COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Reference: Public liability and professional indemnity insurance

TUESDAY, 9 JULY 2002

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SENATE

ECONOMICS REFERENCES COMMITTEE

Tuesday, 9 July 2002

Members: Senator Collins *(Chair)*, Senator Brandis (*Deputy Chair*), Senators Chapman, Cook, Ridgeway and Webber

Participating members: Senators Abetz, Boswell, Calvert, George Campbell, Carr, Cherry, Conroy, Coonan, Eggleston, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Kirk, Knowles, Lightfoot, Mason, McGauran, Murphy, Murray, Payne, Sherry, Stot Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Brandis, Collins and Conroy

Terms of reference for the inquiry:

To inquire into and report on:

a) the impact of public liability insurance for small business and community and sporting organisations; and

b) the impact of professional indeminity insurance, including Directors and Officers Insurance, for small business;

with particular reference to:

c) the cost of such insurance;

d) reasons for the increase in premiums for such insurance; and

e) schemes, arrangements or reforms that can reduce the cost of such insurance and/or better calculate and pool risk.

WITNESSES

Committee met at 9.09 a.m.

POTTER, Mr Michael, Chief Executive Officer, Council of Small Business Organisations of Australia Ltd

CHAIR—Welcome. Today the committee will hold its second day of hearings on its inquiry into public liability and professional indemnity insurance. Before we commence taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. 'Parliamentary privilege' refers to special rights and immunities attached to the parliament and its members or others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the disadvantage of the witness on account of evidence given by that witness before the committee is treated as a breach of privilege. These privileges are intended to protect witnesses, although I must also remind those present that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Unless the committee should decide otherwise, this is a public hearing and, as such, all members of the public are welcome to attend.

The committee prefers all evidence to be given in public, but if you would like to give part of your evidence in camera or in private, please ask to do so and the committee will consider such a request. The committee has your submission numbered 113. Are there any alterations or additions you wish to make to the written submission?

Mr Potter—No, I am happy with the submission.

CHAIR—I now invite you to make a brief opening statement and then we will move to questions beyond that.

Mr Potter—Thank you for the opportunity to make these opening remarks to your inquiry into the impact of public liability and professional indemnity insurance cost increases. This, of course, is in addition to my submission. Small business wants peace of mind when it comes to insurance—including public liability, professional indemnity and workers compensation, not to mention personal health insurance and disability and life insurances. Today I would like to share some of the issues and solutions that have been brought to my attention over the last few months, particularly at our national small business summit. The latest increase in public liability and professional indemnity insurance premiums and the problems with acquiring access to cover are causing a major concern for business, particularly for the small business sector. Increased premiums, up as high as 500 per cent, are causing financial hardships, with some small business unable to get any cover at all. The effects this has on business will force some of them to cease operations.

Discussions are ongoing as to the reasons behind the rising insurance premiums, but it is an issue that needs to be determined as a matter of urgency. The Commonwealth, states and territories and the insurance industry must all get together to resolve the problems. If the issue is not resolved, public liability and professional indemnity has the potential to affect small business capability in the long term. In certain areas, it will affect consumer confidence. In the insurance industry there have been significant events such as September 11 and the collapse of HIH. This has resulted in big changes in public liability and professional indemnity insurance

and reinsurance. The result is less choice for consumers and small business, higher premiums and more rigid policies.

What are some of the solutions? Possibly government should look at pooling arrangements that would enable small business to have a better bargaining capability. Government should eliminate public liability insurance policy requirements being tied to government contracts and lease rentals, because this is causing double coverage to occur. To protect the human and financial resources of small business, government must look at ways of stabilising the cost of public liability and professional indemnity insurance. Possibly the ACCC should be given power to regulate and not just monitor public liability and professional indemnity insurance premium increases. States and territories should consider a statute of limitation period for personal injury claims. States and territories should explore ways to settle claims without resorting to litigation, particularly where it relates to professional indemnity insurance.

Reforms of public liability and professional indemnity insurance should allow one common policy for small business, covering both types of insurances, which would reflect the risk management strategies adopted by small business, not just actuaries' interpretation of risk. A waiver of liability for those who participate in dangerous or adventurous activities, in conjunction with changes to the Trade Practices Act, would allow tourist operators and community events to continue. The Commonwealth, states and territories and the courts need to take into account contributory negligence of the insured person, not just of the person who has the resources to pay the damages.

We see the need for risk management strategies as a way of making insurance more obtainable and reasonably priced, taking into account the duty of care of the insured party. We also see the need for public education programs to try and change the current community attitude—the cost increase in insurance is a community issue, not an individual, small business, corporation or government responsibility. Ultimately, the community pays the increase. Higher risk and premiums will certainly be passed on to the consumer; thus ways to reduce the cost of premiums must be worked out. Again, I suggest pooling.

We think that insurance companies need to develop some sort of low-cost and no-frills insurance product for local groups, and nonprofit and volunteer organisations, including small businesses. Thresholds should be set for claims. Government should look at possibly providing supplementary funding to nonprofit groups, local groups and volunteer organisations to help meet the increased cost of insurance for community activities and services where those activities and services are improving the fabric of the community or it should allow a nominal charge on the price of entry to cover the cost of such insurance. Government should also look at restricting lawyers advertising for personal injury claims by setting limits on how much the lawyers can get paid out of the settlements—that is, controlling their contingency fees. I am sure that you all saw the 'Spoils of Law' article in the *Daily Telegraph* yesterday, which proves the case that we are talking about. We would encourage pretrial mediation to help the reduce the cost of litigation. We would suggest that you investigate nonlegal means of determining small claims and eliminate stamp duty rates and GST collected on insurance premiums. This would all lead to a lower cost of coverage. The intent of all these changes is to reduce the cost of insurance coverage for small business and not allow the lack of coverage from preventing small business growth in the future.

That is principally the statement I wish to make, but for one more comment that I received only this morning by fax that I think might have some relevance to this inquiry. This has come from Geoffrey Hughes, who is a member of COSBOA. He says:

The cause of the crisis: Australian underwriters are not strong enough to write big lines of Public Risk and Professional Indemnity Insurance without taking reinsurance in the world market.

The major operators in the world market for reinsurance are in a shocked and debilitated condition as a result of exceptionally heavy claims arising from severe weather, terrorism (11 September 2001), big corporate disasters (Enron, WorldCom, HIH) leading to heavy professional indemnity claims, contingency fee lawyers and fallen value and returns from investments. They have therefore made radical changes to their premiums and in some cases, have refused to provide some types of cover.

The result is that many branches of the medical profession and various charities and small businesses are without, or are unable, to afford insurance cover they must have to remain in business. There have been friendly noises made by the Prime Minister and others at the Federal level about changing the law of torts to enable certain service providers to limit their liability to their patients, clients and customers.

Limited Commonwealth power. The reality is that the Commonwealth Parliament has the power under sub-sections 51(xxiiiA) and (xiv) to make laws for provision of medical and dental services as well as to make laws with respect to insurance.

It could be argued that the Commonwealth could make a law to limit or exclude claims for negligence against doctors, nurses, hospitals and others who services are being financed by the Commonwealth under Medicare. And the Commonwealth could indemnify the providers of such services if the cover is unavailable in the market.

The power to make laws with respect to insurance seems to go no further than enabling the Parliament to try to regulate the conduct, policy terms and solvency of the underwriters. It does not empower the Commonwealth to make laws that limit the claims that can be made by persons and companies injured by insured but negligent trustees, advisers, builders, manufacturers, retailers, vehicle drivers, amusement plant operators, beach inspectors, doctors, lawyers, auditors, valuers etc. etc.

Control over the law of torts (civil wrongs) remains in the States. Getting the States to act promptly and sensibly in this area is proving extremely difficult, though some States are doing more than others.

It is from that aspect that the Commonwealth need to see how they can improve such powers. That concludes my opening remarks.

CHAIR—Thank you, Mr Potter. Can I take you back one step, to the nature of the problem being experienced by your members. You indicate that public liability insurance increases range between 200 and 500 per cent. Is that anecdotal information or has the association conducted a survey?

Mr Potter—That is from comments we have received from some of our members. It is probably even worse in some instances. I have heard recently of a cleaning company whose public liability went from $3,000 to $17,000—something in that order. We have not done a complete survey of all the types of businesses that we represent, to get accurate figures, but it certainly has increased dramatically.

CHAIR—Do you have a feel for what proportion of your membership this is a significant problem for?

Mr Potter—I would say, at this stage in the game, it is a significant problem for the majority of our members, either through increases or non-reinsurance.

CHAIR—How many members does COSBOA have these days?

Mr Potter—Over 200,000 firms are related to COSBOA through the various associations that are members of our organisation. We are an association of associations that represent small business.

CHAIR—Would you comment on the level of the problem in certain sectors?

Mr Potter—Yes. In various sectors, each company has its own concerns. The food industry, the retail industry or just small business per se are each subject to the insurance companies coming up with the increase in premiums. It would appear that, in practically every instance, the premium has gone up in some fashion.

CHAIR—Which areas have insurance companies withdrawn from?

Mr Potter—Some of that is in the public indemnity insurance field. They are finding it difficult to increase. I was speaking to a former colleague last night, from when I was personally involved in establishing a public liability policy for a group of companies. Last year, it was withdrawn without notice or explanation, and yet they had been very happy to have that policy in place for over 12 years, with no claims.

CHAIR—Can you give examples of businesses that have not been able to find any cover?

Mr Potter—Not off the top of my head.

CHAIR—Is that something you could take on notice and provide us with?

Mr Potter—I will provide you with some of that, yes.

Senator BRANDIS—I am interested in something that Mr Hughes said in the fax you read us before, and that is the causal significance of the reinsurance market for these premium increases. The reinsurance market, of course, is international, and inflation of the cost to domestic underwriters of reinsurance is, as I understand it, a phenomenon that is driven by global conditions in the reinsurance market and has little or nothing to do with pressures on the domestic insurance market within Australia. Are you in a position to elaborate on that?

Mr Potter—I am in a position to elaborate on it from the standpoint that reinsurance certainly has become a global scenario. I think there have only been a few companies in the Australian market that have done their reinsurance globally. If there is an impact due to world conditions, those companies are obviously going to look at how they are going to re-place their reinsurance aspects. It would appear, from comments I am getting from some of my friends in the insurance industry, that it is very hard for some of the underwriters to get that reinsurance coverage. I guess it leads to the question: 'Is globalisation good for our community?' I think, from an insurance standpoint, at some point we as a country have to look at protecting our own. Therefore, we have to look at how we market that and how we look at creating a reinsurance program that enables all businesses and all organisations to get adequate cover. If we cannot get that reinsurance from global sources, we should look to see how we can establish that here.

Senator BRANDIS—These are ultimately market-determined premiums, aren't they?

Mr Potter—In a free-enterprise situation, yes.

Senator BRANDIS—If government intervenes to, as it were, mandate that insurance is to be provided under certain conditions or even—assuming that there were the legislative powers in the Commonwealth to do this—to control premiums, surely all you would find is that insurers would increasingly withdraw from the provision of insurance policies to more and more sectors of the community, and there would not be a thing that the government could do to stop that.

Mr Potter—We would not disagree with your comments. We would say that in essence it is about risk. We feel there needs to be a better way to analyse risk. Often, you find a situation where a small business is subject to a higher risk simply because of the nature of the industry when in fact the nature of the premises has no risk. This is where somewhere along the line the actuaries who make all these decisions obviously must have got it wrong for several years, because now they suddenly want to re-cover with high premiums to cover the cost of their lack of understanding of their market. They are trying to make up that time now in terms of recovery of all the losses. We would argue that it is time we re-examined where in small business the real risk is. If we can get insurance companies to examine the real risk it will lead to lower premiums. We feel that no-claim bonuses and the like should be real as well. And this is not just in terms of public liability and professional indemnity; it is a classic case in the workers compensation situation, too.

Senator BRANDIS—We heard some evidence from a gentleman from the insurance industry yesterday. As I recall it, he said that within the last year outlays by Australian insurers on claims exceeded receipts on premiums in that year by more than $1 billion, which, as you say, does suggest that the actuaries within the underwriters have historically underestimated the amount of reserves that they needed to accumulate through premiums against possible future claims. It may well be that this is a period of adjustment in which the insurance underwriters are seeking to compensate historically for undercharging on premiums.

Mr Potter—Certainly this would seem to be what the insurance line would be. But what about the years when they had excessive profits? How come they did not put a reserve in to cover the times when they have their losses? It is a balancing act at the end of the day. It is not going to change the reality. The reality right now is that we have a high cost of insurance. We are looking at ways in which in the future we will not have this occurring again.

Senator BRANDIS—I suppose what I am getting at is that, if it is assumed that one of the reasons there has been an escalation of premiums in the last couple of years is to compensate for premiums which historically have been too low to protect against exposure to future liabilities, what we are seeing ultimately amounts to an adjustment to a truer reflection of the market price of risk.

Mr Potter—I would agree from your perspective that, in the past, practices of certain insurance companies have been wrong and they have acted incorrectly in managing their business. They have basically been buying business on price and not performance. As a result, we have the failures that we have in the world market. This is not uncommon right now in terms of where you analyse. I guess what we would argue is the difference between big business and

small business. In big business, they use capital for competitive advantage and often it is not the money of the people running those companies. In small business, it is the business person who uses their money, and when it is your money you think very wisely how you spend it and how you manage it. We feel that once again for the excesses of big business in the insurance market—for the failure to do their job correctly—small business is paying the price.

Senator BRANDIS—I am not at all unsympathetic to a thing you have said, but I do wonder whether when we speak of cooling-off periods or pre-litigation compulsory mediation procedures or limitations on lawyers advertising, for instance—all of which may be perfectly good ideas—they are really going to have more than a very marginal, almost token, impact on the problem.

Mr Potter—It will have an impact on the problem because ultimately it will allow claims to be looked at in a sensible state. I do not think anybody would argue that a person who has been seriously injured and is incapacitated and disabled for life needs to get a certain coverage. I guess the question that is being asked now is: how do we provide coverage that gives care to that individual person? However, at the same time we have to look at it from a perspective that asks: how do the insurance companies organising coverage in the various areas manage it in a way that is fair for the risk involved? We are saying that right now what we are seeing is a full recovery for past losses being passed on—whether that be one year or two years, time will tell. Ultimately, we are going to come back to the point where, if we say that at this point in time the premiums are correct, the question will be: will they have their act together in terms of predicting the types of coverage? The escalation in the claims is where the problems are.

Senator BRANDIS—Is that right, though? I understand that the escalation in the claims is an element in the problem. But, as you have said yourself, the change in the structure of the reinsurance market—which is, as we have said, an internationally determined price—and the recovery for premiums which were too cheap in the recent past are also major influences on this. I am not in a position to tell you to what extent one can attribute the inflation of the premiums proportionally among those causes, because I do not know. But I put the proposition to you—I think it is a matter of commonsense—that the major influence on the escalation of premiums is the international reinsurance market. It does not matter two hoots, for example, what a state parliament in Australia might do to regulate what lawyers do in soliciting business. That will have little or no effect on the price drivers in that market.

Mr Potter—I would support you in that point of view if it is really the case that it is ultimately the reinsurance market. From our perspective, one thing we need is to see more facts and figures. Getting the facts and figures out of the industry to actually relate them to what the real cause is would help small business to understand whether the increase in premiums is only due to reinsurance, or whether it is due to the bad management of local companies that have been basically underpricing themselves and not having enough reserves. I suspect that underpricing and not having sufficient reserves have played a big part. However, if they had all of the reserves, that would not necessarily change the effect of underwriting on a worldwide basis. I guess the whole of the insurance world have to re-examine themselves and say that maybe the way they have been operating in the past needs to be improved so that we do not have this escalation. But I would agree with you—

Senator BRANDIS—Perhaps the problem is that they have been re-examining themselves and the conclusion they have arrived at is that they have been undercharging for premiums and the way to bring about this adjustment is to reprice the premiums by a significant escalation. Isn't that the problem?

Mr Potter—If that is the case then we would like to see how they make those decisions on repricing. Let it be a transparent process. Tell us, as the people who are basically going to be paying the premiums, how you came up with your actual premium content—where is the risk and where do you see the value of the claim? If I am in a high risk area, such as in the workers compensation field, I pay a higher premium. If I am in a low risk area then I pay a lower premium. I think small business would ask why we do not see the same thing in relation to both public liability and professional indemnity.

Senator CONROY—Yesterday we were talking to the Insurance Council. They said that, because of their mandate, they were not in a position to give an indication of what the benefits to small business and consumers could be from reforms like the Carr package. When you hear insurance industry figures say that they cannot necessarily see any premium falls in the future, do you think that is a fair position for them to be taking?

Mr Potter—Historically, I guess, when a product goes up in price—particularly a premium—once they get past the angst of having to pay for it and they plan to pay for it, small business can live with it. Very rarely do you see them going down. The only way they will go down is if there is a more transparent way of defining how a premium was calculated in the first instance and by showing the benefits to the businesses, saying, 'If you do these risk management programs in your business, this will lead to lower premiums.' To some degree, you are seeing that in the workers compensation area today. If we can see that happening in both public liability and professional indemnity—that you reward the person who is trying to do a good job by giving a lower premium—then I do not feel it is inappropriate that, where an organisation has failed to do those things and is a higher risk, it should pay a higher premium.

Senator CONROY—Their argument was that the impact of the existing reform package from the Carr government—which you have indicated in your submission you are generally supportive of—would only be to slow further increases rather than to see any significant reduction in premiums for anybody.

Mr Potter—I would anticipate that would be their response because they are representing the bodies that basically say they want to have a higher premium.

Senator CONROY—They wouldn't say that, would they?

Mr Potter—I think we need better statistics to analyse where the cost is causing the premium increases and to see if there are ways in which we can manage that that can allow choice. I guess part of our problem now is that there is less choice in the marketplace and fewer companies involved, and companies are now wary. There are insurance companies out there that have done a very good job in terms of managing their business, and they have recognised that they do not want to fall into the same boat as mismanaged businesses have. In that context, they are probably going to err on the conservative side and have a little bit higher premiums to cover them just in case. We just have to see how they calculate the figures.

Senator CONROY—Have you seen today's *Financial Review*?

Mr Potter—No, I have not.

Senator CONROY—I think the front page reports a comment made yesterday by the Insurance Council representatives that they would consider pulling out of the market altogether if they could not get a decent return on capital.

Mr Potter—That is true: if you do not get a return on capital, you might pull out of the market. Then again, we are a free market and, if somebody pulls out, somebody else will come in. Let us face it: the insurance industry is money for jam. You know you are covering it; you put the money in there and you are getting a return. If the insurance business were that bad, how come it has survived for so long and has been so successful in so many different areas? I think that is a little bit of scare tactics. But, if we take the story that they do pull out, what are we going to do about it as a nation?

Senator CONROY—That was my next question.

Mr Potter—That is where we look towards government. In that instance, government is going to have to come up with a solution. I see that as a government responsibility, in terms of not only federal but also state, in saying, 'How do you do it?' That is where I think, to some degree, pooling could be an answer from a small business perspective. The power of small businesses as one and one is very small, but collectively we are very big. If you look in terms of where they see the future of Australia, they see that coming from small business. Collectively, small business does not have the power to dictate that we would like to see it have so that we would get the benefits of lower premiums that some larger businesses get.

Senator CONROY—Minister Hockey has called, on a number of occasions, for national schemes similar to those in New Zealand to be looked at. Would you support that?

Mr Potter—I would think that we would prefer to see a situation with a national program of sorts. I have to be honest, I do not have all the details at my fingertips, so I am doing this a little bit blind, but we would see anything that would lead to lower costs for small business as positive.

Senator CONROY—Do you have—and I appreciate that you might not—any evidence or any study from New Zealand that shows that that is the case, that the New Zealand scheme, or any comparable schemes around the world, has led to lower premiums for small business?

Mr Potter—In my submission I suggested we find that information, because I think we need to get the facts and figures and look at them. We do not want to go backwards in whatever we do; we want to move forwards. If a national no-fault scheme works, then that would be great. I know that in Canada many years ago a number of no-fault schemes—particularly in the auto industry—were very helpful for the consumer, because effectively you eliminated all the quotations; everything was black and white. If you had a claim, they went in and they looked at the book and said, 'Yes, that's correct.'

That did not mean that those claims were not examined from a fraud standpoint. I think it would be the same with public liability and professional indemnity insurance cover: you still need to examine whether the claims are fraudulent. But, assuming a claim is not fraudulent, it should be black and white in many respects in terms of a person's return for the injuries they have received. For a person who is paralysed and disabled for life, there has to be some way of costing to find what it is going to mean to provide the services. Do we do it by lump sum, which means it could be squandered and wasted, or do we say our need is to take care of that person for the rest of their life using the resources of our community? That is another way to look at it.

Senator CONROY—There has been quite a bit of criticism of the New Zealand scheme, that the premiums do not price risk efficiently and that that has led to a significant unfunded liability. I noted your conversation with Senator Brandis about reinsurance and risk pricing in those sorts of things.

Mr Potter—Without being detrimental to governments, the reality in the past when governments put money aside to cover the risk of what might be future requirements has been that sometimes there is double-dipping—that is, it gets taken out of the pool for other sources. That is common to all government levels. We would hope that, if this were a national scheme that was sponsored by government, they would have the proper reinsurance risk, taking into account the premiums.

CHAIR—Whilst we are on the doubling up issue, you made a comment in your opening statement about government requirements for insurance leading to double coverage. Can you explain how that occurs?

Mr Potter—I will give you a case in point. We have moved to a room in our building that would be one-eighth the size of this room, for which we have to provide a minimum of $10 million public liability insurance. Every tenant in that complex has to do the same. If you were to add up all the public liability insurance coverage on that site, it would be way in excess of what is required. Because the building was provided by a governmental agency, all that would have been needed was for the principal contractor to say, for argument's sake, 'Cover that site for $75 million public liability.' That could have been divided up as one premium among the tenants, which would have reduced the cost. When everybody has to provide a low premium coverage, such as $10 million or $12 million, they pay a higher cost—a lot of that cost is for the initial set-up for the insurance policy. Effectively, we are all paying extra when it is not needed. If you take that across the board, the first question that comes about is why the government suddenly decided that it was the party that was working on behalf of the government on the contract that would have to provide the insurance coverage. It was because it was being transferred down.

It raises the question: who suggested that to government? I dare say it was the insurance companies. Therefore, we need to re-examine that question. When I ask government officials why this exists, they really do not know the answer. My view is that, if governments impose a demand that all people who deal with government at all levels have to have a certain public liability insurance, we should have a national program that is automatic for all companies at a set lower limit. Therefore you would have a great deal of pooling and great deal of risk management, which would lead to a low cost premium.

CHAIR—I take it that you are suggesting that when it is passed down it becomes inefficient and that it would have been more effective for the government to take out those sorts of covers. That is what the Victorian government has done since about 1994, as told in evidence yesterday. An example was given in relation to Human Services. A comparison of the costs of insurance coverage in Victoria under those arrangements compared with those of another state that does it in the way we are discussing may well reveal that you are right in terms of the inefficiency.

Mr Potter—That is where we need to examine the facts and figures to see if there is a real benefit. We do not want to change the way things happen only to find there is a higher cost. Change must be for the better not for the worse.

CHAIR—That concludes the questions. Thank you for your appearance today.

[9.46 a.m.]

BALL, Mr Stephen John, Director, National Insurance Brokers Association

HANKS, Mr John Anthony, Consultant, National Insurance Brokers Association

PETTERSEN, Mr Noel, Chief Executive Officer, National Insurance Brokers Association

CHAIR—I welcome Mr Pettersen, Mr Ball and Mr Hanks from the National Insurance Brokers Association. The committee prefers all evidence to be given in public, but we will consider a request for all or part of evidence to be dealt with in private if that is necessary. We have received your submission, numbered 10. Are there any alterations or additions you wish to make to the written submission?

Mr Pettersen—No.

CHAIR—I now invite you to make a brief opening statement, and we will move to questions beyond that.

Mr Pettersen—We represent the National Insurance Brokers Association. I am the chief executive of the organisation. Stephen Ball is a board member of our association. Importantly, he is a chief executive of Jardine Lloyd Thompson, one of the major international insurance brokers operating in Australia. John Hanks is an insurance consulting specialist who has worked with NIBA over many years. We are here today as a team to help—to provide you with as much information as we can and to answer your particular questions. We have chosen not to make a formal submission as such but, rather, to offer our services, given our capacity in the market.

Insurance brokers are required by law to act on behalf of the buyer of insurance. So we are not representing insurance companies, we are not insurance agents; we are representing insurance brokers. Insurance brokers in the commercial market probably write close to 90 per cent of commercial insurance written by business. That is their primary market. They are required to be regulated by the old Insurance (Agents and Brokers) Act and under the new financial services regime—a regime that, as an association and as an industry, we have supported and will continue to support.

We are here today to answer your questions on what is perceived out there as a crisis. No matter which direction you come from, it is perceived as a crisis. There is no such thing as easy insurance any more. In Australia we have lived in a basically underpriced market for some time. We are only two per cent of the global market. We are seeing catch-up taking place because of that. Things that are happening here are also happening overseas. But we have also had a number of compounding factors driving up rates in this country particularly and making it extremely difficult in the liability areas for some organisations—certainly community groups—to get effective insurance cover, if they can get it at all. As you have obviously heard from insurance companies, they have been prepared to use their limited capacity to cover non-standard risks, but only at a price. It has made it extremely difficult.

We have seen a contraction in the marketplace here in Australia, again making it difficult for brokers to place their clients' business in the traditional insurance market. If cover has been available, the prices have been high. It has also been a condition that the deductibles—the excess—are placed on those policies. We are seeing fewer insurers control the market. Basically, we are also seeing the importance of insurance being highlighted. It is essential. Despite the high cost of premiums, it remains absolutely essential to the security of business here in Australia. Insurance is now a significant business cost, and we all understand that it can no longer be shrugged off as, basically, being unimportant.

We have seen rising rates not only in the liability classes but across the board as a result of poor underwriting results. We hear that underwriters have only made an underwriting profit twice in the past 10 years. We have seen rising reinsurance costs. There are about six major reinsurers globally. They control the market. When they sneeze, the rest of the insurance world catches pneumonia. We have seen investment income down due to the low interest rate situation in Australia. We have seen profit expectations of corporate capital providers being far tougher than they have been in the past. We have also seen concerns over insurer positions. This has mainly been as a result of the demise of HIH last year. All of this is underpinned by a general recognition that underwriters have, for many years, underpriced their product. We have had cheap insurance in all classes here in Australia.

In the liability market we have seen a change in community attitude to litigation. We have seen the evolution of a 'slip and sue' mentality. When you look at graphs, you see a massive upswing in terms of insurers' payouts has occurred since 1997, in what has become a very litigious society. In 1998 there were about 55,000 reported claims. This has gone up to about 90,000 reported claims in 2000. The insurers tell us that they are working on a loss ratio of around 138 per cent. It does not make good business. We have seen increased payouts for bodily injury from the courts. We have seen the reduction of capacity via HIH, who bought out AFI. That was 50 to 60 per cent of the liability market that disappeared and had to be mopped up by the remaining insurers. There are fewer insurers and they are being much more selective. It has made it extremely difficult, certainly for community events and any event involving people: tourism, leisure et cetera.

This is just a brief statement and, obviously, I want to hand over to people more specialised in the market, particularly Stephen Ball, to perhaps add to those comments and to allow you to ask us questions. When you talk about solutions, obviously it is a difficult question for us to answer. We do not want patchwork solutions. I guess it is a combination of a number of things. Business, government and lawyers all have a role to play. We are looking at tort reform. We are looking at the capping of payouts. We are looking at pooling arrangements. Certainly, the solutions will heavily involve the states in being quite consistent in their approach to reform. Steps have taken place. New South Wales, Queensland and Western Australia have moved towards reform of public liability laws, and we are seeing other states bide their time. That, in a five-minute introductory statement, gives you a picture of the people we represent. We represent the buyer, not the seller. Hopefully, we can provide some meaningful answers to you here today.

Mr Ball—My comments really relate to two specific questions which were mentioned in the introduction. They were the impact of public liability insurance for small business and the community and sporting organisations. In general terms, cover is available for most of these organisations, except those organisations that have difficulty in proving that they have control

over the risk of injury or where the responsibility is unclear or where there should be a greater sense of responsibility on the part of the participants themselves.

Market contraction has really made community events very difficult to get cover for, but I do know of at least three major schemes which are well advanced in planning and which will certainly be announced for public participation in the next three weeks. These will look highly upon not-for-profit groups as those that they are looking to support. Sporting groups can get conventional liability cover, but their difficulty is with participation risk—the risk that exists between player and player. Insurers are now saying it is that participation risk which should be the responsibility of the individuals themselves and not of the insurance market. Small businesses in their own right have been looking at increases of 25 to 35 per cent. A lot have had increases of up to 1,000 per cent or more, but a lot have had no increase. There has been a lot of publicity in relation to the extremes of the market increases, but there is not much publicity in relation to the fact that a good part of the buying community is either not getting an increase now or is actually getting relatively small increases.

CHAIR—So you saying that the average increase is between 25 and 35 per cent?

Mr Ball—Yes.

CHAIR—For which sector?

Mr Ball—In the small business area.

CHAIR—Small business, including leisure and community events?

Mr Ball—No, leisure and community events are substantially different to that.

CHAIR—Just small business?

Mr Ball—Small commercial business—takeaway shops, motor garages and so on. There is the question of the impact in relation to the professional indemnity insurance, particularly including directors' and officers' liability. Again, most businesses can get cover for these contingencies, but they are being asked to pay considerably more for it. Where the business has a clear exposure for a breach of professional duty, more careful evaluation is being conducted and prices are being set according to the cost of the capital that is being used for that protection. Businesses are being asked to try to reduce their exposure to loss more, and they are seeking participation in group schemes. Group schemes, I believe, are one of the major ways of overcoming the current crisis.

There are certainly some organisations—for example, financial planners, valuers and geotechnical engineers—who are having an enormous amount of trouble, probably because of a generalised approach to the fact that, within those industries, there are some that are causing a considerable problem for the rest of the participants in those industries. They do require special attention. Noel referred to a litigious society of 'slip and sue.' I believe that, in most organisations or most businesses now, the mentality is to try to make a claim if there is an injury or a damage, rather than to ask, 'Did I contribute to my injury or do the damage myself?'

CHAIR—In what areas are people having difficulty in getting any cover at whatever the price—apart from the community events and leisure area, where there is uncertainty regarding responsibility and control?

Mr Ball—The most publicised areas are sporting activities and crowd events. Sporting activities would include horse riding activities, whitewater rafting, bungee jumping and some of the more hazardous adventure tourism type sporting activities—they are probably the most highly promoted areas.

CHAIR—What about beyond those sorts of areas?

Mr Ball—Beyond those areas I would suggest it is the businesses that have difficulty measuring and proving their risk and their ability to control risk.

CHAIR—Can you offer us some examples of those?

Mr Ball—Non-professions—people who do not have a professional standard to support them, so where there is a vague level of advice rather than specific professional performance measurement criteria—are having difficulties.

Senator BRANDIS—Mr Pettersen, I note your comment that there is no point in offering patchwork solutions. I do not know if you were in the room just before when I was directing some questions to the gentleman from COSBOA, but I want to explore much the same issues with you. My problem with this issue is that I do not know—and you or one of your colleagues might be in a position to tell us—to what extent the escalation in insurance premiums in the last couple of years has been largely driven by price pressures in the international reinsurance market. If that is the principal pressure driving upwards the cost of premiums, then it seems to me that all the public discussion we have about ambulance-chasing lawyers, for instance, or pre-litigation procedures or even about trying to change the litigious culture that is developing in this country—all of the proposals for domestic reform—is really fiddling around at the edges because it does not go to the core of the pressures in the market. Would you care to elaborate on that?

Mr Pettersen—The point you make is valid. The insurance market is, after all, a market; it is subject to fluctuations, it is cyclical. The rates we are seeing now in some of the liability areas, in some of the commercial areas, are equivalent to rates we saw back in 1993 and, certainly in the liability areas, are not as high as they were in 1987 or 1988. We have seen that fluctuation take place. Having said that, we have also seen contraction take place. The market we are seeing in the year 2002 is vastly different from and vastly smaller than the market that has been in existence in previous years. On top of that, we have seen the withdrawal in this market of probably the major player in liability—that is, HIH. Yes, they were offering very cheap insurance and, yes, that did impact on the market. As a result of that, we have seen a steep climb for not only the global reinsurance reasons—and they are certainly valid, and Stephen will comment on that—but also the reasons of HIH, of the underpriced market in Australia and of the global knock-on effects of the World Trade Centre.

Mr Ball—I would reinforce Noel's point: it is a market issue. A lot of the pricing at the present time is driven by global pressure. This is not a crisis which is unique to the Australian

business world. Many parts of the world are having exactly the same issues as we are in relation to rapidly escalating prices or the unavailability of capacity. I believe that the September 11 incident, on its own, has removed a goodly proportion of the available capacity from the Lloyd's insurance market available for the coming year. That will have an impact on the whole world insurance market in terms of the availability of capacity.

Senator BRANDIS—I take it that you agree that—particularly, though not exclusively, in the case of HIH—the premiums that were being offered in this country in recent years were underpriced so that what we are seeing at the moment, when we see the price of premiums escalating, is at least significantly in part a market adjustment to reflect more truly the price of risk?

Mr Ball—Very clearly, Australia was always regarded by global standards as a very cheap insurance market. Specifically in relation to professional indemnity insurance, there has been not just the loss of HIH but the loss of no fewer than five major groups that have departed the market in the last 12 months: HIH and FAI, which are the ones promoted quite heavily; GIO-AMP, as a collective group of organisations, have ceased to write professional indemnity insurance; Suncorp Metway has ceased to write professional indemnity insurance; St Paul insurance company, which would be the global leader for medical malpractice insurance, has ceased to participate in Australia; and Markel, which is an underwriting agency distributing the Lloyd's capacity in Australia, has withdrawn from Australia.

There is a lot of publicity given to the withdrawal from Australia of HIH, but there are many others that are also in that category, to the point that when on a recent occasion we sought to place a renewal of a program which had previously had $200 million of cover in the Australian market readily achievable there was no greater than $85 million worth of cover available in Australia. We simply could not place any more cover in the Australian market than that. So in the space of 12 months there was a considerable reduction in the available capacity in this country.

Senator BRANDIS—Do you generally agree with the view—which I am putting as a devil's advocate rather than advocating necessarily as my own view—that further regulation of court procedures or further regulation of ambulance-chasing lawyers, for instance, is more likely to be fiddling around at the edges than addressing the core of the problem, which is driven by market forces rather than the way in which claims are pursued?

Mr Ball—I think that it is fair to say that what we would prefer to see is a more federalised approach to the framework of liability insurance.

Senator BRANDIS—I am sorry, but that is not what I asked you. What do you say?

Mr Ball—My answer is that I believe that simply playing with tort law reform is not the sole solution; avoiding that issue is not a solution either. I believe there is a discrepancy between the various laws which operate in the country not just between states but also between different types of insurance. Workers compensation and public liability, for example, have different benefit structures, and a person injured in a workplace accident may look to see if there is a better jurisdiction under which to bring his claim. Different states taking different approaches to this may only exacerbate that as a problem. I believe—getting to where I was trying to

comment—a more federal framework to the legal issue would suit more the insurance product, which is itself a national product. We do not differentiate between the cover which applies between New South Wales or Queensland. The legal framework must support that type of product. Because of my own personal ability, I could be employed in Queensland but fall over in New South Wales in a property that is owned by a Victorian. Which jurisdiction do I then bring my action in?

Senator BRANDIS—That brings me to another question that interests me. To what extent is this problem driven by the different litigation culture that exists in Sydney as opposed to the other state capitals and the higher awards of personal injuries damages that are attainable in the Supreme Court of New South Wales compared to the other state and territory supreme courts?

Mr Pettersen—We can only give you a generalist answer here. I think again we are talking about the concentration of population. The concentration of payouts are obviously going to be in Sydney and Melbourne. We have certainly seen, according—

Senator BRANDIS—It is not merely the gross quantity of payouts because it is the most populous part of the country but the fact that the highest damages awards given in personal injuries cases by the Supreme Court of New South Wales are roughly four times greater than the highest damages awards given by any other Australian courts. I just wonder to what extent, as I say, this is a Sydney driven problem.

Senator CONROY—Do not be drawn into the Queensland-New South Wales rivalry here. It is very dangerous.

Mr Pettersen—It is almost getting like the State of Origin here.

Senator CONROY—That is right.

Mr Pettersen—It is a difficult one to answer.

Senator CONROY—But he would still like an answer, no matter how difficult.

Mr Pettersen—We are not specialists in the area of court payouts and judges' opinions on cases. Let me answer in a broader way. Obviously, and hearing your question to Mr Ball earlier, a huge part of this problem has been the excessive payouts and the very generous payouts that have taken place as a result of some very simplistic actions—for people who can walk out of a pub at 11.30 at night, after having been there all day, fall over on the footpath and end up receiving payouts of millions of dollars. We are in a market, after all. That million-dollar payout is as a result of probably a $500 premium, if that. When you put the multiplier effect on that, you see that the pool will rapidly reduce. To maintain that standard of payout, obviously you are going to have to build up the pool and bolster your reserves. That is exactly what we are seeing take place in the market right now. We are seeing the opportunity to bolster reserves and be very prudent as to where those risks are placed and under what conditions.

Senator BRANDIS—I suppose those within the insurance companies who determine the premiums, faced with a situation in which the boundaries of negligence are always expanding—in application, if not in concept—are basically saying to themselves, 'For God's sake, we have

no idea what, in 15 years time, may or may not be regarded as an injury for which a court will allow the claimant to recover damages.'

Mr Hanks—We agree. There is obviously a balance. There will be an effect, in that the benefits that are paid out do drive premiums. If they are reduced in some way—with a balance for the community attitudes and so on—then premiums must reflect the benefits that are paid, in a competitive environment, which we have in Australia.

Senator BRANDIS—So, in the equation that the actuary does in his own mind or on his computer, he is really factoring in a new factor that was not there before—that is, the absolutely unknowable scope of potential future claims, as opposed to the quantum of likely future claims in a fairly static environment in which the limits of liability are more clearly defined and established.

Mr Hanks—Quite so. Obviously, actuaries are better at looking at the past and then looking at projections going forward. But, obviously, it takes assumptions to look towards the future and what is going to happen. That is always difficult.

Senator CONROY—I want to chat with Mr Ball about a couple of the comments he made a minute ago. I have to declare that I have a number of hats and one of them is that of President of Volleyball Victoria, so I am particularly interested in your comments on sporting groups. You made a comment that I got the impression related to the issue of contact sport and the responsibilities of individuals. If they hit each other on the court, that is not a public liability issue; it perhaps should go through a different process, like a court. That was the impression I was getting. More specifically, you are more likely to get injured playing a contact sport than a non-contact sport; therefore, there is a different risk premium attached.

Mr Ball—The point I was trying to make was that there is an expectation that, if somebody is injured in a sport, they will go back to the sponsoring body or the organising body and say, 'You allowed me to play that sport and therefore you bear some responsibility for my injury.' Whereas, if the person chose to embark on a game themselves—if they were in the park on a Saturday afternoon, without organisation—would they seek to recover something from the person they were playing against? It is more a matter of there being a community consciousness and awareness that insurance can sit as an umbrella above what is generally a leisure pastime.

Senator CONROY—I was getting excited there because I thought I would be able to go back to my board and report that, as volleyball is a non-contact sport, we should be able to get ourselves a different risk rating and therefore a lower premium than if we are lumped in in general with sports like Aussie Rules and—

Mr Ball—Again, I think the sudden withdrawal of many companies from the market has just made that type of insurance more difficult to achieve.

Senator CONROY—I can only agree with you on that. Our premiums have gone up substantially.

Mr Ball—In a market of abundant supply, insurers would say, 'I don't really want to do that but, to be able to secure the premium placement, I will give you cover for that risk.' In a market

of contracted supply, they will say, 'Sorry, I don't really want to provide that cover anymore.' Clearly, it is not an easy or a good situation for the sporting organisations to be in.

Senator CONROY—There was a case touted around a few months back of a referee or a player—it was not volleyball; I think it was a basketball or netball match—who ran backwards and fell over. No-one had explained that they might have to run backwards while refereeing, and they won a payout on that basis. That is the sort of thing that you throw up your hands about!

Mr Ball—In a case of players at a park, is the Volleyball Association responsible for the park? Is the council responsible for the park? Is the lawnmowing contractor, who the council employed, responsible for the park? It is that area of responsibility and uncertainty that is causing the market to say, 'Come back to me with certainty, because I can deal with certainty.'

Senator CONROY—The hardest thing to explain to people—whether they be a small business or a sporting organisation—is why, when they have made no claims for 10 years, they are suddenly getting a massive increase. To a degree this comes back to what you and Senator Brandis were talking about: whether this a global issue that is impacting on us, whether we are at the tight end of the cycle or whether we are moving to make changes that do not have that much of an effect on a global scale. Does it matter whether New South Wales introduces caps and gets rid of the 'slip and sue'.

Mr Ball—I think it does matter.

Senator CONROY—I got the impression from your discussion with Senator Brandis—and maybe I was not getting all the nuances of the discussion—that a major factor is the tightness of the reinsurance market. Basically the market vanished after September 11. It is slowly coming back into liquidity at the moment. Would it have made a difference if September 11 had not happened to the difficulties that we are facing here? How much of a response is needed here to what was a global industry and a global phenomenon?

Mr Ball—The market had started to experience a substantial change at the beginning of the year 2000 and maybe even towards the end of the last century.

Senator CONROY—At that stage, HIH were starting to fall over. You worked it out a long time before everybody else.

Mr Ball—HIH embarked on a major change in its business model in about September or October 1999. At that point in time, it was not the catalyst but it was probably one of the more public displays of the fact that the market was changing.

Senator CONROY—I have been around the country talking to different organisations about the liability issue. As an example, in Tasmania they say, 'We're not a risk pool. We are not big enough to influence anybody, so it does not matter whether we do or we don't. We are basically covered by Victoria, so Victoria will determine what we do.' That is not to say that they are not interested in making changes that are comparable, but they basically say, 'Premiums are not set on a Tasmanian risk pool; therefore it does not matter what we do.' Firstly, is that fair? Does

that then flow on to our being two per cent of the world market and so it does not matter what we do?

This is a global industry now, and globalisation has benefits. COSBOA did not quite use these words, but I got the impression that Mr Potter was arguing that this is a market failure situation that people have to step into because we are so small and irrelevant—we are only two per cent of the world market. Are the Tasmanians right to say that it does not matter what Tasmania does; it is what happens on the mainland, particularly in Victoria, that matters? Is it the situation that Australia is so small—we are the Tasmania of the world as a percentage of the pool—that we do not really make any difference?

Mr Pettersen—I think you are generally right; it is a pool. It has been very difficult for members of our association to explain to their greengrocer client, who has run an effective business for 20 years at the same shop, that suddenly his premium has risen by 800 per cent when he has had no claims. There is no explanation. That is what is happening in the marketplace.

Our members have just gone through probably the most difficult 30 June in their history in terms of getting business placed. In the majority of cases, regardless of the stories that you hear about people missing out on coverage, they have been covered. So, looking at the upside, the industry has done a pretty damn good job in making sure that most businesses out there do in fact have the right coverage in place going forward.

No explanation can be given. It is very difficult for us—and certainly more difficult for the broker in the marketplace—to explain the reasons to that particular client. We can talk about being a global market. We can talk about the things we have spoken about this morning—the knock-on effects of September 11 and HIH and all those things. At the end of the day, it is also about bringing capital back into the industry. We have seen a time of massive payout for all sorts of reasons.

You heard yesterday from the people who represent those companies. They are basically looking for a better return on equity. It has been under five per cent, I think, in recent times. They are looking for a better return for their shareholders. Overseas investment, in looking at attracting capital into the insurance market, has not been good. So, yes, we are being driven by market forces. Unfortunately the people in Tasmania will pay—and continue to pay—as will the greengrocer in Townsville. The pain is not over yet. We will certainly see difficulties encountered for the next 18 months to two years.

We are beginning to see some change globally, with some insurance markets in the United States beginning to soften. Obviously these changes will take some time to filter through to the Australian marketplace. I think we will see a better, stronger industry as a result of the events of the past two years. The new APRA requirements in place from 1 July will make it a much safer marketplace in which to operate for insurers and the people with whom they choose to deal.

It has also impacted other sectors. We, the insurance industry and the industry association, have not been immune from this. As an association we pay insurance. Despite the fact that we negotiate with an insurance broker, a member of our association, our rate has gone up by 400 per cent—very difficult, when we have not made a claim either. Again, we are subject to the

marketplace. There is the very example: brokers themselves—the insurance intermediaries required by law to have compulsory $1 million PI insurance—have found it very difficult, come 30 June, to get that coverage.

Senator CONROY—At least we know that if you guys cannot get a winner the rest of us are not being treated too unfairly.

Mr Pettersen—It is a tough old time out there.

CHAIR—Is that a pool for brokers?

Mr Pettersen—It is an industry scheme for those members who choose to be in it. I would think that probably 70 to 80 per cent of our members choose to be in it. Again, it has been a horrendous time having to explain to the majority of brokers out there who have not had a claim and have seen their premiums rise by a minimum of 300 per cent. It has been difficult.

There are two things that we have not spoken about that I think we can do to perhaps minimise the impact of premium hikes in this era of capacity shortage. Businesses themselves can do more to control the risk exposures they have in their day-to-day activities to help minimise claims and reduce bills. They can identify professional negligence, product liability, workplace safety and environmental liability issues, as well as employment practices and issues like corporate governance. We are talking risk management—a greater focus internally on risk management. We are spending a lot of time on this, and we know our members are spending a lot of time with their clients in helping them implement internal risk management practices so that they can bring down the costs by showing insurers that they are taking internal measures to minimise claims against their organisation.

Then there is the issue of taxation. As you have heard, the issue of taxation in this country and the impacts of taxation on insurance—and ultimately on the policyholder—are quite horrendous. New South Wales and Victoria are the most heavily taxed states in the western world when it comes to insurance. In the property classes you are seeing the compounding effect of the fire service levy, GST and stamp duty. In rural Victoria it adds almost 80 per cent on to your insurance premium—so for every dollar given to the insurance company, the person who takes out a property insurance policy in rural Victoria will give another 80c in levies, taxes and charges.

Obviously, this also has its flow-on effects to the liability areas. Although you are not seeing a fire service levy there, you are seeing a GST effect with the compounding stamp duty on top of that. So as the premium rises, so does the tax that the average punter out there has to pay. We have seen the government in New South Wales halve stamp duty on general insurance, which is a positive step. We have also seen steps taken in Tasmania to reduce the overall impact of the insurance premium.

Senator CONROY—In terms of pricing future risk, I think that premiums are traditionally based on future risk and a few other factors. I am interested in your view on that and whether or not past profitability is a factor in pricing future risk.

Mr Ball—I do not think there is any doubt that past profitability would have an impact on future pricing.

Senator CONROY—I am talking about pricing of risk, not necessarily future pricing. I think Mr Pettersen's term was that 'catch-up' is taking place. The question is whether the pricing of future risk requires the taking into account of past profitability.

Mr Ball—Of the risk itself, no. Of the existence of the risk taker, I think it is inevitable—it is not detachable. If there is not going to be somebody there to take that risk then—

Senator CONROY—So you think it is acceptable for catch-up to be taking place, fundamentally because of mismanagement of the industry by itself? HIH are the worst outcome of predatory pricing—they sought market share at the expense of everything. Do you think it is acceptable for the greengrocer or for yourselves to be subsidising past industry losses?

Mr Ball—On the basis of having an industry to work within, yes—I think so. It is probably no different to the wool industry stockpiling product and working together there.

Senator CONROY—Yes, that was a major victory for market forces as well!

Mr Ball—I am not trying to justify it; it is a fact of life, though.

Senator CONROY—But they started off as a fairly regulated industry.

Mr Ball—As did we.

Senator CONROY—They set out to restrict supply in order to create a higher price for themselves. I do not think that the insurance industry is that regulated or has ever set out to restrict supply.

Mr Ball—In fact, I think every insurance company out there would dearly love to be able to be providing prices substantially lower than they are able to deliver at the present time.

Senator CONROY—I am really just trying to get to whether or not it is reasonable for the Australian community to be subsidising past losses. It is not to say that, when you are pricing risk, you do not build in a level of profitability into the future. Let us say that you want to make 15 per cent. You have the price of your risk and your profit margin on top, and that is perfectly reasonable. What we are seeing here is potentially a catch-up on top of that for past mismanagement. That is the point I am getting to. So when Mr Pettersen says that catch-up is taking place, is that reasonable?

Mr Pettersen—Can I just jump in there. When I say catch-up, I am saying catch-up in pricing of premium. We are talking about an unrealistically underpriced market for many, many years.

Senator CONROY—I am not saying that a company is not allowed to make a profit based on the price of the risk and the profitability they want this year. The question is: should they be

entitled to make a super profit that is about making up for their own mismanagement for the past five years?

Mr Hanks—I think the answer is obviously no, but it is in a competitive market situation—

Senator CONROY—But that should not happen in a competitive market.

Mr Hanks—In all industries you are going to have good years and—

Senator CONROY—It is the shareholders of those companies that should pay the price for the mismanagement of the industry, not the greengrocer.

Mr Hanks—But in a market situation where your supply has been decreased, there is a natural increase in price until such time that you build up the capacity again.

Senator CONROY—So there should not be any moral hazard for insurance companies? They should not have to pay their own price for their own mismanagement? You want a moral hazard for everybody else but not for insurance company shareholders.

Mr Hanks—I think in reality they do. If you are in a very competitive market and you have bad management practice, and the competition remained, you cannot catch up.

Senator CONROY—So the problem is that we do not have as much competition in the market as we should.

Mr Hanks—Exactly.

Senator CONROY—So it is back to Mr Potter's market failure argument!

Mr Pettersen—At the end of the day, we all want a market. We do not want to see some letter in the morning's *Australian Financial Review* about a market disappearing.

Senator CONROY—It is a voluntary occupation to provide public liability. We understand.

CHAIR—Mr Pettersen, on that market issue, you were able to say to us that New South Wales and Victoria are the highest taxing states, in relation to insurance, in the western world. In the area of tort reform, the argument I have not heard yet is that the reason we need to go down that path of tort reform or redefining negligence or caps or restricting people's rights to pursue claims is that we are internationally non-competitive. Do you have any information that you can offer the committee on where Australia stands in relation to how competitive we are in reattracting capital in the investment field?

Mr Pettersen—Are you talking about the insurance investment field, or are we talking across the board?

CHAIR—Insurance.

Mr Pettersen—It is difficult for us to comment because that is not our expertise in the marketplace.

CHAIR—All I am saying is that, on those issues, we have not heard that the insurers are not re-entering the Australian market because our tort regime is too restrictive in comparison with Canada's. I am not aware whether that comparison has been done to date, but I am noting so far in relation to the submissions that we have dealt with that it is not an issue that has been raised as an argument for why we should go down this path. You are not aware of this either?

Mr Pettersen—There is a general awareness in the world that, apart from America, Australia would be the most litigious society on this earth. In recent times there have been excessive payouts. At the end of every payout there is an insurance policy, so we have seen a reduction in the capacity of the market. For those overseas players looking to inject corporate capital to provide a better return and a more conducive marketplace to bolster the situation in Australia, it would not be—and has not been—attractive. Part of what is happening in the marketplace now is a direct result of all of that. Whether or not these decisions have been made here in Australia, we have certainly seen international decisions made to withdraw. We have heard some of the names this morning of international markets disappearing. It is not a good market in which to be, and it has not been for some time.

Mr Ball—Let me add to that. It goes back to Senator Brandis's earlier point. Of the 10 major groups still offering insurance in this country, three of them are locals and the other seven are parts of global organisations. They have to compete with their other counterparts internationally for the capital from the organisation. As a consequence, if the return on the capital in Australia is X dollars, and in any other part of the world it is X-plus, those companies will distribute that capital to those countries before it comes here. It is a very tight situation. We now have only three groups within an Australian market that are not totally reliant on foreign organisations for the capital.

CHAIR—But our task is to look at future solutions. Is it, firstly, in relation to our problems of scale on the world market? Is it, secondly, in relation to bad decisions by operators within our market in the past? Or is it, thirdly, that our regime is non-competitive?

Mr Hanks—I think the answer is yes to all three questions.

CHAIR—I seek your guidance as to where the data is to support the third.

Mr Hanks—Quite clearly, the premiums will reflect the claims situation. If, for example, claims are higher because of a bad tort regime in Australia, the premiums will be higher. The return must cover those before you talk about any other profits or moving around in capital.

CHAIR—Again, the level of the premiums may simply reflect the two other factors. That is why I am asking whether you can provide the committee with guidance as to where we would find information suggesting that the third factor is also significant. Equally, there are many others we can direct that question to. I think that is one of the large unanswered questions at this stage.

Mr Hanks—That is the difficulty with statistics in this area, which has been recognised.

CHAIR—There being no further questions, thank you for your appearance today.

Proceedings suspended from 10.36 a.m. to 10.54 a.m.

ANTICH, Mr Robert, General Manager, Compliance Strategies, Australian Competition and Consumer Commission

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission

CHISHOLM, Mr James Donald, Solicitor, Australian Competition and Consumer Commission

KELLEHER, Mr Brian Thomas, Project Officer, Australian Competition and Consumer Commission

CHAIR—I welcome the witnesses to the table. As you would be aware, the committee prefers all evidence to be given in public, but if at any stage you wish to go in camera, we can consider such a request. I now invite you to make a brief opening statement and we will move to questions beyond that.

Mr Cassidy—Thank you. We are very happy to be able to be here today to answer any questions that the committee might have of us. As you would be aware, we did not provide the committee with a formal submission. That basically reflects the fact that we have a fairly limited role in relation to insurance. In particular, our interests are twofold. Firstly, there is a reporting role, which really started in June last year when the then minister, Mr Hockey, asked us to report on the general insurance industry and premium increases following the collapse of the HIH group of insurance companies. We did that in March this year, and I understand the committee has copies of that report. Following that report, Senator Ian Campbell asked us to update the report, particularly to track the impact of the failure of HIH and also having regard to the events of September 11 last year insofar as they have an impact on insurance and insurance premiums. We are in the process of preparing that report and we are aiming to provide it to Senator Campbell by the end of this month. It has also been foreshadowed, following the ministerial forum that was held on 30 May, that we will be asked to monitor insurance premiums over a two-year period and to report on whether they reflect the legislative changes that are currently being either made or considered by Commonwealth and state governments.

CHAIR—Just before you move on from that point—we had some discussion on this issue yesterday—can you elaborate on where that report is meant to go?

Mr Cassidy—Following the ministerial forum, we have not as yet got a formal request or direction from the government to undertake that monitoring, so—

Senator CONROY—Do you have a copy of the press release or the communique?

Mr Cassidy—Yes, I do.

Senator CONROY—My reading of it was that it did not actually say that the government were going to do anything. The government were going to consider.

Mr Cassidy—You may have picked up a subtlety that could—

Senator CONROY—Which may explain why you had not actually received the letter some weeks later.

Mr Cassidy—I was certainly under the impression that we would be getting a request or direction—

Senator CONROY—Is it possible to table that communique, if you have got a copy, so we can have a chat with you about it?

Mr Cassidy—Sure.

Mr Antich—It is available on the web site.

Senator CONROY—Yes. We may even have one handy. I just thought, as you seem to have it to hand—I saw you flicking through your folder—

Mr Cassidy—The answer to your question will actually depend on the terms of any request or direction we get from the government as to who we actually report to. The first two requests that we had asked us to report back to the minister. That is what we will do. Other requests that we have had over a period of time in relation to price monitoring have been couched more generally. Therefore, we have taken an approach of reporting publicly when a report is available.

The second role that we have in relation to insurance is in relation to the consumer protection provisions in the Trade Practices Act, in particular, the warranty and liability provisions and, related to that, the provisions relating to misleading or deceptive conduct. Basically, the Trade Practices Act provides for certain minimum warranties and liabilities that individuals have in the purchase of goods and services. As you would be aware, there are currently proposals to amend those provisions to ensure that they, in a sense, are not a backdoor way for people to make claims that they otherwise would not be able to make as a result of proposed changes to liability laws. So we have an interest, given our broader role in relation to consumer protection under the Trade Practices Act, in what sort of changes might be made to those warranty and liability provisions and, possibly accompanying that, in what changes might be made to the provisions related to misleading and deceptive conduct.

So that is, if you like, our second role in relation to insurance. Overall, as I said at the outset, that is a somewhat limited role compared to that of other agencies which are more directly responsible for matters relating to the insurance industry. Because of that limited role we did not actually provide you with any formal submission, but we are certainly quite happy to try to answer any questions you might have of us.

CHAIR—There is one further point on your second issue regarding consumer protection. Can you describe for me the difference between your role here and that of ASIC?

Mr Cassidy—Our role is not, in a sense, a formal active role. We have provisions in the Trade Practices Act which read into contracts certain minimum warranties and liabilities in

relation to the purchase of goods or services. They are not provisions which give us any right of action. They provide a private right of action—in other words, a right under contract law. We do not have a right of action under those warranty and liability provisions. So, in that sense, our concern is a broader consumer information role. It is one of providing advice as best we can on proposed amendments to those provisions and also trying to make sure consumers are aware of just what any amendments to those provisions might mean.

CHAIR—The submission we have from APRA refers to their role and to ASIC's role. It makes no mention of the ACCC. You have mentioned a consumer protection role. APRA tells us that that is actually the role of ASIC. We need to hear further from ASIC about their role in consumer protection but perhaps, since we are discussing it now, you could describe for me what you understand that to be.

Senator CONROY—I would just like to clarify a point. I thought you said that you have no consumer protection role, only a consumer information role.

Mr Antich—There are a few issues in that question. In relation to us and ASIC, insurance is a part of the financial services role that ASIC now has after 11 March this year as part of the Financial Services Reform Act. In terms of insurance itself—if that is the question—we do not have a role in relation to consumer protection.

CHAIR—The question is about consumer protection in the insurance field.

Mr Antich—Yes, that is right.

Senator CONROY—And you have no role in that?

Mr Antich—No. In respect of the terms of the Financial Services Reform Act, we do not.

CHAIR—What role does ASIC have?

Mr Antich—In terms of the way in which you construe financial services and the way the term is defined—which is very wide—our understanding is that ASIC would have that primary responsibility in relation to consumer protection relating to insurance services. Our concern, and the concern in relation to consumer protection as we are talking about it here, is not in relation to consumer services. We are looking at it from the point of view of the section 68 proposed amendment and the implied terms that go into contracts for the provision of goods or services. The services do not include insurance in that respect. Does that address the issue?

Senator CONROY—Perfectly.

Mr Cassidy—I suppose the confusion might come from the fact that this is a fairly recent change which took effect from 11 March, from memory. So, up until 11 March—

Senator CONROY—Have you let the minister know that that change occurred?

Mr Cassidy—We assume he does know given that it is a change that basically came from parliament and that is the law as it now stands. As I say, we never had a right of action in terms of the actual warranty and liability provisions. But, up until 11 March, if we saw something which we thought was misleading or deceptive in relation to the way in which insurance was being advertised or promoted, we would have potentially been able to take action in relation to that misleading behaviour. However, since 11 March, ASIC now has that role.

Senator CONROY—So when the communique comes out and states: 'Role of the ACCC', it gives an impression that you are there to protect the consumers in this particular area whereas it is probably more appropriate for the heading to be 'Role of ASIC' because they provide the consumer protection in this field.

Mr Antich—Our understanding of that communique is that it relates to the monitoring role which was a follow-on from the previous report that was handed up in March. That is our best understanding.

Senator CONROY—But the monitoring is about providing consumer information, not about consumer protection.

Mr Cassidy—That's right.

Senator CONROY—The key here is that you have no new powers to deal with consumer protection and basically you cannot deal with consumer protection in this area because parliament has specifically mandated it to be an ASIC role.

Mr Antich—That's right.

Senator CONROY—I wanted to make sure we understood that. You used the words 'not formal or active' which designates that you have no powers in this area.

Mr Cassidy—Yes.

Senator CONROY—I suspect that you would require extra powers by parliament if you were to do anything specific about price exploitation in this field.

Mr Cassidy—Certainly in terms of price exploitation we would require legislation by parliament.

Senator CONROY—Looking at the communique—and this is the nuance we were talking about a little earlier, Mr Cassidy—it says:

Ministers agreed that the ACCC's role was crucial to monitoring progress in relation to public liability and general insurance premiums.

I am not quite sure what 'monitoring progress' means but we will come back to that. It continues:

The ACCC will monitor market developments and premium prices and the Commonwealth will review the ACCC's involvement (including more formal processes) if it becomes clear …

According to this communique, you will not provide your first report for at least six months. As I said, it is unlikely the Commonwealth will do anything—and I am not anticipating they will—because they are clearly indicating that they will not do anything until, at the minimum, your next six-monthly report. I will not be holding my breath waiting for Minister Coonan to write to you at this point in time because it is quite clear what the intent of the communique is that it states:

... the Commonwealth will review the ACCC's involvement ... if it becomes clear that cost savings are being made but not passed through to consumers.

Given that there have been no legislative changes yet to drive those cost reductions, it could be some considerable time before the impact of even New South Wales changes are reflected in the market. To my mind, it is quite clear that you have not received any additional powers; you have not received any additional mandate; and, you have not received any request from the federal government to do anything other than what you do now.

CHAIR—And they had powers removed in March.

Mr Antich—We are doing an update to the March report. That is due to be provided by the end of this month.

Senator CONROY—That is consumer information.

Mr Cassidy—That is true. Obviously we cannot comment on exactly what the words of the communique mean.

Senator CONROY—I thought they were self-evident. Without wanting to sound silly, yes, you can comment; you are an independent statutory authority.

Mr Cassidy—But in terms of when you read a sentence—

Senator CONROY—In terms of what it says, it is quite clear.

Mr Cassidy—As you said, it certainly does not give us any additional formal power in relation to consumer protection. The communique goes on to state:

The Commonwealth will provide the ACCC with a standing brief to continue to update this report on a six monthly basis ...

So we are expecting that we will get a remit from the government to undertake that monitoring.

Senator CONROY—You will be monitoring these things on an ongoing basis anyway; that is your role.

Mr Cassidy—To be honest, we would not be undertaking the sort of task we have undertaken up until now without some direction from the government.

Senator CONROY—I appreciate you have got a resource allocation issue and that you cannot cover everything.

Mr Cassidy—As I say, we are expecting that we will get a remit from the government to continue that monitoring role. I do agree with you that it is monitoring so there are no actual additional powers involved in that.

Senator CONROY—Who does your monitoring report go to? Is it tabled in parliament? Is it tabled publicly?

Mr Cassidy—The chair asked that question earlier. It will depend a bit on the terms of the direction that we get from the government. If the minister's letter to us asks us to report to him then that is who we will report to.

Senator CONROY—What was the reporting process for the previous report? That was just to the minister, wasn't it?

Mr Cassidy—That is right. It was originally to Minister Hockey and, of course, subsequently we reported to Minister Campbell—

Senator CONROY—The parliamentary secretary.

Mr Cassidy—and he subsequently made the report public.

Senator CONROY—He is only a parliamentary secretary. He is champing at the bit, along with Senator Brandis—he is in that '282 days to go' faction. Just so that we are absolutely clear, you have received no extra powers—even the remit you were expecting from the government will not contain any extra powers, other than to say, 'We want you to keep monitoring and produce a report and, if it is on the same basis as the previous report, it will go straight to the minister—it will not be a public document.'

Mr Cassidy—In terms of the communique, that is basically what we would expect. One small qualification is that we would have a fairly high expectation that the minister would make our reports public, just as he made our last report public.

Senator CONROY—So any enforcement in this area is actually ASIC's prerogative and responsibility under the terms of the legislation?

Mr Cassidy—When you say 'enforcement', certainly in the context of consumer protection—

Senator CONROY—In terms of consumer protection.

Mr Cassidy—In relation to insurance—

Senator CONROY—Insurance, yes.

Mr Cassidy—That is now with ASIC.

Senator CONROY—In terms of the recent GST price exploitation powers, there were some fairly substantial penalties—I think $10 million was the figure that was bandied around. If you increased the price of a packet of cornflakes by 11 per cent you could get a knock on the door from the ACCC and possibly be fined $10 million. If an insurance company fails to pass on the savings that flow from this legislation, do you have any capacity to fine them at the moment?

Mr Cassidy—No, we do not.

Senator CONROY—So it is $10 million for an 11 per cent increase in a packet of cornflakes, but you cannot do anything about a 400 per cent increase and no future reductions?

Mr Cassidy—In theory, I suppose, it could have been $10 million for an increase in the price of a packet of cornflakes, as you say—

Senator CONROY—Yes, we had a long chat about the theory of the 10 per cent cap. I am agreeing with you for the purposes of this discussion, but you do know my view on the 10 per cent cap.

Mr Cassidy—I think that in principle I am agreeing with you. The point I was going to make was that it is, of course, up to the courts to decide what the level of penalty would be.

Senator CONROY—I appreciate that point—

Mr Cassidy—We are yet to get a $10 million penalty from a court in relation to a single breach of the act.

Senator CONROY—But it does not get to the courts at the moment because you have no powers to take it to the courts. That is the key point.

Mr Cassidy—That is right, yes.

Senator CONROY—So for a 400 per cent insurance increase, which we have heard about this morning—and that was just from the insurance brokers themselves—there is no capacity for any fine at all under the ACCC?

Mr Cassidy—No.

Senator BRANDIS—That has always been the case, hasn't it? The ACCC has never had the capacity to commence enforcement proceedings for a breach of section 52.

Mr Cassidy—Yes, there is a capacity, although we cannot obtain a penalty in relation to section 52.

Senator BRANDIS—That is what I mean—penalty proceedings.

CHAIR—Was that one of the issues that changed on 11 March?

Mr Cassidy—No, that has always been the way and it still is in relation to section 52. It is a general provision about misleading and deceptive conduct—not just in relation to insurance, but generally. The commission has a right of action under that section, but we do not have a right of action for penalty. Indeed, there is a private right of action in relation to that section as well. In terms of private litigation, that section is the most heavily litigated section of the Trade Practices Act.

Senator BRANDIS—Just help me with the history here. Am I right in thinking that, since 1975 when the act commenced, there has never been a capacity for the ACCC or the TPC to institute penalty proceedings for breaches of section 52?

Mr Cassidy—Subject to looking to my colleagues, I am almost certain that is right.

Senator BRANDIS—That is what I thought. Thank you.

Senator CONROY—We have just had a discussion with the Insurance Brokers Association and yesterday with the Insurance Industry Association. The industry association argued that one of the factors that is critical to future premiums is past losses. Do you know of any other industries and businesses that are able to claw back past losses as part of their future pricing arrangements? Let me summarise it simply: you price risk—that is, towards your premium—and then you put on top of it whatever rate of profit you want. The argument that you are entitled to have on top of that a profit that will recoup past losses seems to fly in the face of the moral hazard argument whereas, if you run your industry or your company badly, your shareholders will suffer. Yet the insurance industry seem to argue that they are entitled to make super profits based on their previous past losses.

I noted that your previous report was quite straightforward: the insurance industry had fundamentally mismanaged itself in terms of the losses that it incurred. While there were other factors, fundamentally it had mismanaged the pricing of risk. Do you think it is fair for Australian consumers—and we heard this morning about greengrocers, who having never made a claim, suffered huge percentage increases in their premiums—to have to pay for the mismanagement and the previous losses of the insurance industry? Can you do anything about it?

Mr Cassidy—That is a complex question that has several parts to it. As to whether there would be any other industry that would be able to put up prices to reclaim or make up past losses, the answer to that would be yes. It would depend a bit on the competitive situation in each industry. To take one example that I know is close to your heart, there are often suggestions that some of the margins in relation to the services provided by banks are in part about recovering losses that the banks incurred.

Senator CONROY—And occurred overseas—$4 billion in HomeSide, for instance.

Mr Cassidy—Both overseas and domestically, particularly in the late 1980s and early 1990s. I certainly would not regard it as a unique situation. I think it would depend on the

circumstances of the individual industry and how competitive or otherwise the industry was. Your question about fairness is one that is difficult to comment on.

Senator CONROY—You are the ACCC—the consumer's friend.

Mr Cassidy—Quite so. Issues about what is fair and what is equitable are often matters of individual judgment and assessment as well as matters of hard fact. I suppose I would make the observation that part of the losses that have been incurred in the past are because premiums have basically been too low in various areas of insurance.

Senator CONROY—The industry has mismanaged itself.

Mr Cassidy—Indeed. You could then say that the reason why they were too low was that there was poor financial judgment by the industry.

Senator CONROY—Their job was to price risk. That is what insurance companies do: they price risk.

Mr Cassidy—We would also say that the industry through much of the 1990s was fairly competitive. That probably had some impact on premiums. If losses, at least in part, result from premiums having been too low in the past, you could reasonably make an argument that the recoupment at least of some of those losses through high premiums may not necessarily be all that unfair a thing.

Senator CONROY—So the shareholders should not face any moral hazard in terms of the management of the company?

Mr Cassidy—This is why I am being fairly cautious and hesitant in the way I put all that. To the extent you can say that these past losses are the result of financial mismanagement or poor financial judgment, you can make a very respectable argument that it is ultimately the shareholders in a particular company that should bear that loss rather than the customers of the company.

Senator CONROY—Penalised!

Mr Cassidy—There are competing arguments, and that is why I hesitate to give you a definitive answer on the fairness or otherwise.

Senator CONROY—The key point you made is that it depends on the level of competitiveness in the industry. In a truly competitive industry, you should not be able to make up for past losses.

Mr Cassidy—Unless the losses were industry wide, in which case you might get a general listing of prices or premiums. But you are right in the sense that the more competitive an industry is, the scope—particularly for an individual firm within the industry—to price so as to make up for past losses would be correspondingly reduced.

Senator CONROY—If, as is generally accepted, the industry has basically mismanaged the pricing of risk—which is what it is supposed to be the expert in—in a competitive industry it should not be able to make up for five years of losses by extracting 'superprofits' going into the future. Part of your job as the ACCC would be to monitor whether or not cost savings are being made but not passed through to consumers. That is what you will be asked to do. When you say it is a complex question, it is, but that is what you will be asked to do.

Mr Cassidy—I think not quite, in the sense that you are posing a question of what the appropriate level of premiums ought to be. Reading the communique, what we will be asked to do is to monitor how those premiums are moving in the future and whether those movements are reflecting the changes that have been made to the law.

Senator CONROY—Cost savings are being made but not passed through to consumers.

Mr Cassidy—You could end up with a situation where the premiums on various criteria may be higher than they need to be as a result of making up for past losses.

Senator CONROY—That is what you will be looking at.

Mr Cassidy—No. The point I am making is that we will be asked to look at future movement in the premiums. They could already be too high now. As I understand it, we will not be asked to say anything about the absolute level of premiums.

Senator CONROY—I appreciate the difference you make.

Mr Cassidy—We will be addressing the movement in premiums over the next couple of years.

Senator CONROY—If there are cost savings that are not being passed on to consumers, you will be asked to make some judgment about that without having to go to the absolute level.

Mr Cassidy—That is right.

Senator CONROY—But you will be looking at one of the underlying contributors to the absolute level.

Mr Cassidy—That is true, but only one. I do not envisage that we will be saying anything about the absolute level in insurance premiums and whether they are too high or too low. We will be addressing the movements and whether those movements, as best we can tell, reflect the changes—

Senator CONROY—So just to be clear: you will not be making any comment, any recommendations or any statements about whether or not premiums are too high?

Mr Cassidy—I am making certain assumptions about what sort of remit we will get from the government. But, from reading the communique, it seems that our remit will be about movements in premiums and how they relate to the changes that are being made in liability law.

Senator CONROY—Do you have a good actuary? Have you hired a few good actuaries to help you with this one? My only advice is to hire from outside the industry.

Mr Cassidy—We may well engage some.

Senator CONROY—Do you have the expertise? This is a particularly complex area.

Mr Antich—We have certainly had an actuary for the March report, and we have one for the current report that will be handed down in July.

Senator CONROY—Do you have an external consultant?

Mr Antich—Yes.

Senator CONROY—Who is that?

Mr Kelleher—Mr Clive Amery, of Taylor Fry Consulting Actuaries.

Senator CONROY—Are you keeping him on an ongoing basis for the next two years, which is the period people are talking about?

Mr Antich—I do not think that has been decided yet.

Senator BRANDIS—On the question of the powers of the ACCC in relation to the oversight role, you do not need any additional powers to fulfil the remit, do you?

Mr Cassidy—No, we do not need additional powers. The monitoring, we assume, would be done under the Prices Surveillance Act. Under that act, we do need some sort of remit from the minister to undertake the monitoring, but that is under a head of power which already exists in the act.

Senator BRANDIS—So there are no statutory constraints on your fulfilling the responsibility that you have been asked to fulfil?

Mr Cassidy—No. As I say, provided we get a direction from the minister there is no legal impediment.

Senator BRANDIS—I understand that it is appropriate for there to be complementary legislation in relation to part V of the act, where there are limitations of liability in common law negligence claims which could be got around by suing under part V. But, as a matter of philosophy, it has always seemed to me that the Trade Practices Act ought to be generic. I have always been rather sceptical of those who, whenever a particular problem arises in a particular sector, say that there ought to be sector specific amendments to the Trade Practices Act, as though the Trade Practices Act were a magic wand which could fix everything up. I would be interested to hear your comments on that observation.

Mr Cassidy—As a general matter of principle, we certainly agree with that observation. To take an example, in relation to the provisions in part IV of the act on abuse of market power, there have recently been suggestions that there should be a specific regime dealing with the abuse of market power in the airline industry. Our stated position on that is that if, as we believe, the abuse of market power provisions are not quite adequate, there should be a general change to those provisions rather than ending up with industry specific regimes. Having said that, as is often the case with these things, there are some exceptions, in the sense that part X of the act deals with international liner cargo shipping, and a telecommunications regulatory regime is embodied in parts XIB and XIC of the act. So the act does contain some industry specific provisions. But, as a general proposition, we certainly prefer the provisions in the act to be generic rather than ending up with what someone referred to as a possible Balkanisation of the act and having a set of provisions for this industry, a set for that industry and a set for another industry.

Senator BRANDIS—That is my point. Do I take it from what you have said that you would not favour amendments specifically concerned with the insurance sector, except to the extent to which there is a necessary complementarity which limits the operation of the generic provisions in part V?

Mr Cassidy—That is right as a matter of general principle. I suppose the one qualification is that when you get into the area of pricing—this takes you more into the Prices Surveillance Act rather than the Trade Practices Act—it tends to be done on an industry by industry basis, because the need or otherwise for it depends significantly on conditions within the industry. But, certainly in terms of general conduct—to put it that way rather than as pricing specific—as a general principle we are not all that keen on having specific conduct provisions for particular sectors legislated into the Trade Practices Act.

Senator BRANDIS—A fortiori with an industry like the insurance industry, where there is a more specific regulator—that is, APRA—which has more particular powers?

Mr Cassidy—Indeed. Although you could make the qualification that APRA is basically about prudential regulation. If it were a competition related issue, you could well argue that it should be in the Trade Practices Act.

Senator BRANDIS—I understand that.

Mr Cassidy—But if it were a competition related issue and if, for some reason, the legislation were seen as inadequate, our basic position would be that that should be remedied by a generic amendment to the conduct provisions rather than an industry specific amendment.

Senator BRANDIS—On another issue, Mr Cassidy, we have heard some evidence—or an allegation, at least—that UMP marketed itself to the medical profession by offering uncommercially low premiums to expand its market share. Did the ACCC, or the Trade Practices Commission before it, ever investigate the suggestion that there was predatory pricing by UMP?

Mr Cassidy—I am certainly not aware that we have. Maybe that is something that we would have to take on notice and come back to you on.

Senator BRANDIS—I would be interested to know, if you would not mind taking it on notice, whether there were any complaints made to the ACCC or the TPC about predatory pricing by UMP.

CHAIR—Just before we wind up this session, Mr Cassidy, can I just clarify what powers you lost as a consequence of the 11 March changes—the ability to take action with respect to what, with respect to insurance?

Mr Cassidy—The provisions in part V of the act, which basically relate to consumer protection—they are about misleading and deceptive conduct and false representations—as they apply to what I think is called financial services were transferred over to ASIC exclusively. Also as a result of the 11 March changes, we now have joint responsibility with ASIC for the 'unconscionable conduct in business transactions' provisions—which are in section 51AC of the act—insofar as they relate to the provision of financial services. So there has been an absolute loss of the consumer protection side of things and there is now joint responsibility in relation to unconscionable conduct.

Senator BRANDIS—When you say 'absolute loss', you mean absolute loss to you, not absolute loss to regulators at large. It has merely been a transfer.

Mr Cassidy—The chair's question was couched in terms of what we lost, but you are quite right—it is still on the statute books.

CHAIR—The ASIC submission refers to the transition period for the new financial services regulation licensing and product disclosure regimes. It says:

> Until industry participants complete their transition to the new FSR licensing and product disclosure regimes, they remain subject to their current regulatory regime.

This transition period is two years, which I presume brings us to March 2004.

Mr Antich—I think that is in relation to licensing of brokers and those sorts of issues. They are not the sorts of issues we are talking about here. We are talking about the definition of financial services and the carve-out for consumer protection regime going to ASIC, and that is from 11 March this year. That has been a source of discussion between us and ASIC in relation to how that this handled. Obviously you will have investigations that will straddle that date; you will have conduct that will happen before and after that date. It is a very live issue and it is one we are well aware of. There is a process in place and dialogue with ASIC so we can have an orderly handover of those sorts of issues.

CHAIR—I am seeking to understand how ASIC is conducting its consumer protection role. At this stage, we have, from its submission, a description of licensing and product disclosure and that is all.

Mr Cassidy—I suppose that is something you would have to ask ASIC. As Mr Antich said, we have been in discussions with ASIC about the transition, particularly in relation to conduct which straddles 11 March, and how that should be handled. I am aware that ASIC have been increasing their resources in the consumer protection area in anticipation of the 11 March

change, but exactly what they have done and what they are doing is something I think you would have to get from ASIC.

CHAIR—We have been looking at from March until now. That is roughly a quarter. In this area where the role has now been transferred over to ASIC, how many actions would the ACCC have looked at in, say, the previous quarter or the previous six months?

Mr Cassidy—Is this in relation to insurance or financial insurance?

CHAIR—Yes.

Mr Cassidy—We cannot answer that off the top of our heads; we will have to take it on notice. In fact, we probably cannot answer it without consulting ASIC, because we have referred complaints to ASIC as now being the responsible entity. We will not necessarily know about complaints that have gone straight to ASIC, because complainants realise that the law has changed and that ASIC is now the responsible agency. Let us take that on notice and we will try to give you as accurate an answer as we can.

CHAIR—It might make more sense to ask you this question and you can consult with ASIC so that we do not get double counting in the data. What would be a meaningful period in terms of complaints histories?

Mr Antich—Can you clarify exactly what sorts of complaints you are talking about? That will assist us in trawling the database.

CHAIR—We are essentially looking at complaints relating to our terms of reference, so we are looking at actions relating to consumer protection regarding public liability and professional indemnity insurance.

Senator CONROY—I want to go back to the issue of clawing back past losses or past poor returns to shareholders. Given that the insurance industry has argued in its submission that it is entitled to price premiums into the future based on past outcomes, does that indicate that the insurance industry is competitive?

Mr Cassidy—Again, it sounds like having a bet each way but that is a complex issue. Our view is that the industry was reasonably competitive during much of the nineties. It has obviously hardened somewhat over the last 12 or 18 months and it is rather less competitive now, particularly in public liability and professional indemnity insurance. We regard it as a transition process in the sense that as all these changes are occurring in relation to liability law, for argument's sake, and the capping of possible damages payouts, we can see a distinct possibility that some insurance companies will move back into those areas of insurance when they perceive that their potential exposure will be less than it was previously. At the moment it is a bit hard to make a call on exactly how competitive or otherwise the industry is, because it is in the process of transition. It will probably end up not being quite as competitive as it was during much of the nineties but, as I have said, at the moment it is in a state of change.

Mr Antich—As for competitiveness, clearly what is still within the terms of the act is the conduct of insurance companies who get together to price fix in terms of the extent of increases. It is something that we are aware of.

Senator CONROY—In the past, if they price fixed, they were the only industry that price fixed themselves into bankruptcy.

Mr Antich—That is always an argument for why they price fix.

Senator BRANDIS—Given the particular dynamics of the industry, one would expect that price following, which is not collusive, would be a very commonplace mode of pricing behaviour.

Mr Cassidy—Indeed.

Mr Antich—Yes. It is an issue we are commonly faced with—drawing that distinction.

Senator CONROY—If the Carr-Egan reforms are achieved on a national basis—in other words, if all state governments deliver similar reforms—will substantial savings be passed on to consumers?

Mr Cassidy—At this stage we find it difficult to make a judgment on that. It is something which we are going to be asked to report on over the next couple of years. As part of that process we will have to assess what savings should flow from the legislative changes.

Senator CONROY—But the industry has argued for years that the key price driver has been the court payouts, and that, if you cap the court payouts and you are able to reform what they call 'slip and sue'—I am just thinking of the word you were using yesterday, Senator Brandis, with respect to 'slip over and sue'; did you use the word 'frivolous'?

Senator BRANDIS—Well, 'frivolous claims'.

Senator CONROY—The industry has argued that, if you find a way to eliminate the frivolous claims and you cap the payouts, there has to be some substantial savings. Even Mr Jones, who appeared yesterday on behalf of the Insurance Council of Australia, used the words 'substantial savings'.

Mr Antich—It is obviously a key assumption.

Senator CONROY—I hope it is; otherwise we should not bother doing it. If it is not going to reduce their payouts and the outgoings in the system, why would you bother doing it?

Mr Antich—Clearly there is a lot of support for that position. It is just too difficult to say. Both Trowbridge reports referred to a lot of issues. They were key issues, but there were a lot of issues involved in the whole mix of what drives claims. It depends on all those issues and following through. It will take a long time to see. Our understanding is that the market is hardening for insurance. If it is an inevitable consequence of the pricing of risk previously, and

that was not done adequately, you may end up with a hardening notwithstanding the reforms in the short term. We just do not know. The reforms are there and everyone is implementing them, but obviously it is a big call to even say they are going to be implemented in the same way around the country.

Senator CONROY—I appreciate that.

Mr Antich—It is very hypothetical.

Senator CONROY—I put to Mr Jones yesterday, 'The reinsurance market is softening; it is going in the right direction; its not back to its complete liquidity; it just dried up after September 11. People are coming back into the reinsurance market. There was a shocking period for returns on investments. You would have to think that that is going to ease as well, otherwise people are going to be making a bit more on their investment funds. You get the tort reforms, get rid of the frivolous claims and cap the payouts.' Even Mr Jones was prepared to concede—I do not think I am verballing him; you can check the *Hansard*—that there would be substantial premium falls. In that environment, with all of those things coming together, based on the uniform application of the Carr-Egan model, even he felt there would be some savings. So I am just looking to see some sort of view from the ACCC. Even the insurance industry believes that, if all those conditions are met, there would be savings for consumers.

Mr Cassidy—If all those conditions are met, I think we would agree. I suppose what is exercising our minds a little is that, depending on the mix of factors, over the period we are going to be monitoring we could find ourselves with some factors which will still, in a sense, be exercising possibly upward pressure on premiums.

Senator CONROY—Which factors would they be? If you take out the three or four things I have mentioned, what are the other factors?

Mr Cassidy—I suppose I am not quite as sanguine as you are—

Senator CONROY—On the reinsurance?

Mr Cassidy—On those three or four.

Mr Antich—Yes, reinsurance for one. Some of the evidence we have is that it is not actually softening. We are not convinced of that just yet.

Senator CONROY—We have had a lengthy discussion this morning about whether or not we are big enough to actually influence these issues, given that this is an international pool now—globalisation has meant that it is an international pool—and whether or not there is any point in doing anything domestically when we are only about two per cent of the market. I do not accept this point, but if the single biggest factor is the reinsurance market and it is as tight as you are suspecting—and I know you said that you are not as sanguine as me—then what we do will really make no difference.

Mr Cassidy—This goes to the point that I suppose I was getting at. If you have a mix of factors, some pushing premiums up and some pushing in the other direction, you may perhaps

still have some premiums going up but they would be going up at a slower rate or by a lesser amount than they would if you—

Senator CONROY—Now you are sounding like the insurance industry. That is what they said yesterday.

Mr Cassidy—It is worrying. It is weighing on our minds a bit because we can see a situation where perhaps people are going to be saying, 'We have had these various legislative changes and therefore premiums should be coming down,' whereas there is a possibility that what we will find in our monitoring is perhaps a case of premiums going up but going up by less than they otherwise would have. I am not prejudging what we are going to find, but that is a possibility. In that sort of situation, I would not say that legislative changes are not worth having because, even in that scenario, it would still be the case that they are resulting in premiums that are lower than they would otherwise be.

Mr Antich—The inevitable issue about all these changes is that there is going to be a tail, for want of a better word.

Senator CONROY—I understand; the long tail.

CHAIR—On that point, Mr Cassidy, could you point us in the direction of the argument that the Australian tort regime and other factors are uncompetitive within the global market?

Mr Antich—That the tort regime is uncompetitive?

CHAIR—Yes. Presumably the argument is that we have to do what we can to attract the international market back to Australia, to our small two per cent. We have to make these sorts of changes in relation to tort reform and in other areas so that we are more attractive. I have not yet been able to establish where the indication is that we are not attractive, and that we are uncompetitive in terms of that global market.

Senator CONROY—The United States is the most litigious society on earth. Does the US have our style of tort reform or does it have caps and systems to drive out frivolous claims? Does the US have our sort of tort reform?

Mr Antich—I cannot comment on the US system. On the issue of reinsurance, to go back a point in terms of its influence on the two per cent argument, the level of influence for reinsurance varies and sometimes it can only be five per cent of the premium. You cannot simplify it.

Senator CONROY—I was going to return to that when Senator Collins had finished her question. I am having trouble—and I have had probably as many chats with the insurance industry over the last 12 months as you guys have—about what is the key price driver for premiums. One day it seems to be future payouts; another day it is return on investment funds. It now appears to be the size of past losses and problems in the reinsurance markets. It is beginning to sound like trying to get the oil companies to tell the truth.

Mr Kelleher—That is a point we highlighted in the March report: one-line reasons for price increases were not adequate. There are a number of increases. It is fair to say that the July report will attempt to quantify them as best it can.

Senator CONROY—So you are going to do a bit of a breakdown of what you think are the major factors. You are not just going to say that 50 per cent is reinsurance; you are going to look at the framework conceptually.

Mr Kelleher—We will try to describe what is happening. As you will be aware, accessing up-to-date data—

Senator CONROY—You could very quickly become the most unpopular person in the country by trying to do that.

Senator BRANDIS—What do you mean by 'quantify'? In your analysis, are you going to attribute to the various causes of the escalation of premiums a proportionate importance in terms of the economic effect upon the escalation? I do not understand what you mean by 'quantify' in that context.

Mr Kelleher—We will try to attribute a certain weighting to how reinsurance is impacting. Of course, that cannot be done industry wide because the amount of reinsurance that underwriters choose to take on varies between different risks. In preparing the coming report, we will try as best we can to describe what is contributing and if we can attach a weight we will.

Senator BRANDIS—Thank you.

Senator CONROY—Will that be a public report? It will go to the minister, but will it see the light of day?

Mr Cassidy—It will go to the minister and it will be up to the minister to decide on its publication.

Senator CONROY—When are you hoping to deliver it?

Mr Cassidy—Our remit was to report by July—

Senator CONROY—It is July.

Mr Cassidy—Yes, and we certainly hope to have it to the minister by the end of July.

Senator CONROY—So I should be able to ask Senator Coonan in parliament, when we return, to table a copy if she has not done that already.

Mr Antich—The report is to go to Senator Campbell.

Senator CONROY—I cannot ask Senator Campbell a question in parliament; I can only ask Senator Coonan. He is not a minister.

Mr Cassidy—The report should be with the government by the time parliament resumes.

CHAIR—There being no further questions, that concludes this session. Thank you for your appearance.

[11.52 a.m.]

ROBERTS, Dr Darryl Milburn, General Manager, Central Region, Australian Prudential Regulation Authority

THOMSON, Mr Robert Ian, Senior Actuarial Adviser, Australian Prudential Regulation Authority

CHAIR—Welcome. As you will be aware, the committee prefers all evidence to be given in public but we will consider any requests to go in camera. We have received your submission, No. 127. Are there any alterations or additions you wish to make to it?

Dr Roberts—No.

CHAIR—I now invite you to make a brief opening statement and we will move to questions beyond that.

Dr Roberts—There is clearly a perception that public liability and professional indemnity insurance have become increasingly unaffordable or unavailable for a number of customer groups. While the evidence for this to date is rather patchy and anecdotal, it is clear that premiums have risen dramatically, albeit unevenly, over the past year. APRA would like to comment on some likely causes of, and potential mitigants for, the sharply rising premiums in liability insurance. While the points are already well known, we would like to give some indication of the relative importance that APRA attaches to them.

As our submission indicated, in APRA's view the sharp rises in liability insurance premiums can be attributed to a number of factors, including: escalation in claims costs due to a long-term trend in the community towards expensive litigation and rising court awards; withdrawal of capacity as a result of some direct underwriters quitting or winding back these classes of business and HIH collapsing; cyclical product repricing as companies take advantage of hardening rates to restore product line profitability and underpin company solvency; and worsening reinsurance conditions following the turn of the cycle and the fallout from 11 September.

A key aspect of APRA's perspective on this issue is that we do not see higher premiums as either necessarily undesirable or completely avoidable. The most important protection a policyholder can have is the survival of the insurer, as a failed insurer cannot pay claims. For an insurer to survive, its premiums need to be commensurate with the scale of the risk it takes. It is no comfort to the community to have cheap insurance at the expense of industry solvency.

Fallout from the March 2001 collapse of Australia's second-largest general insurer, HIH, highlighted and compounded emerging pressures in a number of insurance product lines, including public liability, professional indemnity and builders warranty, in all of which HIH was a major player. An outcome of the HIH collapse was that it helped reverse an unsustainable trend of depressed premium rates, because HIH was a major driver, through its underpricing of risk, of inordinate and disruptive competition in the insurance market in the late 1990s.

The September 11 terrorist strikes have taken upwards of $US50 billion out of the world insurance market. The impact of this on the Australian market can be seen in the severe cost pressures created by higher prices and reduced supply in the international reinsurance market. While it is expected that—as in past periods of stress—the market will respond with capital inflows that will in time moderate increases in rates, this will take years rather than months. In the meantime, conditions in the reinsurance market will continue to be very difficult.

APRA has been concerned for some time now that the insurance industry was focusing too much on market share and too little on commercial price setting and sustainable profit making by business class. The least profitable business classes have been professional indemnity, and public and product liability. It is typical much of the time for the industry to make underwriting losses and to rely on investment returns for overall profitability, and this was the case for most of the 1990s. This practice creates pressure, however, when investment markets turn down, as they have done recently. While underwriting performance is now improving, the outlook for investment earnings relative to the 1990s results remains poor. From our perspective, rising premium rates, due to both cyclical and one-off factors, are necessary if industry profitability is to start climbing back towards viable levels. This is not a matter of clawing back past losses, but rather of ensuring future viability. Too many general insurance companies are still making losses or only earning single-digit returns on equity. Return on equity for the industry overall for the year to June 2001 came in below nine per cent compared to, for example, 18 per cent for the major banks. While many would regard the latter result as unduly high, we do not regard the former as adequate in a competitive market for scarce capital.

APRA's new prudential regime for general insurers, which came into force on 1 July this year, substantially upgrades the capital requirements applying to general insurers. The absolute minimum capital requirement rises from $2 million to $5 million while above the $5 million floor, the regulatory capital requirement is now risk based. The risk based approach means that insurers writing liability lines, for example, need more capital to meet the greater uncertainty they face than do insurers writing property business, for example. While regulatory capital requirements have risen significantly, particularly for higher risk companies, the industry overall already had sufficient capital to meet the increased requirements.

A minority of companies faced a capital requirement beyond their resources. These were generally companies at the smaller end, many of whose undercapitalisation was resolved by their parent companies acting to recapitalise the subsidiary or restructure the group. These include captives of domestic industrial groups and local arms of foreign insurance groups. A few companies have needed to commence an orderly exit from the industry by way of merger or run-off. APRA does not believe that the new capital framework has been a material factor contributing to premium increases, although the new regime has made it clear that insurers had been significantly underestimating the risks involved in liability insurance and therefore were not in a good position to accurately price that risk. However, the key point is that the largest six or seven providers, collectively accounting for a majority of liability business, are also among the largest insurance groups in the Australian market and were well -placed to meet APRA's new standards.

APRA agrees with the proposition that uniform nationwide tort law reform would greatly assist in moderating premium increases for liability insurance. On 2 July the Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, announced a high-level panel jointly

established by the Commonwealth and states to review the law of negligence. The negligence review panel will report on a range of options to limit liability arising from injury or death, curb awards for damages, allow individuals to assume their own risk, reduce the statute of limitations, define an appropriate standard of care for professional negligence and limit the liability of eligible not-for-profit organisations. APRA would support those measures announced by the minister, as you might suspect.

The Commonwealth has also introduced legislation to federal parliament to amend the Trade Practices Act to allow people undertaking risky recreational activities to waive their contractual right to sue and to amend the tax laws to encourage the use of periodic payments to compensate negligence victims in place of a one-off lump sum. Tort law reform needs to be enacted uniformly across all the states and territories to avoid forum shopping. In APRA's view, there is clearly now a role for all states and territories to move quickly to introduce tort law reform along the lines of, for example, the recently enacted New South Wales legislation.

Regarding large claims, insurance for liability claims triggered by severe personal injury or death is a particularly difficult business, as our experience in Australia with CTP and workers compensation schemes demonstrates. In the area of medical indemnity, the well-known Calandra Simpson case, which was determined in court last November, could end up costing the doctor's provider in the region of $18 million, and it sets a new benchmark for future claims of a similar type. It is extremely difficult for an insurer to predict the future incidence and cost of such cases. Therefore, it is also extremely difficult to fund them in advance. In APRA's view, there is a pressing need for separate arrangements to be put in place for claims over $10 million by way of a no-fault care scheme for severely injured victims, funded by the taxpayer on a pay-as-you-go basis, or a national reinsurance pool for amounts over $10 million, funded collectively by the insurance industry on an arrears basis, or, preferably, a combination of the two.

In respect of unregulated quasi insurance, community and business groups sometimes seek to reduce their insurance cost by establishing mutuals that provide a form of insurance intentionally designed to escape the technical coverage and stringent requirements of the insurance act and related prudential standards. An example is the discretionary quasi insurance product offered by medical defence organisations. While such schemes have sometimes worked in the past, in APRA's view, in today's world they are a priori at risk of being inherently flawed and dangerously underfunded. The first problem is that such schemes work only if the common interests of the members result in a consistently below average claims experience, which is increasingly rare. The second problem is the natural incentive of such schemes to keep subscription rates at unsustainably low levels. At the end of the day, the cost of insurance is driven by the scale of the risk involved and not by the institutional structure of the party that assumes the liability.

One approach that APRA would not support is any form of price regulation. Price control distorts decision making in markets. APRA as the industry regulator does not itself regulate insurance prices—that is, premium levels—as this would be inconsistent with the Australian tradition of financial deregulation over the past 20 years. Nor would APRA favour any action that might undermine sound commercial decision making in the insurance sector, as that would pose risks to profitability and ultimately to solvency. The fact is that Australian policyholders

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

APRA has been undertaking a major project to modernise its data collection technology and forms. As a result, new technology and new forms will apply to the general insurance industry from the September quarter 2002 onwards. This is a major change that will take several quarters to bed down. The primary focus of our data collection is to monitor the overall prudential soundness of regulated insurers. This does not automatically encompass pricing considerations for individual product lines. Product pricing is a commercial decision for each insurer and may reflect a variety of considerations that go beyond, for example, claims history and administration expense.

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

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

I would just like to make a final comment resulting from the previous testimony by the ACCC in answer to questions about competition in the insurance industry. There are 111 companies now writing new business in the general insurance industry and the entry hurdle is $5 million. In the banking industry, for example, the entry hurdle is $50 million of capital and there are 40 to 50 companies. In the life insurance industry, the entry hurdle is $10 million of capital and there are 40 to 50 companies. Both the banking and life insurance industries are far greater in size than the general insurance industry, so you would have to conclude that across the spectrum of the financial sector the general insurance industry is one of the more competitive parts.

Senator CONROY—Would you view that as a glowing endorsement that it is one of the more competitive compared with some of those other industries?

Dr Roberts—It is certainly less concentrated than the banking and life insurance industries.

Senator CONROY—You would be aware that there would be the odd person out there in the community who would probably feel the banking sector is just not competitive at all. Perhaps you would have seen that somewhere.

Dr Roberts—I am making the point that 111 companies writing business in a smaller sector sounds pretty competitive.

Senator CONROY—But you would be aware of complaints about the lack of competition in the banking sector. Some would argue that it is behaving in a cartel-like manner, particularly in credit card interchange rates. Significant organisations like the Reserve Bank and the ACCC have made the case.

Dr Roberts—I have noted the odd comment to that effect in the media.

Senator CONROY—So saying that it is more competitive than the banking industry probably would not fall into a high level of competition. It is a pretty low benchmark to make the statement that it is more competitive than other sectors in the financial services industry, because you are coming off a low base there.

Dr Roberts—I think all our regulated financial sectors are fairly competitive and that is because we have an excellent regulator in the form of the ACCC.

Senator CONROY—I guess you just do not meet enough consumers, do you?

Senator BRANDIS—Dr Roberts, leaving aside what Senator Conroy thinks is an invidious comparison and looking at it in isolation—

Senator CONROY—You are endorsing competition in the banking sector, are you?

Senator BRANDIS—Is it your view that, looked at in isolation, the general insurance industry in this country is competitive?

Dr Roberts—I think you would have to conclude that. You have 111 companies writing a business of this size and an entry barrier of $5 million which is not a major inhibitor to new entry.

Senator BRANDIS—In your opening statement you said that you were going to tell us what in APRA's view were the principal causes of the escalation of premiums and their relative importance. According to my note, you said that there were four main causes—that is, the escalation of claims costs, the reduction of capacity, cyclical product repricing and worsening reinsurance conditions—but I did not hear you go on to discuss the relative importance of those four factors. Could you speak to that, please?

Dr Roberts—What we meant to convey is that those four are more relatively important as a group than anything else.

Senator BRANDIS—But are you in a position to offer a view among those four factors as to their relative importance?

Dr Roberts—I do not think anyone could separate out the drivers of premiums to the extent they could say it is 25, 25, 25, 25 or some other breakdown.

Senator BRANDIS—The ACCC are going to try to do that. To take one example which we have discussed yesterday and today—that is, the price pressures in the reinsurance market, which is a global market—surely you would have a view as to how that stacks up as a price driver as opposed to, for instance, the escalation of claims costs. Which is more important?

Dr Roberts—Since I am an adventurous person, Senator, what I think—

Senator BRANDIS—I thought you were a prudent person.

Senator CONROY—I am not sure we would want to have a prudential regulator who is an adventurous person, Dr Roberts.

Dr Roberts—I think we could be so bold as to hazard a guess that reinsurance conditions and claims escalation are probably relatively more important than withdrawal of capacity and product repricing and my senior actuary colleague agrees with me.

Senator BRANDIS—Do you agree, Mr Thomson?

Mr Thomson—Yes, I would have to agree with that. As you mentioned in the earlier discussion, particularly about the escalation in claims costs, I would consider that one of the bigger drivers.

Senator CONROY—It is just that the industry seems to be changing its mind.

Mr Thomson—I suppose I am talking from a technical point of view.

Senator CONROY—Given that you heard that the ACCC is planning a foray into this area, will you give them the benefit—other than sending them a copy of *Hansard*, because they are not here listening—

Dr Roberts—If they ask us.

Senator CONROY—You could be bold and offer.

Dr Roberts—There is some natural tension between us, I suppose.

Senator CONROY—Is this a turf war? Have we stumbled onto a turf war?

Dr Roberts—They are of course an excellent regulator, as I said, but they seem to be more oriented towards keeping prices down. We do not want our insurance companies to have such low prices that their solvency is threatened.

Senator CONROY—You mean mismanage themselves as badly as they have done for the last five years.

Dr Roberts—We would prefer that they were managed better, yes.

Senator BRANDIS—I think your point is the main point that I derived from your opening statement—that is, your observation that it is no comfort to have cheap insurance at the expense of industry solvency.

Dr Roberts—Exactly.

Senator BRANDIS—As I take it, your main concern is to ensure that the industry prices properly to the market so as to make sufficient reserves against potential future exposures.

Dr Roberts—Yes.

Senator CONROY—I can only agree with Senator Brandis and with what you said in your opening statement. I think you heard some of my conversation earlier with the ACCC but I do not think you heard my conversation with the insurance brokers, so I want to clarify this point: the insurance industry have made the case to me for some considerable time that future premiums are based on future payouts.

Mr Thomson—That is correct.

Senator CONROY—Whereas, in their submission to us, for the first time they have made the argument that premiums are linked to their past outcomes, which was a bit of a surprise to me because I tended to agree with your assessment that their investment returns, coupled with the future probabilities in payouts, were actually the significant price drivers. While I accept the points that Senator Brandis and you, Dr Roberts, have made that the insurance industry's job is to price risk, they do not seem to have done a great job of it in the last few years, and there is no question that premiums had to go up. The question is: should insurance companies be able to price future premiums to incorporate a clawback of their past losses?

Dr Roberts—I do not believe that is how the market should work. If you look at the return on equity that we quoted for the financial year 2000-01, 8.7 per cent—it is also an industry in which we need them to be earning a competitive rate of return on equity if they are to get capital from the market—I do not think there is any evidence that they are clawing back anything. I think you would have to conclude that it is past investment returns that have subsidised the underpricing in the industry. In the future that pricing should be a lot better as a result of APRA's magnificent new insurance regime, which will force them to reserve more scientifically and also to price to sustain those reserves on a more risk based approach.

Senator BRANDIS—So you do not accept the premise of Senator Conroy's question that, in part, the escalation of premiums in the last year or two is a clawback to cover past losses?

Senator CONROY—Before you answer that question, I would not want to suggest that Senator Brandis has just verballed me but I think he has.

Senator BRANDIS—I am sorry, Senator Conroy, but that is what I understood you to be saying.

Senator CONROY—No. I am talking about the future premium increases, not the ones that have happened in the last 18 months.

Dr Roberts—No, we do not accept—

Senator BRANDIS—Whether or not that is what Senator Conroy said—

Senator CONROY—If you would like to ask that question, that is fine; just do not put my name on it.

Senator BRANDIS—Can I put it as a proposition: do you not accept that the escalation of premiums in the last couple of years is a clawback to recoup past losses?

Dr Roberts—We do not accept that and the industry profits do not indicate that that is happening.

Senator CONROY—Have you done an extensive study of this issue?

Dr Roberts—We track the profits each year and we track the loss ratios each year. For example, the data we have on the combined ratio for product lines, which indicates the claims plus the expenses over the premium, for the year to June 2001, which is the latest we have, indicates that the weighted average combined ratio for professional indemnity business is 158.7, which means that there is a 58.7 loss that has to be subsidised from investment returns. The weighted average combined ratio for public and product liability for the year 2001 is 171.3. This information is available in APRA *Insight*, which is on our web site. It is a very good publication that is well worth reading.

Senator BRANDIS—Can you table that for us?

Senator CONROY—Is its statistics more reliable than your previous ones on the insurance industry?

Dr Roberts—They do include revisions that we had made to some flaws in our previous ones.

Senator CONROY—But you are confident these are robust?

Dr Roberts—Yes, these are robust figures. We stand by them.

CHAIR—Can you comment on the relevance of that time frame in relation to the data in terms of the incidence of these price rises?

Dr Roberts—There is no profit in these products in the most recent year that would indicate there is any clawing back.

CHAIR—But at what point in time did the escalation of premiums commence and how relevant is the time frame you are looking at?

Dr Roberts—That is for the year 2001. We do not have figures for 2001-02 yet, of course.

CHAIR—That is right. But I am asking at what point the incidence of the rising in premiums occurred.

Dr Roberts—The most dramatic one was over the last year. We would hope that these product lines are in profit for the subsequent year's figures, but I doubt very much they will be showing very much in the way of profit.

CHAIR—But these figures you are now citing in terms of the time period we are looking at are not really dealing with the period in which the premium rises occurred.

Dr Roberts—They do not include September 11 effects, for example, but they include the effect of—

CHAIR—That is what I am trying to clarify—what that time period does include and does not include.

Dr Roberts—The hardening in the cycle goes back probably 18 months.

Mr Thomson—I think that is correct. The reinsurance cycle had begun to harden prior to the September 11 events.

CHAIR—So there would be about a six-month period of the hardening of the cycle in that time frame?

Dr Roberts—Our point is that the latest available profit figures for the industry do not indicate any clawing back of past losses.

Senator BRANDIS—I would like to explore a bit further the relationship between past losses on past claims and determining future risks and pricing future risks. There is obviously a relationship between the two, is there not, from an actuarial point of view so that, in determining the quantum of premiums, the actuary is making a projection as to the extent of prudent exposure to future claims but, in arriving at that judgment, one of the most important pieces of data will presumably be past claims and trends, particularly in past claims? Is that right?

Mr Thomson—That is correct.

Senator BRANDIS—I am sorry, I have put that in non-expert language. I wonder if you could elaborate on the point.

Mr Thomson—That is fine. This is part of what is known within the actuarial profession—you might have heard the term—as the 'actuarial control cycle', which effectively means in theory that the cycle should be happening continuously and perhaps should start with the pricing of a product. You look at the risk you are underwriting—and you will look at, for instance, the probability of a claim arising; the size that the claim is likely to be; at what date that claim will arise, whether it is going to be like car insurance where it arises in six months time or whether it is going to be like professional indemnity where it might well be coming in

10 years time; and the type of asset returns you will be able to have in order to discount the value of that future payment—and you will set your premiums accordingly with obviously some form of profit margin enclosed.

So you sell the business and then after a year you can look at your experience of that block of business and ask, effectively, whether your assumptions were correct—has the experience you have had been in line with your assumptions? Inevitably they will not be, because you just cannot get it right. So then you have to do a revision. That happens in two ways. At the end of the financial year you calculate a liability or a reserve for future claims. Clearly, if your experience during the year has not been in line with your premium assumption, you would like to build that into the amount you need for future claims. You would also then go back and reprice, I would suggest. For example, if you know that you are losing money on business and you have combined ratios of the order of 150 per cent—which implies that, for every $100 you getting in the door in premiums, you are paying out $150 in claims and expenses—then theoretically you would reprice. Of course, there are many commercial decisions around the pricing issue. That sometimes means that the repricing does not necessarily happen to the extent that it should.

Senator BRANDIS—So if at the end of a period in the cycle—when historically one can determine, by reference to the proportionality between premiums and payouts, how the premiums have been priced—the insurer finds that the premiums have been underpriced, inevitably the insurer will escalate the premiums. By doing so, the insurer is not clawing back past losses but merely having regard to that data and making a judgment about what the proper price of the premium is in relation to potential future claims.

Mr Thomson—That is basically the situation, yes. The point is that, once you have underwritten a risk and accepted a premium for it, you cannot go back and say to a person, 'We will pay you the claim, but we got the premium wrong, so can you pay a bit more, please.'

Senator BRANDIS—Is there any formula or method by which one can discriminate between the escalation of premiums after a period of underpricing—that proportion of the increase which represents the exercise you have just described—and that proportion of the increase which might be described as a 'clawback', to use Senator Conroy's word?

Mr Thomson—It is a bit difficult, I suppose, in the sense that this can be a highly technical and complicated type of calculation.

Senator BRANDIS—I am just asking whether it is possible to determine. Is there a formula?

Mr Thomson—There are formulas for calculating a premium in that they involve projection—

Senator BRANDIS—But can you discriminate between those two elements: the extent to which the increase represents provision against future liability, having regard to recent past experience, and the extent to which, if at all, it represents clawing back past losses?

Mr Thomson—It would probably be possible for an individual actuary doing some pricing work to do that sort of thing.

Senator BRANDIS—Has APRA engaged in that exercise in relation to the Australian market?

Dr Roberts—Every company is going to have a different approach to pricing. In the past it has not been mandatory for them to get actuarial advice—although, for commercial reasons, the bigger ones would get it. If they do get actuarial advice they would put some weight on it, but they might also put weight on marketing or other factors. The actuarial advice itself is the application of some good methodology to some very heroic assumptions.

Senator BRANDIS—I suppose that, in a sense, the more conservative the assumptions an actuary makes, the higher the premiums will be and the more heroic the assumptions are, the lower the premiums will be. The problem is that the assumptions have been too heroic and they have reduced companies like HIH to insolvency.

Dr Roberts—That is exactly the point of the prudential margin that we have introduced in our new standard. Prior to 1 July, companies were not required to use actuarial advice in making those claims estimates for outstanding claims and, whether they did or did not get actuarial advice, they were not required to put a safety margin on top of the estimate. We have now mandated that they do both of those things.

Senator CONROY—But, under the previous legislation, they were required to seek approval from you to go down the alternative path.

Dr Roberts—No, previously they could estimate their claims in any way they wanted.

Senator CONROY—But when they went down the reinsurance path they required your approval.

Dr Roberts—No.

Senator CONROY—I think if you check the act they did. I have actually asked you that question on a number of occasions previously. They either reserved or they reinsured.

Dr Roberts—Are you talking about reinsurance?

Senator CONROY—Yes. They were not allowed to run around without any backup.

Mr Thomson—That is correct. Under the previous legislation, the actual calculation of the outstanding claims did not require an actuary and there was nothing in the act, as far as I recall, stating how it should be approached. However, the Institute of Actuaries had some professional guidance. On the question of reinsurance, yes, each company had to arrange appropriate reinsurance for its liability risks and APRA had to approve that. They could not go off and arrange it without our approval.

Senator CONROY—I want to just follow up on Senator Brandis's line of questioning, which I think really goes to the heart of some of the concerns that people have, notwithstanding Senator Brandis's unkind attempt to verbal me. I am actually talking about future increases,

rather than what has been going on for the last 18 months. Dr Roberts, you answered this question to a degree earlier but I wanted to clarify it in my mind. When they do their reassessment, if I can use that word, there are a lot of value judgments that go into the assessments and the modelling and the assumptions. Mr Thomson said that it is possible to separate out whether or not when they reprice they are repricing on the basis of a reasonable rate of return. What do you guys think is a reasonable rate of return? You mentioned eight per cent before and seemed to indicate that was not enough. I do not mind what figure you pick but say it is 15 per cent. Is that fair?

Dr Roberts—We would not put a precise figure on it but—

Senator CONROY—I am not trying to hold you to something.

Dr Roberts—something in the double digits.

Senator CONROY—Okay. Let us just say double digits. If double digits turns into 20 per cent, are you in a position where you could say, 'That's probably gone a bit beyond just a repricing of existing risk. That is recouping past losses or clawing back'? Are you in a position where you can safely reassure Australian consumers that in actual fact all that is going on is a bit of repricing based on too low a pricing previously and therefore all they are doing is efficiently pricing the risk this time rather than extracting profits to make up for previous losses? Have you got evidence to—

Dr Roberts—I think if we saw a company that had managed to lift its premiums and still shift its products to the extent that it was earning 20 per cent return on equity we would simply be astonished.

Senator CONROY—Great answer, except it is not what I asked you.

Dr Roberts—It is too hypothetical because I cannot envisage—

Senator CONROY—No. It is not hypothetical because you have come in here and sat down and said, 'No-one is actually profiteering.' I am saying to you: 'Prove it, and give us your modelling that proves it.' That was your assertion in your opening statement, so it is not hypothetical at all. If anything, your opening statement was hypothetical because you have not done the work to back it up.

Dr Roberts—I quoted a figure. Under nine per cent return on equity is the latest available industry profit figure we have.

Senator CONROY—And that is almost double digit so that is almost in your ballpark but you are saying that is still too low. I just want to know what APRA feels is the appropriate level of profitability for this industry.

Dr Roberts—Higher than that.

Senator CONROY—Higher than that. Any ballpark figure? Double digit goes up to 99 per cent.

Dr Roberts—We would not be prescribing what we think an appropriate return is in the market.

Senator CONROY—You do not mind putting a floor under them but you do not want to talk about what is profiteering?

Senator BRANDIS—I do not think that anybody could say that nine per cent return on equity is profiteering.

Senator CONROY—I am not suggesting it is but APRA are prepared to say that that is not an adequate rate of return. I am frankly shocked by that. I can introduce you to a few industries where they would take nine per cent, put it in the bank and say they have done a bloody good job for their shareholders.

Senator BRANDIS—I suppose the peculiarity of the insurance industry, unlike every other industry, is that the future contingencies are of a much greater significance on their balance sheet. Would you agree with that proposition?

Dr Roberts—Yes, I would.

Senator CONROY—It is probably the only industry that works like this but—

Dr Roberts—The other factor that concerns us is that the nineties were a period of strong investment returns.

Senator CONROY—I accept that.

Dr Roberts—This decade we are not going to have that, according to most commentators.

Senator CONROY—I do not want you to misunderstand, Dr Roberts. I accept your fundamental premise that the industry poorly managed its core business—which was pricing of risk—and that that means that there will be an increase. What the community is concerned about is whether or not some extracting of super profits is taking place now or can take place into the future. What has concerned me about the evidence that we received yesterday from the ICA was that they are now indicating that a main price driver is past outcomes. That has surprised me because I always thought that pricing future risk was what it was about plus the investment returns and, as you say, there has been a subsidy. Investment returns are going to improve. We have a cycle and in about one in seven years you might get a negative return. We have probably been lucky that we have had one in 14 years—1987 was the last negative return across the industry, I think. You might be able to pick another year. But you certainly expect one bad year every one, seven or 10 years. We have had that bad year.

Dr Roberts—I think most commentators would say we are looking at a decade where the returns are probably going to be half what they were in the nineties.

Senator CONROY—They are going to be lower than they were previously but they are not negative, which is what has happened at the moment. So there is still a degree of cross-subsidisation—to use your term—that is going to be possible over the next few years. But not with the negative returns—there is no possibility for cross-subsidisation right now. So I think that is a very valid point that you make. They have actually had to price almost completely based on the risk rather than having it a bit lower because there are some investment returns to subsidise it with. I think that is an absolutely fair point. But your defence of the industry today has been quite breathtaking.

Dr Roberts—We are not an apologist for the industry. They can defend and speak for themselves.

Senator CONROY—You can stand by your opening statement.

Dr Roberts—But profitability is necessary to raise capital and to ensure future solvency.

Senator BRANDIS—And for the capacity to meet future claims, most importantly.

Senator CONROY—But solvency takes into account the future claims. You can say you are solvent today but not if your balance sheet has this contingent liability potential. You have to be able to say you are solvent by taking into account future claims. That is the nature of the calculations that actuaries do.

Mr Thomson—Yes, that is correct.

Senator CONROY—Solvency today takes into account the future. It is only when you get an unexpected event like September 11 where your insurance markets close down for six months that you can look at an act of God that maybe places your solvency in question. As Dr Roberts knows—and I am sure you do too, Senator Brandis—the Labor Party supported the new legislation that APRA is enforcing. We supported it wholeheartedly because we think it is important and will drive rationalisation. I think part of the consequence of the bill will be a consolidation in the industry. You are mopping up the medical defence organisations now, so I think that is a good thing. The ACCC are looking at this as they are concerned that it is less competitive than it was and, without wanting to buy into a turf war—and I am actually not—you seem to believe that current increases are justifiable and that all future increases are going to be justifiable. I find that a very brave position, Dr Roberts.

Senator BRANDIS—Hang on just a minute. He did not say all future increases are justifiable.

Senator CONROY—I am hoping to draw Dr Roberts's attention to the fact that at some point before we hit 100—triple digits—some level of increase is not acceptable. More importantly, I hope he would be concerned about it.

Dr Roberts—I did not say 20 per cent return on equity was acceptable. I said that if it happened it would be astonishing. From our perspective, with over 100 companies writing new business where the number of majors is six, seven or eight and not four, the scope for raising prices and still shifting that same volume of product seems very circumscribed.

Senator BRANDIS—I suppose your perspective is a bit different from most regulators, is it not, because you are concerned with prudential regulation, and therefore the more secure and more profitable the company, the safer they will be?

Dr Roberts—That is correct.

Senator CONROY—A monopoly is ultimately the safest form of company, but you are not advocating that you have only one insurer, are you?

Dr Roberts—No. It is actually in our charter to balance safety against competition.

Senator BRANDIS—That is the whole point. There is a tension between those two values, both of which are appropriate values. But if you are the ACCC, you are more interested in competition. If you are the prudential regulator, you are more interested in safety. Both perspectives are legitimate. They are just different perspectives.

Dr Roberts—That is correct. Certainly, at the moment in that balance we would like a little bit less competition and a little bit more safety.

Senator CONROY—So, as I think you said, we have walked into a difference of opinion between APRA and the ACCC—but a legitimate one. Do you believe that the industry are entitled to increase premiums to incorporate a level of profitability that makes up for their previous mismanagement of the pricing of risk—in other words, not to price risk accurately and efficiently into the future but to make up for the fact that they delivered poor returns to their shareholders over five years? There is a moral hazard for everybody but an insurance company shareholder. Is there an inherent right for an insurance company to only make a profit and not make the losses that they have made, or should it be able to make up for past losses?

Dr Roberts—We think premiums should be set on the basis of sound commercial decision making.

Senator CONROY—Does that mean that they are entitled to make up for five or six years of losses?

Dr Roberts—We would not be making moral judgments.

Senator CONROY—I used the words ‘moral hazard’. You have quoted them back to me on a number of occasions. I am only using the words in the way that you have quoted them to me.

Dr Roberts—What we would like a company to do in setting premiums is to assess the risk of the product accurately so they can price that well, to get expert advice from their actuary, to have regard to the overall level of prudence that we think is appropriate for a regulated entity and to set the price on that basis.

Senator CONROY—Do you believe that the industry has done that—and got it right—in the last five years?

Dr Roberts—I would not like to make the same judgment across the whole industry but, broadly speaking, we think that there has been poor assessment of risk and too much underpricing of particular products.

Senator CONROY—Do you believe that the insurance industry is entitled to put up prices to recoup the losses from those poor judgments in the past?

Dr Roberts—We would be more concerned that the prices are appropriate for their future viability.

Senator CONROY—I absolutely agree with you, but that is not the question that I am asking you. Let us say that they price risk efficiently and they get a 15 per cent return on top of the efficient pricing of risk. Are they entitled to put five per cent on top of that to make up for their losses in the last five years?

Dr Roberts—I doubt the market would let them.

ACTING CHAIR (Senator Brandis)—Do you think that is what they have been doing?

Dr Roberts—No. We have seen no evidence of price gouging or whatever you call it.

Senator CONROY—I am happy to use the word 'gouging'. I talk about super profits, but 'price gouging' is probably a more appropriate term.

Dr Roberts—I do not see how you could get away with that with so many companies in this industry.

ACTING CHAIR—Are you in a position to know, Dr Roberts? As the prudential regulator, are you able to say that, on the basis of your empirical assessment and oversight of this industry, there has not been price gouging?

Dr Roberts—To take up the chair's comments earlier, we do not have the data for 2001-02. We can certainly say that in relation to 2000-01, because the weighted average of the total combined loss ratio for the whole industry over every product line for 2000-01 was 106.4. So there was an underwriting loss for the whole industry in the last year for which we have the full year's data.

ACTING CHAIR—So the real answer to Senator Conroy's point is that you are not in a position to say yet, because the data on the basis of which any such analysis or conclusion would be arrived at is not available?

Senator CONROY—I appreciate you now putting words in Dr Roberts's mouth in answer to a question I did not ask!

ACTING CHAIR—Is that the case, Dr Roberts, that you just do not have the data to enable you to respond?

Dr Roberts—Yes—and if the suggestion is that we should have an open mind then I think that is a good suggestion and we will take that on board.

Senator CONROY—But I have not actually asked you to justify the past premium increases. What I have asked you is whether or not you believe that the industry is entitled to make up for past mismanagement by price gouging, not whether or not it could happen in a competitive market. Do you think they are entitled to do it?

Dr Roberts—You are asking me a very hypothetical question.

Senator CONROY—You come in here and defend their increases—you argue that they are justifiable. I am asking you now whether or not you think they are entitled to claw back for five years of inefficient pricing of risk?

Dr Roberts—I think they should be good corporate citizens—they should not do things that are purely for the shareholder's benefit if they are exploitative of their customers.

Senator CONROY—Thank you—that is a perfectly reasonable answer. Do you think that there is a role then for the ACCC to be looking at these things? That is what they are doing—you heard them say that they are going to be monitoring to make sure cost savings are passed on.

Dr Roberts—I think that the market flaw in insurance is more the complexity of information. I think that the new APRA regime will do a lot to make the reporting and the accounts of the industry more transparent. Therefore, there will be a fair bit of market discipline.

Senator CONROY—So you are not sure then that there is a point to what the ACCC is doing?

Dr Roberts—We have no objections to any references that are given to the ACCC.

Senator CONROY—I am sure that Senator Coonan has just breathed a huge sigh of relief. We will let her know that APRA does not mind her giving a reference to the ACCC.

ACTING CHAIR—I just wanted to ask questions about UMP—United Medical Protection. There has been a lot of anecdotal evidence—which now seems to have been corroborated by what in fact happened—that UMP was grossly underpricing itself in a drive for market share amongst the medical profession. I am concerned that that could have happened without that conduct being detected by APRA.

Senator CONROY—It is outside APRA's powers.

ACTING CHAIR—Do you want to comment on that, Dr Roberts? Was that not something that was within your oversight role?

Dr Roberts—No—as Senator Conroy says, we have no powers over UMP. The current management—the management prior to the provisional liquidator—is not the same

management that was in place when that period of fast growth occurred. But we do have a general concern with any regulated entity that grows very quickly in a short period of time.

ACTING CHAIR—I am sorry—I had assumed that UMP was an entity over which APRA had jurisdiction, but I am wrong about that.

Dr Roberts—No, it is not, because UMP provides a kind of quasi-insurance which escapes the Insurance Act.

ACTING CHAIR—Thank you.

Proceedings suspended from 12.48 p.m. to 2.02 p.m.

DAVIS, Mr Robert, National President, Australian Plaintiff Lawyers Association

GORDON, Mr John, National Vice-President, Australian Plaintiff Lawyers Association

CHAIR—Welcome. The committee prefers all evidence to be given in public, but we will consider a request for all or part of evidence to be given in camera if that is necessary. Are there any alterations or additions you wish to make to your written submission?

Mr Davis—There are some additional documents that we will seek to tender if that is appropriate. There are no specific changes to the original submission, but there will perhaps be some additions that we would like to make in a small opening.

CHAIR—We will deal with that when you refer to them in your opening remarks.

Mr Davis—With your leave, I would like to speak to the economic issues and the evidence issues in relation to the causes of premiums going up, and Mr Gordon will speak to any legal issues in relation to legal social policy or tort reform issues.

CHAIR—Go ahead.

Mr Davis—Thank you. I am sure that the committee is well aware of a great deal of the background facts, so I will skip over a lot of the material and merely highlight the points that we think are important and we would be very happy to elaborate on in oral evidence.

Firstly, we have some concerns about the way in which the cause of increased premiums has been portrayed over the last six months. It is often portrayed as a result of increasing public liability claims, a litigation explosion and an increase in the average amount of claims paid. We say that each of those three points is not correct. Those are not drivers of the current situation—the current crisis, if we can call it that.

Dealing with the increase in claims, it is true that public liability claims have increased since 1992 through to 2001 at a rate of about nine per cent per annum. That is according to APRA statistics. However, what is not reported and what is not commonly understood is that the number of policies against which claims have been made has increased in that same period by 13 per cent per annum. There were 1.2 million policies in 1992-93. In 2000-01, there were 3.3 million policies. This is very significant in terms of the claims that have been made by the insurance industry about how claims have jumped. The raw data about claims jumping is immaterial. The only real issue is what is the ratio of claims per policies, and the ratio of claims per policies has actually not jumped. This is to some extent supported by a separate source, the Trowbridge report of 27 March 2002, which looked at the rate of claims per hundred thousand premiums, which is a slightly different cut on the data. They came to the conclusion that there had been a decline in claims since 1995. Claims are not the issue here.

The second claim that is often made by the insurance industry is that there is a litigation explosion caused by a litigious society—a 'claim and blame' culture. This is untrue. Civil actions in Australia, according to the Productivity Commission, have declined by an average of

four per cent per annum for the last three years. Admittedly, that is aggregate data. It refers to all sorts of civil actions other than personal injury actions. The recent Trowbridge report—

Senator BRANDIS—I am sorry to interrupt, Mr Davis, but do you have the figures for personal injury actions?

Mr Davis—We do.

Senator BRANDIS—What are they?

Mr Davis—With your permission, I will hand up a paper that we prepared in which we looked at each of the state registries and the reasons for increases in each of the state registries. For the record, the paper is called *Exploring the litigation explosion myth*. I am the author of that paper, which is dated 8 January. A copy of this paper was sent to the Senate library earlier this year, on request from them. However, I do not believe it has ever been put onto the public record.

CHAIR—If there is no objection, we will table that document.

Mr Davis—There have been some increases in some states in some courts; there have been decreases in other states in other courts. In those courts where there have been increases there are explicable reasons for the increases other than the increasing litigiousness of Australian society. Furthermore, one thing which is often not understood in relation to litigation rates is that over the last decade the Australian population has increased by two million. Without anything else, we would expect an increase in litigation rates throughout Australia when you take into account the increase in population. Further than that, as the baby boom bubble shifts through the population there is a faster rate of increase of the adult population. Again, these things are not referred to in the Trowbridge analysis and they are very relevant in the sense that, of itself, an increase in litigation is indicative of nothing.

Then we come to the question of increasing claims that are paid. It is often said that there is an increase in claims paid over and above the background inflation rate, and we would certainly endorse that. There has been an increase in the average cost of claims over the background inflation rate. There are two points, however, that we would like to make in that regard. Firstly, claims for compensation always have and always will increase faster than the background inflation rate. That is because when you compare claims with background inflation, you compare apples with oranges. An inflation measure is a retrospective measure. It looks at what has happened in the past up to that point. However, compensation payments include a component for future as well as past damages, so there is always a ratcheting up to take into account the future. That is why, if you compare claims this year with the inflation rate this year, historically there will always be an increase above the background inflation rate.

Secondly, however, at page 62 of the most recent Trowbridge report—and the copy I have is dated 21 May 2002—there is the statement that they excluded nil claims from their analysis. On our reading of that report, nil claims are claims which fall below excesses and deductibles. If you exclude nil claims, you will automatically create an artefact which is going to be a further increase in the average cost of claims that you do include. Over the last 10 years excesses and

deductibles have increased enormously, and anything which is settled underneath the excess and deductible has been excluded from the data.

CHAIR—Does the exclusion in the Trowbridge report in May accommodate past calculations where nil claims may not have been excluded?

Mr Davis—I have a copy of the report that states, 'Appendix 2 contains a summary of the experience by year of the average size of claims.' It goes on to state, 'We have excluded nil claims from the analysis.' That is a decade of data that they have looked at.

CHAIR—So they are comparing apples with apples.

Mr Davis—That is correct. The other thing which everybody will no doubt be aware of is that, again according to the Trowbridge report, premiums as at 2001 were 90 per cent what they were in 1993. There was a substantial discounting of premiums in the early or mid-1990s and now there is a catch-up going on. We have a market cycle in the insurance industry, which we submit is the real reason why there is currently a premium crisis. A number of factors have coincided with a hard phase of the market cycle. One of them is low investment earnings, which is seriously impacting on returns for insurers so they now have to look to premium income more than they did in the past. Also, in the past insurers did not make proper provision for future claims. I am sure that the recent amendments to the provisioning requirements of APRA will go some way to fixing this but in the past insurers used future provisions for competitive purposes such as discounting premiums and chasing market share, and to some extent they have been led into that by the HIH-FAI fiasco. Of course we have the dramas of increasing reinsurance costs worldwide and what has happened as a result of September 11. Essentially, it is a market failure. This market failure is worse than previous points in the market cycle, which on average appears to repeat on a 10-year basis or a 10-year frequency.

I will leave the tort reform issues to Mr Gordon but we submit that tort reform as such will fix nothing. There are a number of reasons for this. Firstly, there is an absence of competition in the Australian insurance industry. That is the only thing which is going to reduce premiums, short of regulation of premiums, which of course nobody really wants. Secondly, to some extent tort reform will remove incentive for safer conduct, so in the long term it may increase the rate and cost of injury to Australian society.

Thirdly, tort reform distorts the market by subsidising and protecting those who profit from the dangerous activities. It shifts the cost of the injury to the injured and through them to the community at large in an increased health care burden, an increased workers compensation burden, an increased unemployment burden and increasing need for pensions because there is a decrease in superannuation recovery. It will not address the causes of the market cycle, which are an inherent feature of all free markets, and it will not prevent future market failures.

Furthermore, there is research which we would like to tender, as well, which shows that in the United States, where they have had extensive experience of tort reform over the last 30 years, no connection has been demonstrated between tort reform and reduced premiums. With your leave, I would like to hand up APLA's submission to the National Ministerial Summit into Public Liability Insurance. About half the document comprises the American research which I

have referred to which is a paper called, *Premium deceit: the failure of 'tort reform' to cut insurance prices*.

CHAIR—There being no objection, the report is tabled.

Mr Davis—At present, a substantial amount of common law damages that are recovered by injury victims are, in fact, paid to governments and government organisations. There are refunds for medical and hospital expenses, workers compensation, unemployment and social security benefits and there are preclusion periods in relation to future entitlements. Tort reform in terms of capping and thresholds actually reduces the amount of Commonwealth and state recovery for those items. That is the direct loss. There is also indirect cost down the road in terms of the possibility of increased injury risk and the increased cost of injury for the Australian taxpayer.

We would submit that this whole issue of cost shifting requires detailed examination. We have presented to the Australian Productivity Commission on this issue. We were invited to appear before them and make a submission some two months ago. The informal feedback that we received is that this is a matter which does require serious consideration and that it really has not received serious consideration. So we would submit that the whole issue of cost shifting flowing from tort reform should be examined in great detail by economic modelling and the Productivity Commission is the appropriate organisation to do that. However, the time frame of that may not suit the current political imperative that everybody faces.

CHAIR—What was the basis of your submission to the Productivity Commission?

Mr Davis—We were invited to appear before them with a view to putting forward probable research subjects that we felt may be important for selection by the Productivity Commission. We put forward the whole question of cost shifting and tort reform.

CHAIR—So they were canvassing about future inquiries?

Mr Davis—That is right. The last point that I would like to make is that the ACCC has been charged with a pretty big task of trying to ensure that the insurance industry passes on any savings that they will receive as a result of so-called tort reform. We would submit that they probably do not have the resources for this but, certainly, they do not have the powers to enforce the passing on of costs savings. They can only ensure that the insurers operate within a competitive marketplace and do not collude. But where there is no competition, they have no power to produce a forced saving and they have no power to regulate prices. So, to that extent, I would submit that unless they are charged with those powers—which could be extremely difficult to do in terms of policy—they will not be able to really achieve anything. There are a number of other documents that I would just like to tender as a bundle, again, with your leave. You already have our earlier submission. There is a letter which we have written to Senator the Hon. Helen Coonan in relation to the latest Trowbridge report where we identify and attempt to deal with some of the issues that are raised in that. I seek leave to put that before the committee.

CHAIR—There being no objection, it is tabled.

Mr Davis—There is a submission which we made to the medical indemnity forum on 23 April, because I understand there is clearly an overlap between that and this. I seek leave to put that before the committee.

CHAIR—There being no objection, the submission is tabled.

Mr Davis—There is an analysis of Trowbridge's proposals for tort reform. We have gone through and looked at each of those and explained what we think is right and wrong in relation to each of them. I seek to put that forward.

CHAIR—There being no objection, it is tabled.

Mr Davis—Finally, there is a recent report from the Center for Justice and Democracy called *Shakedown: how the insurance industry exploits a nation in time of crisis*. It is dated April 2002, and I would seek to put that before the committee.

CHAIR—There being no objection, the report is tabled.

Senator BRANDIS—There is no objection, but what is the Center for Justice and Democracy?

Mr Davis—It is an American organisation. Like many organisations of a similar ilk in America, it styles itself as a think tank. It initiates research on policy issues and it has an obvious and unashamed consumer perspective to that. That is my submission.

Mr Gordon—I want to briefly address the issue of the allegation that negligence and its interpretation in the courts in Australia is out of control. By way of background, I am a practising barrister. I practise in the personal injury area in Victoria and Western Australia mainly. The suggestion that negligence is a free shot at a windfall gain for plaintiffs could not be further from the truth. Recently in the High Court appeal in the Wallis Lake oysters claims, Justice Michael McHugh said:

... the imperial march of negligence has just about come to an end and ... was rather in retreat.

With respect to His Honour, I think he is understating the actual position, if one looks at the recent analysis of negligence claims by the High Court in Australia. The claims that deal with the area of negligence that have reached the High Court over the last couple of years, in our submission, have all imposed restrictions in one way or another on the ability of plaintiffs to access common law damages. In Woods v. Multi-Sport Holdings Pty Ltd, perhaps the most recent decision, it essentially said if there is an obvious risk you cannot sue for it.

In relation to the Modbury Triangle Shopping Centre, the High Court said that there is no negligence where criminal conduct intervenes, in circumstances where someone is injured as a result of that conduct. John Pfeiffer Pty Ltd v. Rogerson was a case where the idea that one could go to a jurisdiction where there was a better chance of getting damages was put to rest because it was said that procedural laws in Australia are dictated by the place where the cause of action arose, not where you are suing. The case of Romeo v. the Conservation Commission of the Northern Territory was, again, another case of the so-called obvious risk, no liability. The

joint decisions in Brodie v. Singleton Shire Council and Ghantous v. Hawkesbury City Council, one in which the plaintiff won and one in which the plaintiff lost—the Brodie case is often cited as a significant development in that it is said that it opened the door for councils to be sued for nonfeasance—put in its stead a much more restrictive test; namely, public policy. In effect, in our submission, it has restricted the availability, if one looks at what was available to plaintiffs before that decision and what is now available, than was the case prior. So, in the last two years, any suggestion that the High Court is in some way opening the floodgates to litigation by making it easy for plaintiffs is comprehensively dealt with by a brief analysis of those recent decisions. In those circumstances, one would have thought that one would have seen following on from that a reduction in the number of claims. That, essentially, is what we are suggesting we are seeing in Australia at the moment—not a litigation explosion but a restriction on the ability of people to sue for damages in Australian courts.

That having been said, it is our position that there is no connection between tort reform and insurance premiums; none has been able to be demonstrated. One would have thought that if one was going to abrogate Australian rights—the rights of individual people to sue and to be compensated in full by a wrongdoer, which has been the principle on which this system of common law has stood since the First Fleet—then you would have thought that you would need to very carefully and very effectively demonstrate a connection between this litigation explosion or the open door policy, the Santa Claus judges and insurance premiums. None is demonstrated. To the contrary, the insurers will say, and have said publicly, that they will not undertake to reduce premiums in the event that they get the tort reforms that they are asking for. There is no connection.

If you are asking the question, 'Should we be restricting people's common law rights?' we say that there is no need to do that. There is no open door for plaintiffs to waltz into court and put their hands out for damages. It is a difficult procedure, and it has become more difficult in the last two years as a result of these High Court decisions. Secondly, we would respectfully say that there must be compelling evidence for there to be an interference with those longstanding common law rights in Australia. There must be a demonstrable connection between the interference with those rights, which is what tort reform is essentially doing, and the premiums that are being charged and paid. Until that is demonstrated, there is no basis for the sorts of reforms that are being asked for by the insurance industry.

CHAIR—Perhaps I can start with that issue. Mr Davis, thank you for the material that you have provided us in relation to the American experience on tort reform. This has been one of the questions that I have been raising throughout the day. It has been put to us that one of the main reasons we need to apply tort reform is to make ourselves more globally attractive—to attract more competition and members of the global market to come back into Australia. When I then query what the international experience is or what are the comparisons that we are looking at in relation to other sectors within the global market, there has been no clear response on that issue. I presume, from your earlier statement, that the assessment of the US will give us some guidance there. Are you aware of any other material that might be useful?

Mr Davis—No, although the US study is interesting in this sense. About 30 years ago in the United States crises would occur in different lines of insurance from time to time, as they do in this market. Crises would occur in medical insurance, product liability insurance, motor vehicle insurance et cetera and each of the states responded to varying degrees to those crises. The

study looked at the states which responded to an extreme extent and the states which responded to almost no extent or sometimes did not respond at all. It looked at premiums being charged throughout the country and found that while there were differentials between premiums that were charged in different states, the differentials had no connection with the levels of tort reform. It seemed that the differentials were driven by other factors. I recommend that you read the study which is quite a long and detailed.

Insofar as the United Kingdom is concerned, anecdotal evidence that we have is that they currently do not have the same sort of crisis over there that is being faced here. Our crisis seems to be linked more towards what is happening in the United States, and they certainly are facing yet another crisis in liability insurance in the US. In part, that is driven by what happened with Cyclone Andrew earlier in the decade, but it is also driven by increased reinsurance costs generally because of the depressed United States economy. The lower returns on earnings for the insurers seem to be the real driver of the crisis over there. That is driving reinsurance costs for insurers in Australia and worldwide. They are currently having a crisis in insurance in Singapore. There is no suggestion that Singapore is undergoing a tort crisis.

CHAIR—Is there currently in the US? This study looks at the history of the US, but is there a current response looking at tort reform as well?

Mr Davis—There is yet another push for further tort reform in the US even now, after 30 years of tort reform. What seems to have happened over there over the last 30 years, from my own personal experience—and it is not covered in this report, but I did study in the United States for a short time—is that, each time there is a market crisis, the insurance industry calls for further tort reform in response to the market crisis. So there is a constant ratcheting down of the compensation entitlements of citizens under different lines of insurance, but it has done nothing to stop crises from reoccurring periodically. As for the EC, I cannot comment. I really do not know what is happening in the European Community.

CHAIR—Senator Brandis might want to ask this question in relation to what is happening in New South Wales, but is there a suggestion in the US experience that some states are more prone to litigation than others and that that is a more significant factor than the premiums?

Mr Davis—Not that I am aware of in the—

CHAIR—I think California was the example that was referred to earlier.

Mr Davis—I have heard anecdotal stuff that some states are more prone to litigation, but the difficulty with the anecdotal stuff is that unfortunately a lot of it is mythologising. You really do not know how much of it is based on fact and how much of it is driven by rhetoric. It is like the litigation explosion myth and the claims myth that we have in Australia at the moment. When you deconstruct them you often find that the substance is not there. As for the Australian experience, there are certainly differences between states in terms of cost of living. The cost of living in Sydney is much higher than the cost of living in Brisbane. The cost of living in Melbourne is much higher than the cost of living in Brisbane, Perth and Adelaide. The cost of living does flow through to damages awards, because damages awards, in part, are based on the cost of providing services and replacing labour and that sort of thing. In that sense, there is

definitely a connection between the economics of a state and the average magnitude of awards in a state.

CHAIR—Within a global market, are insurers avoiding coming into our market because Australian courts have a reputation for being too liberal? I have seen no clear response to that question.

Mr Davis—My opinion—and it is opinion only—is that that simply could not be true. Australian insurers in the Australian market, like every insurer, make money where they can. If they were fleeing the Australian market because they were not making money here, they should have been fleeing a decade ago, because that is when they say that they started incurring big losses in this long-tail line of insurance. They did not. I think a big part of their problem is that, during the mid part of the decade, some in the insurance industry conducted their business like a chook raffle, if you will excuse the expression. They did not properly provide for future claims. They competed with HIH. They tried to retain market share. The net effect of that competition was that there was a substantial increase in the policy base in Australian society. Everybody got used to cheap premiums and being able to get a policy whenever they asked for it. Now the background economy has changed; nothing else has really changed other than perceptions. The insurance industry in the United States has been claiming more recently—but also in recent memory—that, if they do not get tort reform, they will vacate the market and their capital will go elsewhere. They have not done that. That is mentioned in those studies. It appears to be a threat and not something that is ever followed through. One of the problems with vacating the market, of course, is that, if you vacate the market, somebody else will come into the market and pick up your market share.

Mr Gordon—There is one other piece of evidence too: if it is liberal courts that are terrorising insurers investing in Australia, then the best market for them to look at is New Zealand, where there is no tort system and there are no damages for public liability. You would have thought, if that was the driving force, in they would go. There is an insurance crisis in New Zealand. The same things are driving the crisis in New Zealand and the crisis in Australia, yet the tort systems could not be more diametrically opposed.

Senator BRANDIS—Do any of the papers that you have tabled today tell us the statistics in New Zealand?

Mr Davis—No, they do not.

Senator BRANDIS—Is there a document you can direct our attention to, Mr Gordon? It had not occurred to me, I must say, but it seems to me that the New Zealand-Australia comparison is an extremely useful one. Could you, on notice, direct us to a readily accessible discussion of the New Zealand provisions?

Mr Gordon—There is one in particular, by Judge Goddard of the New Zealand compensation court, that is well worth looking at in this context. We can undertake to make that available.

Senator BRANDIS—Could I trouble you to supply us with the references to those sources?

Mr Gordon—Yes.

Mr Davis—I am not sure that the Judge Goddard report refers to the impact on premiums; it refers more to the social aspects.

Senator BRANDIS—It is the impact on premiums that will be of most interest to us.

Mr Davis—Again, it is tangential information. I was in New Zealand last week and I came across an article in the *Otago Daily Times*. I am not sure to what extent this is a reliable source of information.

Senator BRANDIS—We are politicians, Mr Davis. We believe everything we read in the press!

Mr Davis—So do I! We all know that, in Australia, obstetricians are vacating obstetrics because of litigation, or at least that is the claim that is made. They cannot get obstetricians in New Zealand, and there is no litigation against obstetricians in New Zealand. It has nothing to do with their income, according to the President of the Royal Society of Obstetrics and Gynaecology in New Zealand; it is that they do not like the lifestyle, they do not like being called out. If you wish, I am very happy to tender this newspaper, because it is interesting reading.

CHAIR—There is no objection.

Senator BRANDIS—I have a few issues I want to touch on. Let me assume that you are right in saying there is not a litigation explosion. Even though there is something of an increase in personal injuries claims nevertheless, that is explicable by factors such as population increase and so on. You would not disagree, though, that over recent years there has been a very significant escalation in the average size of awards in personal injuries cases that ultimately come to be litigated all the way through to judgment.

Mr Davis—There certainly has been an increase. The area where we might take issue is what is meant by the word 'significant'.

Senator BRANDIS—Let us quantify it. Mr Gordon, you are a personal injuries barrister, and you, Mr Davis, are a personal injuries solicitor.

Mr Davis—Yes.

Senator BRANDIS—Can you generalise? What is your impression of the escalation of the top end of the range awards over the last decade or so?

Mr Davis—The one area that may have introduced some increase in that area was the Griffiths v. Kerkemeyer decision. It is so difficult, because you have to take into account the background inflation rate. We can all think back to what the damages awards were for a particular type of injury five or 10 years ago. We also forget in that exercise what the cost of

living was at that time and what the average wages were at that time. We remember how ridiculously low the compensation awards were then compared with now.

Senator BRANDIS—Are you able to tell me what in Queensland is the highest PI award now, and what the highest PI award was perhaps 10 years ago?

Mr Davis—I could not tell you that with any clear reliability other than my general impression, but my general impression is that 10 years ago the highest PI award might have been $2 million. Now it is probably around $4 million—something of that magnitude. The difficulty is that you have injuries and you have injuries—for example, the Simpson case in New South Wales, which is probably the worst example of an injury that anybody would ever face. I forget the amount that was awarded in that case. There is a breakdown.

Senator BRANDIS—It was more than $20 million, wasn't it?

Mr Davis—It was a lot—

Senator BRANDIS—It was about $28 million, I think.

Mr Davis—Yes, and from recollection I think that something like $8 million of that were refunds. This comes back to the cost shifting issues, which really have not been examined in this debate about capping damages and restricting compensation. So much of that award was repaid to the Commonwealth for medical expenses and for social security.

Senator BRANDIS—Mr Gordon, you mentioned some recent decisions of the High Court in support of the proposition that the boundaries of negligence are being drawn back, as it were. You would not disagree, would you, that until fairly recently the frontiers of negligence did seem to be, to use the expression that Justice McHugh used, an 'imperial march'? I can remember this from my own experience at the bar that, particularly at the time of the Mason court, almost every negligence case one read removed barriers to recovery and expanded the frontiers, rather than the reverse. It may be that the tide has turned, as the court is not completely insensitive to public opinion, but you would not disagree, would you, that for many years it was the other way around?

Mr Gordon—I think what happened, with respect, was that interpretations of the law that had been assumed unquestioningly for a long time began to be questioned—for example, the proper way to analyse causation and foreseeability.

Senator BRANDIS—During that period—I think we are talking about the late eighties, early nineties—in negligence, just as in equity and other areas, the High Court, under the intellectual influence of people like Mason and Deane and others, almost reconceptualised the law of negligence, did it not?

Mr Gordon—I would not agree with that comment.

Senator BRANDIS—Okay—it reworked the existing concepts.

Mr Gordon—I would agree to the limited extent that they reinterpreted the law of foreseeability and causation to the extent that they removed difficulties which stood in the way of ease of proof of particular sorts of claims and they made it clear what foreseeability meant, where it had not been clear prior to that. But in terms of the basics of the law of negligence, the reliance on reasonableness and the need for there to be a significant connection, I think that the addition of proximity to foreseeability in fact added to the difficulty in proving a duty of care in some instances. Within the bounds of the law of negligence, which has pretty much remained unchanged since Donoghue v. Stevenson, I think there have been shifts. But the essential elements of the law of negligence have not changed significantly. I think what we are seeing now is the issue of duty, for instance, being very restrictively interpreted by a court—if the risk is obvious, people are not going to recover, that sort of thing. So there are ebbs and flows, but I think the boundaries remain pretty much constant.

I would just like to address two other points. One is in relation to your previous question. If that is right, then we should have had the insurance crisis back at the time of the Mason court. That is when there should have been the perception of a litigation explosion, not now—not when the law of negligence is in hasty retreat from its imperial march. Secondly, in relation to your question on increases in damages, can I just take one example and attempt to demonstrate where I do not think there has been an explosion. One could hardly think of more deserving cases than people who contract mesothelioma from asbestos inhalation as a result of negligence.

When I was involved in the first mesothelioma common law damages cases in Western Australia and in Australia in the late 1980s, the awards were $100,000 to $110,000 for general damages. I ran two cases in Western Australia last year and the award for general damages was $130,000 in one case and $160,000 in the other. The increase in the cost of living and things like that since 1988 has been about 30 or 35 per cent. So it has pretty much kept pace with the cost of living, within general parameters. In deserving cases like that, there has not been an explosion in the award of general damages for the same sort of injury. In relation to severe injuries, where there is a long-term future care component, the medical profession have changed the law, because they have said that it is far better that people are cared for at home than in institutions. There is a cost associated with that. There are drivers that are the result of the way that people are cared for—which I think is generally applauded by society—that have caused some of those increases we talked about.

Senator BRANDIS—You directed the committee's attention to a number of cases that had ultimately gone to the High Court, to make the point that the boundaries of negligence are being confined. That is not really the most appropriate inquiry, is it? Most personal injuries cases settle. I was never a personal injuries counsel myself, so I defer to your greater knowledge, but I remember hearing some statistics in Queensland a few years ago to the effect that more than 98 per cent of personal injuries cases were resolved before trial. That is broadly right, isn't it?

Mr Gordon—Yes.

Senator BRANDIS—I think there is an expectation that personal injuries claimants usually get something. The idea that most personal injuries cases do succeed is sort of the folklore of the profession, isn't it?

Mr Gordon—It depends on what you are talking about. I do not think most people who are injured as a result of negligence see a lawyer.

Senator BRANDIS—Let us define our terms then. Most personal injuries cases that get to the point of proceedings being initiated in a court result in that plaintiff getting something, whether it be in the fewer than two per cent of cases that are ultimately litigated or in the more than 98 per cent that settle in the meantime. That is right, isn't it?

Mr Gordon—Fair enough.

Senator BRANDIS—The driver, as it seems to me, of cost pressures on claims is not the fewer than two per cent that are litigated, but the more than 98 per cent in which there is a settlement negotiation. Almost inevitably, the insurer or the insurer's solicitor will say, 'The likelihood is that the plaintiff will get something.' The defendant's insurer will accept that that is likely. Therefore, there will be a commercial resolution. It is to make provision against settlements more than to make provision against judgments that the insurance companies have to create these reserves and put up the premiums. Isn't that right?

Mr Gordon—That has not changed.

Mr Davis—I think that is right, although I think the point that is important there is that, where there is a settlement, it is the insurance industry itself which makes the decision, for commercial reasons, whether or not to settle.

Senator BRANDIS—I understand that, but that is not the point. They make the decision and it is a commercial decision, but it is a decision based upon their perception of their own possible exposure in the event that the claim were to be successfully litigated by the plaintiff. When the actuaries and the insurance companies are costing insurance premiums, what they are doing is costing the range of likely settlements more than costing the likelihood of future adverse judgments.

Mr Davis—That is true to an overwhelming extent; there is no doubt about that. They have to take into account the cost of settlements because that is where the majority of the claims cost comes from. However, if they are properly provisioning for future claims and pricing their premiums appropriately in the marketplace, that is not an issue for them. It is when they do not make provision for future claims and they compete aggressively with each other for reducing premiums and increasing market share that it becomes a problem for them when the claims come home to roost.

Senator BRANDIS—That is what happened to HIH, but that is a solvency issue of the insurer. When you say 'provisioning properly for future claims' that means striking a premium that meets the market. That is the very issue with which we are seized. That is why there are these upward pressures on insurance premiums or, to use the slightly more antiseptic language you have used, this provisioning for future claims.

Mr Davis—They need to rely upon actuarial evidence for future claims. Historically—certainly over the last decade—they have not really been relying on actuarial evidence; they have been competing with each other and doing all sorts of other things in the marketplace.

Senator BRANDIS—They have been underpricing to get market share.

Mr Davis—Yes. One of the difficulties with the liability arena is that it is a long-tail liability, whether we are talking about negligence or about personal injury. That, unfortunately, means that insurers, if they are not forced to properly provision for future claims, can understate the component that they put away for that long-tail liability and use that money to prop up their balance sheets in the short term, as happened with HIH.

Senator BRANDIS—Do you contend that it would be good policy to have more particular regulation of insurance companies to require some statutory reserves of premiums to be kept aside from their ordinary revenue and their ordinary commercially available capital?

Mr Davis—Yes. I also think it would be prudent if benchmarks were established for actuarial assessments. At the moment, insurance companies have either accepted or ignored actuarial recommendations, depending on what the short-term imperative was for them in terms of making their books look good. There has to be that future provisioning, and it has to be prudent future provisioning. There needs to be benchmarks for that.

Senator BRANDIS—I also want to invite you to talk about the regulation of legal practitioners. One of the bogeymen in this debate has been the lawyer. It seems to me that quite often those loose allegations have been thrown about by people looking for a bogeyman rather than a solution. Nevertheless, it seems to me that there is a legitimate public concern that the encouragement and fostering of claims by a certain sector of the legal profession has been one of the drivers of these costs. Would you like to comment on that? In your response, you might like to tell us about changes in the regulation of lawyers advertising no win, no fee arrangements and so on, which your association has had something to do with.

Mr Davis—It would be foolish to ignore that there is certainly a perception out there that lawyers who act for personal injury claimants on a no win, no fee basis and who advertise their willingness to do so are 'ambulance chasers'. That perception exists not only here but everywhere where lawyers represent people who are injured and cannot afford to pay for legal services themselves. They have to depend upon the lawyers themselves to 'stump' their costs until the case is finalised. It is a perception that we will probably never get rid of, because unfortunately people do get injured, and people who are injured do need access to the legal system. The only way they can get access to the legal system, if they cannot afford to pay, is by finding a lawyer willing to act for them on a no win, no fee basis.

Some years ago we used to have a legal aid system in Australia, which has gradually dismantled because it was frightfully expensive, admittedly. As a matter of policy, around the country it has been put back onto the private profession and onto free enterprise. Coupled with that, there was a progressive dismantling of the Law Society's powers to restrict advertising of legal services. Up until the beginning of the 1990s, lawyers were extremely regulated as to whether they could advertise at all. In fact, in Queensland it was not that long ago that the maximum size of your sign could be three inches high, and if it was more than three inches high you would face disciplinary proceedings and be fined. That was the degree to which regulation took place. Members of the bar could not be seen to attend solicitors' offices because if they were present in a solicitor's office it may be viewed as touting for work. There was a whole host of fairly Dickensian restrictions.

With the move towards freer markets and greater competition—the national competition policy—the societies were required to dismantle the advertising restrictions such that the only thing that they could regulate was advertisements which were misleading or deceptive. In other words, things were brought into line with the Trade Practices Act. The policy behind that was to encourage advertising from the legal profession. This was government policy; this was not driven by the lawyers or the law societies. This has created a negative perception in the community for lawyers, which we have to deal with, but lawyers do have to represent people who are injured. We have ethical obligations; we have moral obligations to the community. We are a service industry and, as a service industry, if the policy of the government is that lawyers should be entitled to advertise then lawyers should be entitled to advertise.

Senator BRANDIS—As I understand the no win, no fee arrangements—I am sure you will correct me if I am wrong—'win' is defined as either a judgment for the plaintiff, or a settlement satisfactory to the plaintiff and, ordinarily, satisfactory to the plaintiff is what is certified to be satisfactory by the solicitor. That is right, isn't it?

Mr Davis—Depending on the fee agreement but, generally speaking, yes.

Senator BRANDIS—So in the 98 per cent plus of cases that are never litigated to trial, when we speak of 'no win, no fee' it means 'no settlement, no fee', and 'settlement' means whatever settlement the solicitor—who is also the funder of the litigation and whose capital is at risk—says is the best he can do. That is right too, isn't it?

Mr Davis—No. The practice is that you obviously have to act in the best interests of the client. Where there is a settlement on the table, you have to advise the client whether or not you feel that that is the best settlement you can obtain or whether the matter should go to court.

Senator BRANDIS—Under the typical fee agreement, with which you are familiar, is there a requirement that the solicitor take counsel's opinion?

Mr Davis—No, there is not, although there has been a substantial change in the way the legal profession has been structured over the last decade in that we now have personal injury specialisation in many jurisdictions. Over the last decade there has been a shift of specialisation in this area from the bar towards the solicitors' branch of the profession. Barristers have tended to specialise more and more in the advocacy branch of the profession whereas the negotiations and settlements—the front-end work—are left in the hands of the solicitors.

Senator BRANDIS—It is almost tabular, isn't it, in that an experienced personal injury solicitor can almost look at a table on his desk and say that a finger is worth this much money and a left arm is worth that much money? It is not a very inexact science, isn't it?

Mr Davis—No. The traditional way these days of giving a client advice is to give them a high range and a low range. We say, 'The probability is that you will get something that falls in the middle of that range. The high end is the outlier and the low end is the outlier.' You give that to the client at the time when there is a negotiation for settlement taking place. In fact, in Queensland you are required to give the client full details in relation to costs, the exposure that the client might face if they do not settle and lose the case, and the opponent's costs. All of this information is required to be fully disclosed.

Senator BRANDIS—Mr Davis, playing the devil's advocate for the moment, I know what my friend Senator Conroy would say if he were here; he would say that there is a moral hazard problem. For example, take a solicitor whose practice is not going very well and who has cash flow problems. He takes a personal injuries plaintiff on a no win, no fee basis. The solicitor has a fee agreement that will become operational when the settlement is reached. A settlement offer is made; it is less generous than the plaintiff might expect, nevertheless, under the pressure of needing to get the fee in, the solicitor says to the client, 'You have to take this; I am recommending that you take it and, if you don't take my reasonable recommendation, the deal is off.' I am sure that happens seldomly but it must happen—there is at least a risk, isn't there, of that happening?

Mr Davis—I am sure that does happen from time to time.

Senator BRANDIS—Does your organisation, or for that matter a professional body like the Law Society, have a system of oversight in place to protect against that happening?

Mr Davis—To some extent, yes. In Queensland the Law Society conducts what we call section 31 trust account examinations. The trust account examinations are an opportunity for the trust account inspectors to enter a solicitor's firm and examine the trust account records; they can also call for files that the solicitor has—

Senator BRANDIS—Why would that show up in the trust account statements?

Mr Davis—They do not, but they do show up when you are examining files. If there is doubt expressed about whether or not a client has been overcharged or whether or not there has been some dishonesty—

Senator BRANDIS—Or in the case I have given, which I think is the real risk here, whether the solicitor has settled too cheaply.

Mr Davis—I am sure undersettling does occur; although, part of the difficulty is a lot of the dynamics that go on in settlements. One of the things that can really create a problem for a client is how good their witnesses are. You prepare the case as best you can but—

Senator BRANDIS—But don't you have your initial settlement discussions before you proof the witnesses?

Mr Davis—Not in my firm, no. In my firm we take statements from witnesses and we prepare the cases a long time before we issue proceedings. Some firms, I am sure, do it differently, but that has always been my experience: you do not issue proceedings unless you know that it is a case you will win.

Senator BRANDIS—I am sure that is the right way to do it, and I am sure that is the way most people do it, but are there not often settlement negotiations before the proceedings is issued, after the first letter?

Mr Davis—That is rare these days. What has happened in Queensland is that there is a very stringent regime of pre-action procedures and protocols that have now been put in place. More

recently, a personal injury proceedings bill was passed—I think it was only a week or two ago—which brings that into being not only for motor accident and work cover work, where they originally evolved, but right across the board. Now, pre-action procedures and protocols apply everywhere. In Queensland, within a very short time after the client first consults a solicitor, the solicitor has to submit a detailed notice of claims to the insurer. Attached to that must be medical reports and signed authorities to enable the insurers to get access to the claimant's medical records. Basically it puts the insurer on the same footing as the claimant in terms of being able to investigate the action.

If the claimant says things in a notice of claim that they subsequently resile from, it is a terrible problem for them. For this reason you have to prepare them as best you can as early as possible because, if you make the wrong choices, if you make some ill-advised statements in your notice of claim, they will come back to haunt your client and, more importantly, your client will come back to haunt you. Unlike the many elements of the medical profession, the legal profession is quite willing to revisit settlements and litigate against other solicitors who have not achieved the proper result for their clients.

CHAIR—Unfortunately, we are over time. There are a few other issues that perhaps you might provide some additional information on if you think it is relevant. The questions I have relate mostly to issues related to tort reform, the two bills that have been tabled in the House of Representatives, and joint and several liability. That is about it. Maybe they were covered in the comments that you tabled today.

Mr Davis—Yes, some of those issues are covered in the documents that we have submitted. One is in relation to the responses to Trowbridge's proposals for reform. If you wish, we would be quite happy to make a further written submission available, or I can address these matters now briefly.

CHAIR—Only if you think that will go further than what you have already tabled. I have not had the chance to look at that yet. The only other question I had outstanding related to Senator Brandis's questions in relation to settlements. Do we know if there has been a disproportionate increase in the quantum of settlements?

Mr Davis—No, we do not. Part of the difficulty here is that the Trowbridge report analysed the cost of claims where there was a nil cost to the insurer. That means anything falling under the deductibles or the excess levels would be a nil claim to the insurer. There has been a substantial increase in deductibles over the last few years. I know of one instance in New South Wales—again, anecdotally—where a local authority's deductible currently is $70,000, whereas two or three years ago it was $10,000. That creates particular problems for some organisations such as councils, because, of course, if the insurer can settle that claim under the deductible, it is a nil cost to the insurer. Often the councils do not have much control over whether or not that matter is going to be settled. When you analyse just the cost of claims that are not nil claims to the insurer, you get a skewing of the data to the high-end claims and that means that automatically the data is going to show an increase in the average cost of claims as an artefact.

CHAIR—Thank you very much for your appearance today.

Mr Davis—Thank you for the opportunity to present before you.

[3.08 p.m.]

LUCAS, Ms Sarah Katherine, Chief Executive Officer, Sport Industry Australia

CHAIR—Welcome. The committee prefers all evidence to be given in public, but we will consider a request, if necessary, to go into camera. We have received your submission, No. 18. Are there any alterations or additions you would like to make to your written submission?

Ms Lucas—I do not have another written submission for you, but I would like to run through that submission. Obviously, there have been some changes to the situation since we tabled that submission.

CHAIR—Fine. I invite you to make some opening comments to your submission and we will move to questions beyond that.

Ms Lucas—Thank you. As I said, there have obviously been some changes and advancements in some of the areas that we raised in our submission. I would like to go through each of those areas and make some comments. Obviously, the whole public liability insurance problem is of huge concern to our sporting organisations. Sporting organisations, being generally not-for-profit, community based organisations, have limited capacity to deal with the financial burden of increasing premiums, but obviously cannot operate without public liability insurance. It is of great concern to us and, while it may be part of a natural market cycle, it is something that our sports cannot endure while the cycle moves around to a softer area.

Firstly, I will go through my submission. With regard to the SCORS—Standing Committee on Recreation and Sport—report, and I think you are aware of that report which they commissioned, in the submission I ask for the release of the full report, because it actually contained some very valuable information and I think part of the problem is that our sports do not really understand the full extent and the diverse nature of the problem. While it is still a useful report, I think it is probably less urgent now that it be released in full. My concern now is more that the recommendations made in that report and in the summary report that was released are actually enacted. I have been speaking to the chairman and the members of SCORS just to make sure that they continue to work on those areas, so that is obviously not such an issue at the moment.

With regard to the ACCC inquiry, I am pleased to see that there is still some action there. As Rob Davis alluded, it does not appear to be a problem in countries such as the UK, so it is of concern to me that it has become such an issue here. While I understand that public liability has been an unprofitable area for insurance companies for some time, I have read one report—and I am sorry, I cannot quote where it is from—that said that the charity and not-for-profit area has actually been the one profitable area within public liability. So it concerns me that, if that area is profitable, we are facing increases of premiums up to 800 or 1,000 per cent.

Risk management is a term that we are all getting sick of hearing, but it is the crux of the matter, particularly for sports to address, and there has been a lot of work done on that through the states and also through the Australian Sports Commission. We are encouraging our sports to

make sure that they develop and implement appropriate risk management strategies. I will speak a little more about that later.

Self-insurance and pooling have been touted as one of the easy answers, but I think it is quite apparent that there are no quick fixes for this problem. Pooling has only been official up to a certain point. I will just quote from one of my colleagues, who is an insurance broker. He says:

> Once you have a situation where there are a sufficient number insured to prevent distortion of incident rates, there is no further benefit from the perspective of risk exposure and claims loss ratios in having a greater number of people insured. For a hypothetical example, say the incident rate of injury for a sport is one injury per 500 participants. Whether the insurer has 5,000 insured or 50,000 insured, the incident rate is still one injury per 500 participants.

All that does is actually expose the insurer to a greater level of risk, rather than a reduced level of risk. So, while there can be some financial benefits initially in pooling, it is really not the answer in an outright sense. Self-insurance is actually being forced on a lot of sports in that their excess has risen into the tens of thousands of dollars, which effectively means they are self-insuring and carrying their own risk, at least for that initial amount. But any self-insurance program that would cover all sport would obviously require government underwriting, because there simply is not the pool of funds available immediately to make sure that they can actually carry that risk.

Regarding litigation rates, we are very pleased to see some of the reforms with regard to the laws of negligence. It was interesting listening to Rob Davis go through some of these issues, because from our perspective the problem is not so much that claims are going to court but that they are being settled out of court. The insurance companies make a cost-benefit analysis on most claims, and I have heard from some insurance companies that anything under about $50,000 just is not worth fighting, so for them it is better to just settle. That means that the law of negligence is obviously not reinforced. I think there is community perception—and it is probably quite right—that it is a fairly soft law of negligence at the moment, that it is fairly easy to prove that there was some negligence or to actually be successful in a claim.

I have spoken to a lot of insurance companies and asked them whether mediation would assist. They have said that currently the mediation does not work either because insurance companies choose to settle because of the legal costs involved or because it goes to court anyway and the claims are successful. Our suggestion would be that some other mediation process be developed. I saw in one of Senator Coonan's releases that they were looking into that. We would encourage that that be pursued, because until we can manage to change community attitudes—that is, that there really does not have to be much negligence involved for you to be successful—this situation is going to continue, with people claiming for almost anything. There does not seem to be an acceptance of the risk of being involved in any kind of activity.

With regard to waivers, we are pleased to see the changes to the Trade Practices Act, because that was creating a problem, particularly for some of our riskier sports and activities. People need to assume their own responsibility and their own risk when participating in these activities. Obviously, you cannot waive responsibilities if there has been negligence, but if you are going to take the risk of parachuting, for example, you certainly need to assume that risk. We do not see that capping payouts is the answer—the US studies we have mentioned have also shown that—and they may only adversely affect those most seriously injured. That needs to go hand-

in-hand with negligence law reform. In our experience, large payouts are not the problem. From the discussions I have had with the insurance companies, the problem is more the size of mid-range claims.

Uniform volunteer protection legislation should be introduced nationally. Perhaps that is something that COAG should be involved in. Our one concern at the moment with legislation such as that enacted in South Australia for volunteer protection is that while it recognises people acting in good faith and protects them against any actions for liability it basically passes that liability and risk onto the organisation. If they are a not-for-profit organisation, the situation is basically the same for them: they still have to carry that risk. We would like to see that protection extended to the organisation itself. If a person has acted in good faith, the organisation should also be protected from any action against it.

Nothing has happened in the areas of landlord insurance and coaches insurance. It is still of great concern to us that local councils require sporting organisations to be joined on their public liability insurance policies, which is obviously forcing costs up considerably. We have been talking to SCORS and the state governments about that but nothing has really happened. It is something that we have to pursue, because while ever they do that they put sporting organisations in a position where they simply cannot afford their premiums.

Our concern as the sport industry association is that sports seem to be getting a rough ride in this. There does not seem to be any consideration of the fact that they are essentially not-for-profit community based organisations, that they are not in a position to change their business practices to absorb increasing costs or that, while they may have been a profitable area within public liability insurance, they are certainly bearing the brunt of the increases in premiums. Clearly, insurance companies have decided that it is an area that they want to get out of, so they have simply raised the premiums to a point where they know the sporting organisations cannot afford them.

While it is good to have these reviews and tort reform, the review of the Trade Practices Act and so on happening—and that certainly needs to happen hand-in-hand with everything else—the insurance companies have not really been engaged in this discussion to any great extent. I have been speaking with them and also with another insurance broker. Our plan now is to introduce a national accreditation standard for sporting organisations. We will do that in concert with other industry groups, the Insurance Council of Australia and some of the insurance companies. We have already spoken to a number of them and they are enthusiastic about the idea. That accreditation standard will set a minimum standard for risk management. We will not seek to duplicate the work being done in the states on risk management but will try and set some sort of standardised level. Also, and more importantly for the insurance companies, we will look at implementing methods of data collection and auditing. Insurance companies say that the problem is that everyone has been talking about risk management for years but it has really been a tick-the-box procedure and it has not been implemented in an effective way. Adequate data collection and auditing will prove, through the claims coming through, that the risk management is effective and that the sports bodies have addressed the issues facing their particular sport.

That is what we are working on at the moment. However, it is obviously a lengthy and expensive process. Being a not-for-profit organisation, it is a difficult one for us to move

forward on. I am going to be writing to Senator Coonan seeking some support for this because, as I said, we have the commitment of the insurance companies to be involved in it. Obviously, what we will do is set it up in such a way that, if a sport achieves that accreditation standard, we will have an arrangement with an insurance company whereby, firstly, they will consider them for insurance—because at the moment they are simply not considering a lot of sports for insurance—and, secondly, they will look at reducing their premium so that it is based on a more accurate assessment of their risk, rather than the broad brush approach that seems to be happening at the moment.

That is basically where we are up to at the moment. As I said, I think we need the other changes going along hand in hand—certainly, the Trade Practices Act changes are essential. But our problem is that the insurance companies do not seem to have been engaged in this. The bottom line is that we can implement any kind of risk management and we can do whatever we like, but if the insurance companies are not interested in picking the market back up or in being involved in the market they will simply refuse to, or they will set their premiums at a level that effectively excludes them from the market. There are obviously problems with the insurance companies themselves with the lack of capacity to write the insurance. That is another effect that is making it difficult. So we have to make the sport business as attractive as we can and as risk-free as we can. That is my summary of the current situation.

CHAIR—In relation to the Trade Practices Act and the issue of waivers for the riskier sports, does your organisation have a view as to where that line should be drawn?

Ms Lucas—In determining what is a risky sport?

CHAIR—Senator Conroy, for instance, was referring earlier today to concerns about whether a sport is regarded as contact or non-contact and whether that might make a difference.

Ms Lucas—I think that it should almost apply to all sports. While I do not want to see any of our participants hurt in any way—and certainly, if there is a negligent act then they should have means for recovery—I think there needs to be an acceptance that there are risks involved in participating in sport. While you will still have your personal injury compensation, there has to be proven negligence for liability to be an issue. I cannot see that it should not be adopted across all sports. If they are implementing risk management programs and policies that are appropriate then the sport should be fairly safe to participate in and you should have to assume the level of risk of the sport that you are participating in.

CHAIR—Going back to your comments about the SCORS report, do you understand why the full report has not been released?

Ms Lucas—This one probably should be private—I understand there were some concerns about the recommendations that were contained in the report and the implications that they would have on some of the parties involved.

CHAIR—Is this why it has not been released but the recommendations have been?

Ms Lucas—No, the recommendations were not released. Only a summary has been released, with a resolution by SCORS to do a number of things. But the recommendations in the initial report were not released.

CHAIR—So the summary of recommendations was different, possibly, to the recommendations that were canvassed in the full report?

Ms Lucas—Yes, the summary just had the resolution that SCORS would act on a number of issues, but they did not go into any great detail on the recommendations as the original report did. I was on the management committee for that report, too, which is why I am privy to that knowledge. I did request that the report be released with the recommendations taken out if that was an issue, but they chose not to do that.

CHAIR—The only other question I have follows from your comments about insurers' views about claims under $50,000—I think that was the sum.

Ms Lucas—Yes.

CHAIR—So that is your understanding of something that is regarded as not worth challenging because of the cost of the current claim process?

Ms Lucas—That may vary from company to company but certainly that is a figure I was quoted.

CHAIR—So in terms of a potential mediation process you are really looking at something along the lines of a small claims process?

Ms Lucas—Possibly, yes. But I think it is part of changing the whole culture of somebody saying, 'I've had an accident. Therefore, somebody should pay.' I think if there is a more onerous process—in that if there is truly a case to be answered then, yes, you can still succeed—that may dissuade people from thinking, 'I've had an accident. Therefore, it's got to be somebody's problem.' If negligence is not involved and it is simply an accident—they have tripped over or there is contributory negligence—then I think a mediation process may stop that trend or at least slow that trend down.

CHAIR—Regarding your comments about local councils as landlords seeking to have sporting organisations joined with their public liability policies, how prevalent is that?

Ms Lucas—I think it is fairly widespread. Certainly in Victoria it has been quite an issue to the point of one club actually having to close until they could negotiate a better deal with their local council. But it is fairly widespread and more councils are picking it up.

CHAIR—The alternative we had from the local councils is that these organisations are coming to the local councils saying, 'We can't get cover. Can you help us?'

Ms Lucas—That is a different interpretation. My experience has been that the sports have been wanting to use the facilities and their local council has said, 'Yes, but we're not taking the

public liability responsibility for you.' In effect, they are helping the council insure that property for the whole time. There are some issues there, too. For example, who is responsible for maintenance? Surely that should be a local council or local government responsibility and not the responsibility of the sporting organisation.

Senator BRANDIS—Do you want to read that document from earlier into the record?

Ms Lucas—Yes. It is Hunter, R. and Doroshow, J., 'Premium deceit: the failure of "tort reform" to cut insurance prices'. That is from the Citizens for Corporate Accountability and Individual Rights. That reference may provide some more supporting evidence.

Senator BRANDIS—Is that from a journal?

Ms Lucas—I presume so, yes.

CHAIR—Thank you for your appearance today.

Committee adjourned at 3.27 p.m.