

REFORM OF THE LAW OF NEGLIGENCE: BALANCING COSTS AND COMMUNITY EXPECTATIONS

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I INTRODUCTION

Over the last nine months, Australian governments have recognised the need to respond to some critical issues relating to public liability insurance and the effect that the accessibility and affordability of this type of cover has on many groups in the community.

The Insurance Council of Australia ('ICA') and its members have welcomed the commitment of all governments to address these problems and have endorsed the decision of the ministerial meeting on public liability on 30 May 2002 which included a commitment to 'a range of targeted and broad based reforms designed to contain the costs of claims and to deliver predictability for the pricing of insurance products'.¹ In other words, the ministers accepted that there was a case for reform.

The pressure for reform has principally come not from insurers, but from the community, whose daily lives have been affected by this problem. The insurance industry has provided input and comment on what it believes is needed to help address the problems facing this class of insurance. To the extent that insurers have put forward suggestions for limiting damages in certain circumstances, it has been to assist governments in the difficult balancing act between fair compensation and community access to adequate protection.

II THE NEED FOR REFORM

Two key areas in need of attention are the lack of certainty in outcomes and the significant increases in claims costs. The importance to insurers of a high level of certainty in terms of when liability exists, cannot be overstated. The liability classes are 'long tail', high risk, low return markets and in the broadest

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1 Commonwealth of Australia, *Joint Communique Ministerial Meeting on Public Liability, Melbourne 30 May 2002* (2002), <<http://assistant.treasurer.gov.au/atr/content/publications/2002/20020530.asp>> at 17 November 2002.

terms insurers are seeking predictability and stability in order to be able to achieve commercially acceptable returns for the considerable capital invested. Insurance is no different from any other commercial sector: the private capital invested in these businesses must attract commercially acceptable returns for the capital to remain invested. This has not been the case for liability classes of business in recent years. As the Australian Competition and Consumer Commission noted in its *Insurance Industry Market Pricing Review* in March this year: 'It is generally accepted that shareholders require higher returns to compensate for the risks involved in insurance underwriting'.²

Consistency is important not only in terms of legal principle, but also in practical terms for insurers. Substantial differences between jurisdictions reduce the predictability of risk and increase the transaction costs for insurers, all of which lead to higher costs and, therefore, higher premiums.

Insurers have acknowledged the contributory effect of the collapse of HIH, the fall in equity markets and the broader impact of 11 September 2001, which has led to a more conservative approach to risk. However the 30 May 2002 report by consultants Trowbridge to the Insurance Issues Working Group of Heads of Treasuries, identified a key trend which had begun long before the events of last year — claims costs increases in public liability that are well above inflation. In the period 1997–2001, the average size of public liability claims in Australia increased by 11 per cent a year. The report also identified general damages and legal costs in personal injuries cases as major cost drivers.³ These factors, along with underwriting losses for public liability of about A\$500 million a year for the last four years, have had a major impact on the pricing of risk and on the willingness of insurers to take on the risk in the first place.

III THE ROAD TO REFORM

The Commonwealth, the States and Territories have all either passed legislation or are considering draft tort reform packages. However, while some of these measures may lead to cultural change or provide relief in specific areas such as adventure tourism, there is a need to ensure that there are some core changes which will deliver the stability and predictability which insurers seek and which will encourage more players back into the business.

Changes to damages laws and procedural laws are likely to have the most significant short-term impact. The most significant change to the law relating to damages is the introduction of a robust and effective threshold for claims relating to non-economic loss (general damages).⁴ In relation to procedure, the

2 Australian Competition and Consumer Commission, *Insurance Industry Market Pricing Review* (2002) 22, <http://www.accc.gov.au/pubs/publications/industry/finance/insur_ind_price_review_1.pdf> at 17 November 2002.

3 Trowbridge Consulting, *Public Liability Insurance: Practical Proposals for Reform* (2002), Report to the Insurance Issues Working Group of the Heads of Treasuries, 30 May 2002.

4 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) 188–93.

most important matters are the early notification of claims and the introduction of uniform and effective limitation periods.⁵

Although statutory changes to the core elements of negligence and foreseeability have a much higher dependency upon the way they are applied by the judiciary, they are nevertheless very important in providing a long-term sustainable change to liability law and appropriate messages to courts as to the approaches they should take. They underpin and provide long-term support for changes to damages and procedure. An important aim must be to seriously attack claims cost inflation — a form of superimposed inflation.

Unfortunately, the legislative reforms proposed and, in some cases, passed in some jurisdictions to date do not address the underlying problems adequately. At the moment, Victoria and Queensland do not have any general damages thresholds in their reforms. This could adversely affect outcomes not only in those major States, but in the wider Australian market as well.

Those States which have introduced thresholds have done so in a number of different ways. However, this is not so much an issue if the outcome is an effective restriction within each jurisdiction on the level of compensation awarded for non-economic loss in the case of minor injuries.

IV THE LAW OF NEGLIGENCE

Of more importance in terms of consistency, is reform to the substantive law of negligence. For this reason, ICA has welcomed the decision by the fourth ministerial meeting on public liability insurance on 15 November 2002 to agree to a package of reforms implementing key recommendations of the Panel of Eminent Persons' Review of the Law of Negligence chaired by Justice Ipp ('the Ipp Panel'). These recommendations cover the basis of liability, including duty of care, contribution to injuries and assumption of risk.

Further, ministers identified the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW), which implements most of the Ipp Panel's recommendations, as a legislative model for nationally consistent reform of the law of negligence.

The ministers' failure to adopt the Ipp Panel's recommendation for a national, uniform statute, has been interpreted in some quarters as a recipe for further uncertainty. ICA does not share that view and believes the ministers' agreement will make the assessment and pricing of risk easier for insurers.

Insurance industry representatives attended the meeting and agreed with the findings of the PricewaterhouseCoopers Report to the Insurance Issues Working Group of Heads of Treasuries. This provided an actuarial assessment of the likely reduction in claims costs and the flow through of an estimated 13.5 per

5 Ibid 85–99.

cent reduction in premiums following the adoption of those recommendations expected to have an easily quantifiable financial effect.⁶

These outcomes will of course depend on the accurate drafting of the legislation, the timetable for the legislation to be passed in each jurisdiction and its interpretation by the courts. However, the collective commitment to reform by Commonwealth, State and Territory Governments is to be applauded.

In addition, if changes apply to liability arising only from events after the date of change, there will be a slow reduction of claims costs and the impact on insurance costs will be consequently slower. If the New South Wales model is followed, where reforms apply to all claims other than those settled or in respect of which court proceedings have commenced, then the immediate impact of the change will be significantly greater.

V THE TRADE PRACTICES ACT

The importance of substantial changes to the *Trade Practices Act 1974* (Cth) ('*TPA*') cannot be overstated, particularly in respect to the damages that can be recovered in the event of breaches of that Act. The Commonwealth's commitment in the 15 November 2002 Joint Communiqué⁷ to amend the *TPA* to complement State and Territory law reform is an important development.

The *TPA* raises a broader question than the matter dealt with by the Ipp Panel, being the problem of personal injury and death claims under the *TPA*. The legal outcomes from breaches of the *TPA* must be aligned with the legal outcomes arising from the law of negligence. The rule should be that the *TPA* should not override principles resulting from the law of negligence or reforms to the level of damages implemented by the States and Territories.

The key problem under trade practices law is that if A suffers a loss caused by a contravention of the *TPA* by B (for example, an innocent misrepresentation), then A may recover the whole of its loss even though it contributed to that loss or there were other causes. In other words, an action which was essentially the same as an action for negligence, and in some cases actions where there may in fact be no negligence, gives rise to a claim in damages where none of the ameliorating provisions of the law of negligence apply — that is the application of the principles of contribution and the laws of causation and remoteness to ensure that there is no inappropriate compensation. A like event giving rise to a like loss should not have different consequences depending on the cause of action used by the claimant. It is critical that federal law be aligned with State

6 PricewaterhouseCoopers, *Report to the Insurance Issues Working Group of Heads of Treasuries — Actuarial Assessment of the Recommendations of the Ipp Report* (2002), <<http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115.asp>> at 22 November 2002.

7 Commonwealth of Australia, *Joint Communiqué Ministerial Meeting on Public Liability, Brisbane 15 November 2002* (2002), <http://assistant.treasurer.gov.au/atr/content/publications/2002/20021115_2.asp> at 17 November 2002.

and Territory legal outcomes, as otherwise the intended operation of those State and Territory laws will be subverted.

The Ipp Panel concentrated on liability relating to personal injury and death. As important as this sector is, it is not the only element of the liability issue experiencing difficulty. Product liability and, as lawyers well know, professional and medical indemnity are also in crisis. ICA notes the positive statement by the 15 November ministerial meeting on proportionate liability for economic loss and a determination to consider capping liability and risk management via professional standards legislation.

VI INDUSTRY RESPONSE

There are still those who suggest that there is no problem and the insurance industry has been unwilling to 'open its books' to prove a problem exists. Apart from existing regulatory requirements, insurers have been opening their books to other external scrutiny. They cooperated with a thorough review of public liability experience by independent actuaries, Trowbridge Consulting, appointed by the ministerial meeting on public liability.

In addition, two Australian Competition and Consumer Commission ('ACCC') reviews of insurer pricing have found no evidence of any improper conduct.⁸ The ACCC will monitor pricing for the next two years. The industry has acknowledged the need for more comprehensive data and the ICA has developed a proposal for a national public liability statistical database, and is currently consulting with the Australian Prudential Regulation Authority ('APRA') in this regard. Information from APRA, Trowbridge Consulting and the ACCC confirms that insurers have been losing significant sums in public liability and professional indemnity insurance in recent years.

VII CONCLUSION

The second report of the Ipp Panel made a number of recommendations which if adopted nationally would create a climate for more affordable and accessible public liability cover. Australia now has an ideal opportunity to restore the balance and regain a stable and predictable market for public liability insurance.

⁸ Australian Competition and Consumer Commission, above n 2; Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review* (2002), <http://www.accc.gov.au/pubs/publications/industry/Insurance%20report_Sept2002.pdf> at 17 November 2002.