jones, 'Liability costs to weaken business'.

⁶¹ Deloitte Touche Tohmatsu, *Queensland Events Corporation Event Insurance Review*, December 2001, as reported in the *Liability Insurance Taskforce Report*, pp 16-17.

⁶² Sports Federation of Queensland, *2001 Sports Insurance Survey Summary*, 2001.

⁶³ Queensland Council of Social Services, *The Cost of Community Service – Insurance Survey 2002*, February 2002.

up by measures such as using up cash reserves, reducing expenditure in other areas (eg training), cancelling events, or paying for the increases out of their operational budget (meaning a diversion of funds from their intended purposes or a reduction in services). Others were increasing their fund raising activities while some were going to the extreme of stopping taking out premiums for things such as building and contents and to cover volunteers. The Council noted that the premium increases have not been accounted for in funding from the Government.⁶⁴

Adding to the current insurance problem is the imminent requirement for organisations registered with Volunteering Queensland to have adequate public liability insurance cover or have their membership cancelled. The move has been considered necessary to ensure that individuals wanting to do volunteer work through organisations are protected while providing services. Given that a number of bodies have indicated that they will have difficulty in complying, Volunteering Queensland said it may approach the Government in six months time to request assistance for organisations having difficulty paying premiums.⁶⁵

5.2 RECENT QUEENSLAND GOVERNMENT INITIATIVES

In December 2001, the Queensland Government pledged to underwrite public liability insurance premiums for Parents and Citizens' Associations (P&Cs), which faced premiums as high as \$1 million over the next year.⁶⁶ However, recognising that the problem cannot be dealt with on a piecemeal basis, the Government also established a Liability Insurance Taskforce to investigate the impact of public liability insurance premiums.

6 LIABILITY INSURANCE TASKFORCE INTERIM REPORT

The main role of the Queensland Liability Insurance Taskforce is to advise the Queensland Government on appropriate strategies for addressing the problem of increasing public liability insurance premiums and to work with the insurance industry, community groups, the legal profession, and other relevant stakeholders to devise feasible solutions. It will also have an oversight role regarding the implementation of any strategies already approved.

⁶⁴ Queensland Council of Social Services, *The Cost of Community Service – Insurance Survey 2002*, February 2002.

⁶⁵ 'Insurance a must: volunteering body', *Southern Star*, 23 January 2002, p 12.

⁶⁶ Spann, 'Malled: Insurers shut out shops'.

The Taskforce met for the first time on 23 January 2002 with an updated terms of reference, including the idea of caps on compensation payouts. An Interim Report was released on 18 February 2002 (the [Liability Insurance Taskforce Report](#)).⁶⁷ State Cabinet has agreed to implement all 19 recommendations contained in it. In line with the Terms of Reference, those recommendations cover insurance arrangements, risk management and law reform.

More extensive consultation is set to occur, following the tabling of the Interim Report. However, the Taskforce's focus up to this point in time has been on finding some strategies to assist the P&Cs and the not-for-profit sector. That is because, unlike small businesses, those bodies lack the ability to pass on premium increases to consumers and are, therefore, more vulnerable to fluctuations in insurance prices.⁶⁸

While there has been some agitation in the community for reforms to the common law to contain damages awards and curb solicitor advertising, any common law reforms will need a nationally coordinated approach that will take considerable time. In the meantime, more immediate strategies in other areas need to be considered to assist those organisations being affected the most.

6.1 TERMS OF REFERENCE

The Terms of Reference requires the Taskforce to –

- develop and implement arrangements to extend the Queensland Government Insurance Fund to cover State School P&Cs;
- examine the viability of establishing a voluntary insurance pool for not-for-profit community organisations which are not eligible to join the Queensland Government Insurance Fund;
- develop, in conjunction with industry and the legal profession, training packages on appropriate types of cover and risk management practices; and
- consider issues surrounding limitation of damages in personal injuries actions (and liaise with governments in other jurisdictions to develop a national approach) and factors affecting common law injury costs.⁶⁹

⁶⁷ The Report is available on the Department of Premier and Cabinet website at <http://www.premiers.qld.gov.au/about/pcd/economic/insurancetaskforce.pdf>.

⁶⁸ *Liability Insurance Taskforce Report*, p ii.

⁶⁹ *Liability Insurance Taskforce Report*, p 11.

6.2 CAUSES OF PUBLIC LIABILITY INSURANCE PREMIUM INCREASES

The Taskforce concluded that the problems surrounding public liability insurance, particularly rising premiums, are a result of a combination of factors, as considered in Section 2 of this brief. The increasing number of personal injury claims is a major driver of premium price increases but a range of other factors have also had an impact on insurers and prices to various degrees. Those include –

- overall declining profit margins for the insurance industry;
- major rationalisation and industry adjustments, including a dropping out of insurers, after fierce competition and acceptance of bad risks during the 1990s (see Section 2.1), such that competition is now significantly reduced;
- lower investment returns due to a global economic downturn;
- new APRA solvency requirements under the new Commonwealth *Insurance Industry Reform Act* (see Section 2.2); and
- poor risk management practices.

It appears that the collapse of HIH Insurance and recent terrorist attacks have brought the underlying problems to a head.

The Taskforce reported that the APRA data indicated that Queensland has fared better than the rest of the country. While losses have been made, they have not been as large as the national average. In 2000, while Queensland accounted for 14.6% of national gross premium revenue, it accounted for only 12.4% of claims expenses.⁷⁰

6.3 SCOPE OF THE PROBLEM

The Taskforce found difficulty in determining the scope of the public liability insurance problem due to lack of available data sources. However, surveys such as those undertaken by Deloitte, Commerce Queensland and the Queensland Council of Social Services (considered above), indicate that premium rises have had broad community impacts. The Taskforce also noted from discussions with stakeholders, that there are groups, including some not-for-profit organisations and some small businesses, that have faced only minor increases in premiums. On the other hand, relatively soft-adventure operators (eg camping grounds, transport operators) also reported large increases in premiums and inability to obtain cover. Thus, the bodies affected and extent of impact seem somewhat unpredictable.

⁷⁰ APRA Statistics 1996-2000.

Overall, it was considered that the main adverse impacts were being felt by businesses engaged in providing 'high risk' activities (eg adventure tourism operators with some reporting increases up to 5000%) and those with bad claim histories, and by community bodies offering activities involving the public, such as dances and fetes.⁷¹

6.4 PARENTS AND CITIZENS ASSOCIATIONS

In December 2001, the Government announced that it would extend the Queensland Government Insurance Fund arrangements to all 1,300 State school P&C Associations from March 2002. The Taskforce worked closely with the P&Cs regarding the coverage. The Fund is a form of 'self-insurance' where participating government agencies pay an annual premium to cover the likely cost of overall claims. Thus, there will now be guaranteed coverage for P&Cs and the premiums they will pay, along with government agencies, will be less than what they would otherwise be paying to a private insurer.

Essentially, the outcome is one of government underwriting which the Taskforce has considered should be a 'once off' arrangement and not extended any further than the P&Cs. The P&Cs were regarded as a 'special case', given that they were statutory bodies attached to the Education portfolio. The Taskforce did not consider it to be feasible to extend such arrangements to not-for-profit community bodies as it could expose the State budget, and ultimately taxpayers, to unknown future liabilities.⁷²

6.5 NOT-FOR-PROFIT COMMUNITY SECTOR INSURANCE ARRANGEMENTS

The Taskforce considered a number of options to assist not-for-profit community organisations to obtain appropriate insurance cover and to reduce the cost of cover to those groups. While maintenance of the status quo was one option, given the theory of some that the situation would rectify itself, the Taskforce considered that this approach was not appropriate as many factors suggested that high premiums will remain for at least a few years yet.⁷³ It favoured options involving the groups banding to form a group purchasing insurance arrangement or, if this was not viable, entering into their own self-insurance arrangements. Both options would meet the objectives identified by the Taskforce as being important.

⁷¹ *Liability Insurance Taskforce Report*, pp iii-iv; Chapter 3.

⁷² *Liability Insurance Taskforce Report*, pp 22-23.

⁷³ *Liability Insurance Taskforce Report*, p 19.

Those objectives are: enabling all not-for-profit community groups to obtain more affordable appropriate insurance cover; providing a mechanism for coordinated risk management; achieving long-term sustainability; causing minimal distortions in the insurance market; and preventing the transfer of financial risk to government.⁷⁴

6.5.1 Insurance Broker Packaged Insurance

The Taskforce considered the option of the Government seeking to have an insurance broker to design packaged insurance policies especially for not-for-profit community bodies. The idea was dismissed because underwriters, who ultimately approve the insurance the broker wishes to provide, may not provide brokers with the required flexibility for insuring not-for-profit bodies. After all, underwriters are seeking to minimise exposure at an ever increasing level.⁷⁵

6.5.2 Group Purchasing of Conventional Insurance

This option has not-for-profit community groups collectively buying an overarching insurance policy from a broker or an underwriter with the insurer bearing the risks. The Government would act as a facilitator. Such a move would reduce prices of premiums for those groups (by around 15%) and would provide a good basis for coordinated risk management strategies. Individual premiums could be worked out on the basis of all members paying the same premium or at different rates according to their individual risk profiles and claims histories. However, if the scheme was a voluntary one, with groups free to come and go as they choose, financial benefits of pooling could be lost.

6.5.3 Pooling with Self Insurance

This option, like the previous one, involves the groups banding together to pool funds but instead of purchasing conventional insurance, the collective would cover the costs of claims themselves from that pool of funds. It would be overseen by an administrator to determine costs and other matters and, also, to apply insurance rating factors based on risk assessment to rate each individual member body to determine the pool of funds needed to meet liabilities. The Queensland Government Insurance Fund is an example of such a scheme.

⁷⁴ See *Liability Insurance Taskforce Report*, Chapter 4.

⁷⁵ *Liability Insurance Taskforce Report*, p 19.

The benefits of this option are the ability to smooth out premium rises; cost savings of around 30-40% (depending upon participation levels); and the possibility of having incentives for those bodies who adopt good risk management practices and have good claims histories. The drawback, however, is that member bodies may be exposed if there is a shortfall between premiums collected and liabilities faced but such could be countered by appropriate reinsurance placements. There may also be problems with the sustainability of the scheme if it was voluntary.

6.5.4 Government Underwriting Liability Insurance Risks

A further option is for the three levels of government to underwrite liability for not-for-profit community groups. An example is the assistance currently being offered by the State Government to the P&Cs. As noted earlier, the danger with this solution is potential exposure of Queensland taxpayers to large costs well into the future.⁷⁶ That could eventually impact on the delivery of other important government services. Thus, the Taskforce did not consider this option to be viable beyond the assistance given to the P&Cs.

A Discussion Paper prepared by the Tasmanian Department of Treasury and Finance concluded that full and partial government subsidies would be unsustainable.⁷⁷

6.5.5 Preferred Approach

The Taskforce considered that, as a first step, the Government should investigate the feasibility of the **group purchasing option** for the not-for-profit community sector with the Government playing a brokering role between the relevant community groups and the insurance provider(s). The crucial elements for success would be a provider(s) willing to carry the risk and provide cover for the whole not-for-profit community sector; and a sufficiently large number of participating groups to reap the benefit of economies of scale and to ensure continued sustainability of the scheme.

There are a number of strategies to achieve full participation, ranging from legislation to make all groups join the scheme to incentive mechanisms. The downside of a compulsory scheme, however, is that it removes the incentives for each body to adopt good risk management practices.

⁷⁶ *Liability Insurance Taskforce Report*, p 21.

⁷⁷ Tanya Taggart, 'UNCOVERED – The blame game's hidden cost'.

The Taskforce recommended that the Government further investigate the possibility of facilitating a group purchasing arrangement for this sector and to call for Expressions of Interest from those organisations to determine the level of support for such an arrangement. Feedback should also be sought from those bodies concerning whether any such arrangement should be compulsory or not. It was suggested that if these arrangements were not successful, then the option of self insurance may be worth considering.

When the Taskforce Report was released, the Deputy Premier and Treasurer, the Hon Terry Mackenroth, stated that the Government would soon place advertisements in newspapers calling for Expressions of Interest from any groups wanting to participate in group insurance arrangements. Mr Mackenroth considered that the thousands of community bodies in Queensland which were not able to access arrangements already in place (eg through churches or sporting groups) would benefit from bulk buying.⁷⁸ The Government would put forward the proposed scheme at the national summit. The insurance industry has said that it needs to know more details about the scheme before it decides whether or not to support it.⁷⁹

The Taskforce Report noted that the soaring premiums have also impacted on certain small business sectors, especially tourism operators, and that in its second stage of its work, the Taskforce will focus on the potential to extend group purchasing to certain small business groups. Some already have group arrangements in place.

6.6 RISK MANAGEMENT STRATEGIES

The Taskforce considered that risk management strategies were vital in reducing personal injuries claims, given that the rising incidence of such claims were a significant factor contributing to higher costs for insurers and consequent rises in premiums for consumers. Strategies were needed to identify and analyse risks and to deal with them. For example, an organisation might choose to avoid high-risk activities or share part of a risk with another body through contractual arrangements.

The Report noted anecdotal evidence that many bodies do not address, or properly address, potential risks posed by their operations and considered that the time will soon come when bodies that cannot show that they have risk management practices in place will have considerable difficulty in obtaining insurance. Community bodies, in particular,

⁷⁸ 'State Government Acts on Taskforce Report', *Ministerial Media Statement*, 18 February 2002.

⁷⁹ Ashleigh Wilson, 'Bulk-buy insurance plan to beat rises', *Australian*, 18 February 2002, p 5.

rarely have the resources or capacity to adopt proper risk management and many are volunteer bodies whose members have no relevant experience.

The Taskforce recommended that the Government (State and Local) play a role in providing assistance to community bodies and small businesses, particularly in providing information, education and training in risk management. An example of work already undertaken is the manual developed by the then Office of Sport and Recreation in 1998 to enable organisations to increase their awareness of risk management and to help them to establish proper risk management processes. The Brisbane City Council and the Logan and Ipswich City Councils are currently distributing training programs for community bodies containing guidelines on how to develop risk management plans and policies.⁸⁰

It was also recommended that the Government implement incentives for better risk management, for example, by making it a condition of funding for government grant programs that community bodies adopt risk management programs.

It is also interesting to note that the Victorian Government has agreed to financially assist tourism organisations to improve risk management procedures and to share information and resources. The Taskforce stated that it would seek advice from Victoria on the strategies being considered.

In releasing the Taskforce Report, the Queensland Premier announced that the Government would commence working on risk management education and training programs for the community and small business sector with a view to assisting the insurance industry and community organisations in developing user-friendly guidelines on simple steps to improve their risk management practices.⁸¹

6.7 LAW REFORM – LEGAL PROFESSION AND THE COURT SYSTEM

The Taskforce also considered the argument that increased advertising by lawyers (especially the ‘no-win-no-fee’ advertisements) and increasing damages awards by the courts were prominent factors in the rising cost of public liability insurance. It found, however, that while these were having some effect on premiums, they were not the only factors and do not explain why the premium increases have been so large in recent times.

⁸⁰ *Liability Insurance Taskforce Report*, pp 27-30.

⁸¹ ‘State Government Acts on Taskforce Report’ *Ministerial Media Statement*, 18 February 2002.

It also found that Queensland courts have been more conservative than the Victorian and New South Wales courts in awarding damages for personal injuries.⁸²

Conclusions about whether increasing claims on insurers mirrored rising public liability lawsuits were limited by the lack of statistical data and information about public liability claims in the courts. It was hard to ascertain what proportion of insurance claims were or were not the result of court awards. There was also the problem that costs of claims paid out by insurers may also include investigation and administration costs which would have to be done anyway whether or not the matter proceeds to court or a lawyer is engaged. It was also difficult to determine what proportion of costs were attributable to the legal costs of the insurer as opposed to those of the claimant.⁸³ The Taskforce believed that more information must be collected on the foregoing matters in order to inform further work on legal reforms.

The Taskforce was concerned that while there increasing calls for capping damages awards, there needed to be a balance struck between the rights of individuals to obtain adequate compensation and the community's capacity to pay the costs of higher premiums. In addition, if premium rises were driven by an increasing number of small claims, which some insurers believe has occurred, then capping would have little effect on prices. The Taskforce also indicated that (as examined earlier in this Brief), the United States tort law reforms (including capping of damages) have not resulted in lower premiums for consumers.

An interesting suggestion made by the Taskforce was that insurers could consider imposing an excess on premiums in the policy similar to that imposed on young motor vehicle drivers.

The Taskforce also considered the following other measures –

- a national 'no-fault' compensation scheme similar to that in New Zealand but it was noted that the growing unfunded liability of the scheme was placing an upward pressure on premiums;
- a statutory compensation scheme, similar to WorkCover, to set maximum payouts for particular heads of damage and types of injury (eg \$10,000 for a limb). Under Queensland's statutory schemes (the *WorkCover Queensland Act 1996* and the *Motor Accident Insurance Act 1994*), damages, costs and premiums have been held steady while qualified access to pursuing court action remains;

⁸² *Liability Insurance Taskforce Report*, p vii.

⁸³ *Liability Insurance Taskforce Report*, pp vii, 31-36.

- procedural reforms to reduce the legal cost component by encouraging early resolution of matters (eg increased use of mediation processes, active case management). While already provided for in Queensland under the *Uniform Civil Procedure Rules 1999*, the Taskforce considered that there is further room for improvement;
- structured settlements where periodic payments are made over a long period of time rather than provided by way of a lump sum, particularly where special medical care is required on an ongoing basis;
- abolition of juries for damages actions (given that juries often provide damages awards of larger amounts than judges). The Taskforce noted that this would leave the issue of quantum to the judge;
- curbing lawyer ‘no-win-no-fee’ advertising but this may breach trade practices legislation and National Competition Policy and needs further discussion at a national level. The New South Wales Government has introduced new rules to prevent solicitors from advertising on television, radio or in hospitals in an effort to contain rising insurance costs.⁸⁴

The Taskforce Report recommended that the issue of law reform required a national approach and should be referred to COAG for further discussion and information sharing with the possibility of considering nationally consistent legislative changes. Any options considered in relation to changes to the common law would take some time to achieve, particularly as considerable community consultation would be needed. However, procedural reforms at a State level, as considered above, would be quicker and easier to achieve and it was recommended that the Government examine a range of possible improvements at this level to reduce overall costs.

The Taskforce Report separately recommended that because of the difficulties that some incorporated associations were having in obtaining insurance, the legislative requirements for those bodies to hold public liability insurance should be reviewed.

Further recommendations were –

- that solicitor advertising be examined in the context of National Competition Policy review of the legal profession currently occurring in Queensland;
- that further research occur concerning whether damages capping and/or abolishing common law rights can result in lower premiums; and

⁸⁴ Linda Morris and Geesche Jacobsen, ‘Advertising curbs put brakes on the “ambulance chasers”’, 28 February 2002, *Sydney Morning Herald* online. Downloaded from <http://www.smh.com.au>.

- that the Government examine ways that accurate and reliable information on litigation rates can be obtained.

7 RESPONSES BY OTHER GOVERNMENTS

The Queensland Insurance Taskforce also considered responses to the public liability insurance problem by governments in other jurisdictions, apart from the Commonwealth's recent call for a national summit, considered earlier. They are as follows –

- The **Victorian** Government has –
 - held a forum with other governments, the Insurance Council of Australia, community organisations and small business. Separate meetings were held for not-for-profit community bodies and small businesses respectively regarding the feasibility of group insurance arrangements and risk management strategies. A working group has been established to focus on pooled insurance product arrangements for not-for-profit community groups.⁸⁵ It also supports the concept of a national approach to the issue;
 - the insurance industry has been asked to disclose its accounts concerning public liability payouts and to prove grounds for increased premiums on a 'confidential basis' before the Victorian Government sought to impose any reforms, a call that has so far been resisted by the industry;⁸⁶
 - in early 2002, the Victorian Government provided \$100,000 to assist the State's adventure tourism industry. The fund is intended to be used to implement risk management strategies in high-risk adventure tourism businesses, some of which faced premium rises of up to 1000%, to demonstrate to insurance companies that businesses are proactively seeking to minimise risk.
- The **New South Wales** Government is understood to have expressed reservations about a national scheme similar to that in New Zealand but wished to consider the matter further.⁸⁷ It has pressed for a national summit but urged that discussions not be restricted to public liability insurance issues. The Taskforce Report noted that it appeared that a working party had been set up to consider insurance issues with a report to be completed in early 2002 detailing what options may be feasible to deal

⁸⁵ *Liability Insurance Taskforce Report*, p 37.

⁸⁶ Gabrielle Costa, 'State tells insurers to justify increases', *Age*, 31 January, 2002. Downloaded from <http://www.theage.com.au>; *Liability Insurance Taskforce Report*, p 37.

⁸⁷ Kathy Lipari, 'Premium costs to force insurance overhaul'.

with the problem. As noted above, the Government has moved to curb solicitor advertising;

- The **South Australian** Government appointed a Volunteer Risk Management Working Group to identify strategies to help volunteer bodies in risk management and accessing insurance and to provide advice to Government. The recent State election has caused some delays in its proceedings;
- The **Tasmanian** Department of Premier and Cabinet has established a working group to develop and deliver information seminars and materials to community-based organisations, not-for-profit groups and small business. The main focus is on improving risk management of its not-for-profit community groups rather than providing any other forms of specific assistance;⁸⁸
- The **Western Australian** Government has a five-point plan in place to address the issue and other measures including –
 - considering the possibility of capping negligence claims, if a working party of government officers determines that this was a feasible option;⁸⁹
 - the introduction of legislation providing qualified immunity from liability from personal injuries negligence actions for volunteers;
 - education programs to promote risk management strategies to small business, volunteer groups, sport and recreation bodies and to provide relief from high premiums;
 - requiring government agencies to review the insurance coverage required in Government contracts; and
 - asking the Commonwealth to extend the ACCC inquiry to specifically look at public liability insurance issues;⁹⁰
- The **Australian Capital Territory** Government has proposed a Taskforce to consider the issue; but it is yet to be established. However some discussions have commenced within Government and the community;
- In the **Northern Territory** no action has yet been taken as there appears not to be the same level of community reaction as in other jurisdictions.

⁸⁸ *Liability Insurance Taskforce Report*, p 39.

⁸⁹ Roger Martin, 'Premier wants cap on claim payouts', *Australian*, 6 February 2002, p 2.

⁹⁰ *Liability Insurance Taskforce Report*, p 38.

8 `CONCLUSION

As the Queensland Liability Insurance Taskforce Report has found, the causes of the current public liability insurance 'crisis' are varied and interrelated. While the growing number of large damages awards are having some impact, they are not the sole reason for the current problems. There appears to be no simple and quick solution to the difficulties. The Queensland Government, along with other governments, is attempting to develop strategies that can be implemented in the immediate future to assist bodies, such as not-for-profit community organisations, most affected. One approach that appears feasible as a first step, is for governments to broker group insurance purchasing arrangements. Any moves for common law reforms are ones for the long-term and require further discussion at a national level.

APPENDIX – MINISTERIAL MEDIA STATEMENT

State Government Acts on Taskforce Report

Mr Peter Beattie MP, Premier and Minister for Trade

18 February 2002

State Cabinet today agreed to implement all 19 recommendations in the interim report of the Public Liability Insurance Taskforce, Premier Peter Beattie said.

Releasing the report, Mr Beattie said the initiatives would help alleviate the burden on community groups confronted by spiralling insurance costs.

He said the recommendations focus on three key areas - insurance arrangements, risk management and law reform.

“In recent times public liability insurance costs for many vital community organisations have gone through the roof,” Mr Beattie said.

“Some have had their premiums skyrocket by as much as 1,000 percent and worse still others have had to consider closing their doors because they cannot obtain any coverage at all.

“The reasons for this are many and varied but include a marked increase in the number of claims and claim payouts, the declining availability of insurance coverage and domestic events such as the collapse of HIH and international events such as September 11.

“It is a major problem throughout Australia and unfortunately there are no quick fix solutions.

“We established the Taskforce to try and determine the extent of the problem in Queensland and to see what part the State Government could play to help groups in our community who have been the worst affected.

“This interim report is a result of their work to date and includes a number of recommendations which will assist groups both now and in the future.”

Mr Beattie said the State Government would start work on risk management education and training packages for the community and small business sector.

“Proper risk management is one simple hands-on way that organisations can work to reduce their premiums,” Mr Beattie said.

“However, many community-based organisations are run by volunteers who have no experience and training in risk management or have trouble in accessing information on the issue.

“We will work with the insurance industry and community organisations to develop user-friendly guidelines on simple steps they can take to improve their risk management practices.”

The Deputy Premier and Treasurer Terry Mackenroth said that, in line with the recommendations, the State Government would also soon place advertisements in newspapers throughout Queensland calling for expressions of interest from any groups wanting to participate in group insurance arrangements.

“There are thousands of community organisations in Queensland and while some of these are already grouped together under the auspices of different churches or sporting groups many are also stand alone organisations,” he said.

“By bringing these stand alone groups together we hope to help them broker an overarching insurance policy and through bulk buying achieve costs savings in premiums for all the participants.”

Other recommendations include:

- the issue of law reform be referred to the Council of Australian Governments (COAG) to explore the development of a national approach to limiting common law damages for personal injury;
- the Government examine a range of improvements to the current legal system in order to reduce overall costs covering aspects such as pre-litigation rules and processes, review of solicitors costs and the benefits of structured settlements;
- that lawyer advertising, in particular ‘no win, no fee’ advertising, be examined in the context of the review of the legal profession currently underway in Queensland;
- further research be undertaken into determining whether capping damages claims and or abolishing common law rights can result in lower premium costs.

Mr Mackenroth said he would take the report to Canberra next month for a meeting belatedly convened by the Commonwealth Government after months of inaction.

“We are actively playing our part in trying to address this growing problem and will be calling on the Commonwealth Government to stop sitting on their hands and do the same,” he said.

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