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Inquiry into the Provision, Regulation and Pricing of modern insurance products for Small Businesses

Submission to the Parliamentary Joint Committee on Corporations and Financial Services

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1. Introduction

- 1.1 This submission addresses the Parliamentary Joint Committee on Corporations and Financial Services enquiry into the provision, regulation, and pricing of modern insurance products for small businesses and not-for-profit and community organisations operating in Australia. This submission focusses primarily on the following Terms of Reference:
- (2) the affordability and availability of these insurance products across different regions and sectors, including regional and remote Australia and high-risk industries;
 - (3) the adequacy of the current regulatory framework in addressing modern insurance challenges.
- 1.2 This submission focuses on the potential for this enquiry to be used to suggest civil liability reforms in Australia with the stated purpose of improving insurance markets. Civil liability reforms were suggested and implemented throughout Australia in the early 2000s with this very aim, and the purpose of these submissions is to ensure that if further civil liability reforms are suggested for this reason, the rights and interests of ordinary Australians are considered in the process. These submissions focus particularly on the potential for further civil liability reforms to affect claims for damages negligently inflicted psychiatric injury.
- 1.3 These submissions have been prepared by Dr Martin Allcock.
- 1.4 Dr Allcock is a lawyer and Senior Lecturer in the law discipline within the School of Business and Law at Edith Cowan University, and has published books and scholarly journal articles focusing on the law of negligence. Dr Allcock has also presented papers at numerous national and international scholarly conferences on the topic of the law of negligence.

2. Background and Context

'Insurance crisis 2.0'

- 2.1 The question of the affordability and availability of the insurance products for small businesses is intimately connected to the regulatory framework, in particular, to the law of negligence. This is not the first time that the availability of insurance has been considered an issue. In the early 2000s, sweeping civil liability reforms were introduced in all Australian jurisdictions with the primary goal of ensuring the health of insurance markets.¹ This followed on from a public debate which commenced in the mid-1990s regarding the threat posed to the health of insurance markets – and in turn the functioning of Australian society – by the law of negligence in the context of significant rises in liability insurance premiums.²

¹ See *Civil Liability Act 2002 (WA)*; *Civil Liability Act 2002 (NSW)*; *Wrongs Act 1958 (Vic)*; *Civil Law (Wrongs) Act 2002 (ACT)*; *Civil Liability Act 1936 (SA)*; *Civil Liability Act 2002 (Tas)*; *Civil Liability Act 2003 (Qld)*; *Personal Injuries (Liability and Damages) Act 2003 (NT)*.

² Significantly impacting this debate was the collapse in 2001 of HIH, the largest personal injury indemnity insurer in Australia, which resulted in the Australian government having to intervene to underwrite HIH's obligations.

- 2.2 One of the common narratives at this time was that the unpredictability of the common law of negligence was leading to huge increases in insurance premiums, and that public liability insurance was consequently becoming less affordable.³ Fears surrounding the economic effect of a widening ambit of liability included the concern that if the common law was not limited in some way, the number and size of claims of negligence would reach such a level as to make the provision of insurance totally uneconomic. Of particular concern was that this would in turn lead to insurance becoming unavailable in relation to many activities, potentially threatening the core of Australian society.⁴ This perceived problem provided the political impetus for the Australian government to investigate measures to consider restrict liability in negligence, which ultimately culminated in the civil liability legislation of the early 2000s being enacted.⁵
- 2.3 The availability of insurance has been, and continues to be, integral to the healthy functioning of the common law of negligence and also of legislative schemes of liability such those relating to motor vehicle accidents and to industrial accidents. In this context, it is notable that the Insurance Council of Australia (ICA) in October 2025 released a report entitled *A Sustainable Public Liability Insurance Market in Australia: The Case for Civil Liability Reform*, which attempts to make the case that public liability insurance is becoming unaffordable to small businesses in Australia due to ‘increasing litigation and rising claims costs.’⁶ In this report, the ICA makes recommendations for reforms to civil liability in Australia.⁷ The ICA proposes ‘Reforming some segments of legal frameworks to decrease underwriting risk, increase competition, and ensure insurance availability’.

Summary of the ICA’s proposals for reform

- 2.4 The ICA contends that the biggest drivers in increasing insurance costs are ‘[s]ignificant increases in claims for psychological injury, in addition to any physical injury’, along with increases in workers compensation and CTP claims.⁸ The ICA makes numerous

Medical protection organisation UMP was also close to collapse at this time, forcing the Australian government to guarantee its debts and liabilities:

³ This was recognised in the Ipp Panel’s final report into the law of negligence: see Introduction, Ipp Report ‘Review of the Law of Negligence Report’ (Commonwealth of Australia, 2 October 2002) at 25.

⁴ These included professional activities, particularly those related to the medical profession. In 2000, the President of the Australian Medical Association Dr Kerryn Phelps expressed concern about the effect of the law of negligence on the medical profession, claiming that many obstetricians were leaving obstetrics because they were imposed with unduly burdensome insurance premiums. Similar claims were made in the media that neurosurgeons were leaving that speciality. There were reports also of this issue affecting many desirable social and cultural activities. Of particular concern was that the cost of insurance premiums had risen to such an extent that local authorities could no longer afford to stage many long-standing community activities, such as fetes and blue light discos: see Peter Underwood, ‘Is Mrs Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 39, 39-42.

⁵ For further discussion of this social and political context, see JJ Spigelman, ‘Negligence and Insurance Premiums: Recent Changes in Australian Law’ (2003) *Bar News: The Journal of the NSW Bar Association* 10, 10-2; Peter Underwood, ‘Is Mrs Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 39, 39-42; David Ipp, ‘The Politics, Purpose and reform of the Law of Negligence’ (2007) 81 *Australian Law Journal* 456; Danuta Mendelson, ‘Defendants’ Liability for Pure Mental Harm to Third Parties in Australia: Still a Work in Progress’ (2009) 17(2) *Journal of Law and Medicine* 165.

⁶ Insurance Council of Australia, *A Sustainable Public Liability Insurance Market in Australia: The Case for Civil Liability Reform* (Oct 2025) 3.

⁷ *Ibid* 4.

⁸ *Ibid* 6-7.

recommendations in the report ‘to address the impact of psychological claims on insurance’,⁹ including:

- Allowing claims to be brought for physical injury or psychological injury but not both;¹⁰
- Allowing claims for psychological injury ‘only where treatment was sought and obtained by the claimant within 12 months of the initial physical injury’;¹¹
- That ‘Civil Liability legislation should be amended to impose a higher threshold for claims for nervous shock to access non-economic loss. For example, impose requirements that some third parties must have been present or directly witnessed the injury or incident’; and
- That ‘Alternatively,¹² civil liability legislation in each state and territory could be amended to exclude access to common law compensation for nervous shock by a third party that has not sustained the primary/initial injury’.¹³

2.5 With this context in mind, it is argued that if further civil liability reforms are suggested to improve the health of insurance markets in line with the ICA’s recent report, account should be taken of the effect of previous civil liability reforms on liability for psychiatric injury in order that such reforms do not have undesirable effects on ordinary Australians.

3. The effect of the previous reforms on the rights of ordinary Australians

3.1 It is important to consider the effect of previous civil liability reforms when considering potential further reforms. The previous civil liability reforms of the early 2000s – prompted by attempts to improve the health of insurance markets – introduced a number of arbitrary and unjust limitations of liability in relation to claims for psychiatric injury, including unprincipled physical, temporal, and relational requirements. Arbitrary and unjust limits on liability in the civil liability legislation relating to claims for damages for psychiatric injury included:

- The normal fortitude rule being enacted in all legislation in the form of an independent requirement.¹⁴ This form of the rule acts as an arbitrary limit on liability in situations where the plaintiff is not a person of normal fortitude but has nonetheless been legally wronged by the defendant;

⁹ Ibid 9.

¹⁰ Ibid 8.

¹¹ Ibid.

¹² Ibid 9.

¹³ Ibid. The ICA also recommends the introduction of legislative limits to damages for gratuitous care (*Griffiths v Kirkmeyer* damages), damages for gratuitous care to third parties (*Sullivan v Gordon* damages), along with the introduction of injury thresholds, caps on damages, and injury scales. The report makes recommendations on several other matters relating to civil liability for negligence, including issues relating to claims associated with dangerous recreational activities, and ‘worker to worker’ claims.

¹⁴ See *Civil Liability Act 2002* (WA) s 5S; *Civil Liability Act 2002* (NSW) s 32; *Wrongs Act 1958* (Vic) s 72; *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s 34. This follows Recommendation 34 of the Ipp Report, ‘Review of the Law of Negligence Report’ (Commonwealth of Australia, 2 October, 2002).

- The removal of the consideration in all legislation of whether the plaintiff witnessed the ‘aftermath’ of a shocking event.¹⁵ By removing this consideration, the legislation arbitrarily and unjustly limits liability in time and in space to the scene of the accident in cases where the plaintiff cannot satisfy one of the remaining considerations;
- The requirement in all legislation that the plaintiff suffer a ‘recognised psychiatric illness’ as opposed to a ‘recognisable psychiatric illness’.¹⁶ The word ‘recognised’ arbitrarily and unjustly locks plaintiffs into historical understandings of psychiatric disorders.¹⁷ This approach is arbitrary and unjust;
- The inclusion of further limits on liability in the legislation enacted in New South Wales, Victoria, South Australia, and Tasmania, imposing additional arbitrary and unjust temporal and relational requirements on plaintiffs;¹⁸ and
- Inconsistency in relation to the details of provisions affecting claims for negligently inflicted psychiatric injury between jurisdictions, resulting in unjust distinctions being drawn between plaintiffs depending on which jurisdiction they may have had the misfortune to suffer psychiatric injury.¹⁹

4. The potential effect of future reforms on the rights of ordinary Australians

4.1 Like the previous civil liability reforms affecting claims for psychiatric injury in Australia, the reforms suggested by the ICA represent a further arbitrary and unjust incursion into the common law rights of ordinary Australians. Limits on claims to only those where the plaintiff was present at the scene of an accident or directly witnessed an accident are unprincipled and unjust. Reforms which would make distinctions between “primary” and “secondary” victims – as is the law in the United Kingdom – would also operate in an unprincipled and unjust manner. Existing civil liability legislation already imposes unjust limitations on liability in relation to claims for negligently inflicted psychiatric injury. Civil liability reforms such as those suggested by the ICA would impose a further heavy burden

¹⁵ See *Civil Liability Act 2002* (WA) s 5S(2)(b); *Civil Liability Act 2002* (NSW) s 32(2)(b); *Civil Law (Wrongs) Act 2002* (ACT) 34(2)(b); *Civil Liability Act 1936* (SA) s 33(2)(a)(ii); *Civil Liability Act 2002* (Tas) s 34(2). This is more restrictive than Recommendation 34 of the Ipp Report, which refers to the aftermath of an event.

¹⁶ *Civil Liability Act 2002* (WA) s 5S(1); *Civil Liability Act 2002* (NSW) s 31; *Wrongs Act 1958* (Vic) s 35(i); *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 1936* (SA) s 53(2); *Civil Liability Act 2002* (Tas) s 33. This follows Recommendation 34 of the Ipp Report, ‘Review of the Law of Negligence Report’ (Commonwealth of Australia, 2 October, 2002).

¹⁷ For further discussion of the significance of the distinction between the legal formulae ‘recognisable psychiatric illness’ and ‘recognised psychiatric illness’, see Des Butler, ‘*Gifford v Strang* and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia’ (2004) 12 *Torts Law Journal* 1, 16; Des Butler, *Damages for Psychiatric Injuries* (Australian Legal Monographs, Federation Press, Sydney, 2004) 126; Peter Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (Lawbook Co, 2nd ed, 2006) 35-38; Peter Handford, ‘Psychiatric Injury – The New Era’ (2003) 11 *Tort Law Review* 1, 13, 23-24; Danuta Mendelson, ‘Psychiatric Injury Law in England and Australia – Drawing Closer Together?’ (2007) 15 *Journal of Law and Medicine* 176, 189-190.

¹⁸ See, eg, *Civil Liability Act 2002* (NSW) s 30; *Wrongs Act 1958* (Vic) s 73; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) s 32.

¹⁹ See Martin Allcock, ‘Pure Psychiatric Injury Pursuant to the Civil Liability Legislation: An(other) Economic Perspective’ (2018) 25 *Journal of Law and Medicine* 814.

on the shoulders of ordinary Australians who have the misfortune of suffering psychiatric injury due to the negligence of another.²⁰

- 4.2 Those who suffer psychiatric injury in an accident – frequently due to the death or serious injury of a loved one caused by the negligence of another – experience enormous disruption to their personal and professional lives. Many are unable to work at all following such an injury, or to the capacity they previously were able, which results in a significant emotional and financial burden being left on the shoulders of the victim. The suggested reforms will result in more Australians having to shoulder this burden for reasons which little to do with justice or fairness.
- 4.3 Limits on liability of this nature will reduce the ability of the law to deter risky behaviour, effectively transferring the costs of risk-causing activity onto plaintiffs who are left with enormous primary accident costs in the form of financial losses such as medical costs and loss of earning capacity.²¹ They will also reduce the extent to which the law is able to minimise the economic burden on society caused by accidents by spreading accident losses throughout society.²² Accidents impose enormous secondary costs on society and therefore result in economic inefficiencies throughout society as a whole.²³ Secondary costs relate to the social and economic dislocations which occur when the costs of accidents are left on the shoulders of the injured, such as increased costs to the medical system, greater burden on welfare systems etc.²⁴ Despite such accident costs being described as secondary, these costs are no less a burden to society than primary accident costs.²⁵ Indeed, the secondary costs associated with psychiatric injuries are enormous.²⁶

The health of insurance markets

- 4.4 It may be argued that effective loss-spreading requires healthy insurance markets, and that if reforms achieve the goal of improving the health of insurance markets, they will be of benefit to Australian society. However, it is important that claims regarding the health of the insurance markets be sufficiently scrutinised before reforms are undertaken. This is a lesson that ought to be learned by considering the previous civil liability reforms. It has been argued that many of the claims advanced in order to justify the previous civil liability reforms were

²⁰ Ibid.

²¹ See Peter Bell, 'The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury' (1984) 14 *University of Florida Law Review* 333, 349.

²² See, eg, Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499; Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970); Stephen Perry, *Tort Law*, in Dennis Patterson (ed.), *Companion to the Philosophy of Law and Legal Theory* (Blackwell Publishers, 1996).

²³ See, eg, Patrick Atiyah & Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Weidenfield and Nicholson, 4th ed, 1987) 489.

²⁴ See Guido Calabresi, 'Does the Fault System Optimally Control Primary Accident Costs?' (1968) 33 *Law and Contemporary Problems* 429, 429; Guido Calabresi, 'Changes for Automobile Claims, Views and Overviews' (1967) *University of Illinois Law Forum* 600, 602-3; Guido Calabresi, 'Fault, Accidents and the Wonderful World of Blum and Kalven' (1965) 75 *Yale Law Journal* 28; Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499.

²⁵ See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970) 27.

²⁶ See Peter Bell, 'The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury' (1984) 14 *University of Florida Law Review* 333, 349.

not ultimately sustainable.²⁷ The panel appointed to suggest reforms to the law of negligence completed its report without any empirical evidence from the insurance industry to support the proposition that there was, in fact, an insurance crisis. Furthermore, such evidence was not as strong as was initially believed.²⁸ Significantly, it has been suggested that the common law may actually not have been the fundamental cause of the sharp rise seen in insurance premiums at the turn of the twenty-first century, particularly in light of the observation that the common law duty of care had by that time been expanding for many years without any gradual corresponding rise in insurance premiums.²⁹ Statistical evidence at the time regarding rates of injury litigation also indicated that while there had been a steady increase in litigation in the 1990s, there was no evidence of ‘an explosion’ in litigation during this time.³⁰

5. Recommendations

With the above in mind, the author makes the following recommendations in relation to the Terms of Reference addressed in these submissions:

- 5.1 If civil liability reforms are considered in the context of the availability of insurance for small businesses, it is recommended that any reforms which arbitrarily and unjustly limit liability for claims of negligently inflicted psychiatric injury not be implemented. Reforms of this kind would represent an unjust limiting of the common law rights of ordinary Australians, effectively transferring the burden of accidents from commercial insurers onto the shoulders of ordinary injured parties and their families.
- 5.2 It is recommended that the relationship between the law of negligence and the health of insurance markets be explored fully before any further potential civil liability reforms are considered. Issues that should be fully explored before further civil liability reforms are considered include:
 - 5.2.1 Whether the number, type, and size of claims of negligence over the previous two decades has in fact had an impact on the health of insurance markets;
 - 5.2.2 Whether the previous civil liability reforms of the early 2000s actually improved the health of insurance markets as intended; and

²⁷ See Peter Underwood, ‘Is Mrs Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 39, 47-54; Kylie Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective’ (2007) 15 *Torts Law Journal* 195, 196; Edmund Wright, ‘National Trends in Personal Injury Litigation: Before and After ‘Ipp’’ (2006) 14 *Torts Law Journal* 223, 266; Des Butler, ‘Gifford v Strang and the New Landscape for Recovery for Psychiatric Injury in Australia’ (2004) 12 *Torts Law Journal* 1, 14.

²⁸ See Des Butler, ‘Gifford v Strang and the New Landscape for Recovery for Psychiatric Injury in Australia’ (2004) 12 *Torts Law Journal* 1, 14; Des Butler, *Damages for Psychiatric Injuries* (Federation Press, 2004) 122-4; Kylie Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective’ (2007) 15 *Torts Law Journal* 195, 196.

²⁹ See Peter Underwood, ‘Is Mrs Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 39, 50.

³⁰ See Trowbridge Consulting and Deloitte Touche Tohmatsu, *Public Liability Insurance: Practical Proposals for Reform*, Canberra, 2002, <http://www.treasury.gov.au/documents/314/PDF/plr.pdf>; cited in Peter Underwood, ‘Is Mrs Donoghue’s Snail in Mortal Peril?’ (2004) 12 *Torts Law Journal* 39, 50-1. Also see Edmund Wright, ‘National Trends in Personal Injury Litigation: Before and After ‘Ipp’’ (2006) 14 *Torts Law Journal* 223, 266; Kylie Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective’ (2007) 15 *Torts Law Journal* 195, 206-8.

5.2.3 Whether civil liability reforms such as those recently suggested by the ICA will in fact likely improve the health of insurance markets.

5.3 When considering potential civil liability reforms in relation to the issue of the health of insurance markets, it is further recommended that consideration should also be given to the effect of such potential reforms on the broader Australian community. In particular, it is recommended that consideration should be given to:

5.3.1 The likely financial and emotional impact of such potential reforms on ordinary Australians and their families, and in particular, whether such reforms will effectively transfer the burden of accidents from commercial insurers onto the shoulders of ordinary injured parties and their families;

5.3.2 The likely impact that such reforms will have the ability of the law to deter risk-causing behaviour;

5.3.3 The likely impact that such reforms will have on the ability of the law to spread the costs of accidents over people and time; and

5.3.4 Means by which the law may be reformed in a principled and just manner.

6. Conclusion

Insurance is essential for the survival of small businesses. It is accordingly important that attention be given by lawmakers to the issues affecting the availability of appropriate insurance products to small businesses. It is notable in this context that reforms to the law of negligence have recently been suggested by those in the insurance industry in order to improve the availability of insurance. Regrettably, the reforms suggested by the ICA propose the implementation of arbitrary and unjust limitations on liability with respect to claims for negligently inflicted psychiatric injury. It is recommended that reforms of this nature not be implemented, as the suggested reforms are sweeping and, if implemented, would represent an arbitrary and unjust limiting of the common law rights of ordinary Australians. Such reforms, if implemented, would effectively transfer the burden of accidents from commercial insurers onto the shoulders of ordinary injured parties and their families. It is also recommended that a sufficient body of evidence be sought and referred to by lawmakers when considering potential civil liability reforms. I would welcome the opportunity to provide further evidence or appear before the Committee to elaborate on these issues if required.