Public liability and professional indemnity insurance

Fifth monitoring report

July 2005
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## Glossary of terms and abbreviations

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<thead>
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<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>APRA</td>
<td>Australian Prudential Regulation Authority</td>
</tr>
<tr>
<td>AWE</td>
<td>average weekly earnings</td>
</tr>
<tr>
<td>book of business</td>
<td>the number, size and type of accounts (policyholders) that an insurer underwrites</td>
</tr>
<tr>
<td>broker</td>
<td>an intermediary who places the risks of parties seeking insurance with insurers and whose principal is the insured</td>
</tr>
<tr>
<td>brokerage expenses</td>
<td>commissions, brokerage and similar charges paid or payable by the insurer to agents or brokers</td>
</tr>
<tr>
<td>claims frequency</td>
<td>the number of claims reported by incident year as a proportion of the total number of policies for the corresponding underwriting year</td>
</tr>
<tr>
<td>claims payments</td>
<td>the payments that have been made on all claims at a particular date</td>
</tr>
<tr>
<td>combined ratio</td>
<td>the sum of the loss ratio, the expense ratio and the reinsurance ratio; it shows the percentage of premium that is represented by the costs of writing the business including the cost of incurred claims</td>
</tr>
<tr>
<td>earned premium</td>
<td>the total amount of gross written premium that is earned during the period, earned being that proportion of risk covered by the policy that has expired at the end of the reporting period. For example, although one year’s premium may cover 12 months of risk, the insurer is said to have ‘earned’ six month’s worth of that premium after six months has elapsed</td>
</tr>
<tr>
<td>excess</td>
<td>the amount of the loss that will be paid by the insured party before the insurer pays the claim</td>
</tr>
<tr>
<td>expected future payments</td>
<td>the insurer’s liability for outstanding claims recognising the potential cost to the insurer of settling claims that it has incurred at the reporting date but which have not been settled (i.e. expected future payments in relation to unpaid reported claims, IBNRs, IBNERs and costs that the insurer expects to incur in settling those claims)</td>
</tr>
<tr>
<td>expense ratio</td>
<td>the percentage of gross written premium that is represented by the costs of writing the business, excluding claims costs, reinsurance costs and general expenses</td>
</tr>
<tr>
<td>gross written premium</td>
<td>the total premiums underwritten by an insurer during a period, before the deduction of reinsurance expense</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
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<td>-------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
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<tr>
<td>HIC</td>
<td>Health Insurance Commission</td>
</tr>
<tr>
<td>incident</td>
<td>an incident resulting in a loss that may develop into a claim against the insured</td>
</tr>
<tr>
<td>incident year</td>
<td>the year in which an incident occurs</td>
</tr>
<tr>
<td>incurred claims</td>
<td>the total number of claims for any one incident year that may result in a liability for the insurer, this would include claims paid and claims outstanding (including IBNRs and IBNERs)</td>
</tr>
<tr>
<td>incurred but not enough</td>
<td>a provision in an insurer’s book that recognises that estimates for reported claims may be inadequate</td>
</tr>
<tr>
<td>reported claims (IBNERs)</td>
<td>claims arising from incidents or losses that have taken place during the underwriting period but are expected to be reported to the insurer in subsequent periods</td>
</tr>
<tr>
<td>long-tail classes</td>
<td>classes of business that have claims that can be reported over many years after writing the policy, such as employers’ liability, public liability and professional indemnity</td>
</tr>
<tr>
<td>loss ratio</td>
<td>the percentage of earned premium that is represented by the cost of claims payments and expected future payments (including IBNRs and IBNERs) attributable to that earned premium</td>
</tr>
<tr>
<td>net combined ratio</td>
<td>the combined ratio net of reinsurance expenses and recoveries</td>
</tr>
<tr>
<td>net written premium</td>
<td>gross written premium less reinsurance expenses</td>
</tr>
<tr>
<td>personal injury or death</td>
<td>a claim relating to an incident that results in the injury or death of a third party</td>
</tr>
<tr>
<td>property damage claim</td>
<td>a claim relating to an incident that results in the damage of third party property</td>
</tr>
<tr>
<td>reinsurance</td>
<td>the process by which an insurer cedes some of its premium underwritten in exchange for the reinsurer accepting some of the risk; simply put, this is insurance for the insurers</td>
</tr>
<tr>
<td>reinsurance expenses</td>
<td>the amount of premium ceded to reinsurers for reinsurance during a period</td>
</tr>
<tr>
<td>reinsurance ratio</td>
<td>the percentage of gross written premium represented by the cost of reinsurance</td>
</tr>
<tr>
<td>report</td>
<td>the notification of an incident or loss that may develop into a claim against the insured</td>
</tr>
<tr>
<td>report year</td>
<td>the year in which an insurer is notified of an incident or loss that may develop into a claim against the insured</td>
</tr>
<tr>
<td>Term</td>
<td>Meaning</td>
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<td>------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>retention rate</td>
<td>the amount of risk retained by a reinsured after placing reinsurance</td>
</tr>
<tr>
<td>settlement</td>
<td>when parties to a claim agree to finalise the claim or a court gives a verdict, the claim is said to have been settled</td>
</tr>
<tr>
<td>settlement year</td>
<td>the year in which a claim is settled</td>
</tr>
<tr>
<td>superimposed inflation</td>
<td>the rate of inflation of claims costs by reason of factors other than economic/investment factors, for example court awards and legislative amendments</td>
</tr>
<tr>
<td>underwriting expenses</td>
<td>costs attributable to the underwriting of specific classes of insurance</td>
</tr>
<tr>
<td>underwriting year</td>
<td>the year in which the policy was issued or renewed</td>
</tr>
</tbody>
</table>
Summary

Since 2002 Commonwealth, state and territory governments have pursued a framework of reform in response to rising premiums and reduced availability of public liability and professional indemnity insurance.

This is the Australian Competition and Consumer Commission’s fifth report in accordance with requests from the Australian Government to monitor costs and premiums in these classes of insurance.

The report covers information available from monitored insurers as at 31 December 2004 on trends in the frequency of claims, cost of claims, premiums, terms and conditions of policies and underwriting financial performance for both public liability and professional indemnity insurance. It also reports insurers’ views on the actual and expected impact of reforms on claims costs and premiums for both classes of insurance.

In addition to information gathered from insurers, the report discusses data from other sources, including from the Victorian County Court, the NSW District Court and the Health Insurance Commission.

There were 42 direct insurers active in the public liability insurance sector in Australia during 2004. Of these, the four largest earned 48 per cent of premium revenue, indicating that supply of this class of insurance is not highly concentrated.

Based on data provided by eight of these insurers (which accounted for 71 per cent of premium revenue for that class of insurance), the ACCC found the following:

- The average premium for public liability insurance fell by 4 per cent in 2004 and most insurers expect premiums to fall further in 2005—previously, the average premium had remained stable in real terms between 1997 and 1999 before rising significantly from 2000 onwards.
- In respect of the terms and conditions of insurers’ standard public liability insurance policy, on average, the cover limit and level of excess have risen by around 10 per cent and 20 per cent respectively since 2002.
- There was no substantial change in the average size of public liability claims settled in 2004, in contrast to increases in most years since 1997.
- Both the number and frequency of claims incurred by insurers have remained relatively stable since 2002—there has been a small increase since 2002 in the frequency of property damage claims and a slight decrease in the frequency of personal injury claims.
- The underwriting financial performance from public liability insurance written in 2004 is expected to be slightly lower than in 2003, with the gross combined ratio rising by 4 per cent to 88 per cent and the net combined ratio rising by 2 per cent to 77 per cent.
- Most of the monitored insurers believed that the number and cost of public liability insurance claims in 2004 were lower than they would have been if tort reforms had not been implemented, with the estimated savings ranging from 1–5 per cent to 16–20 per cent.
- Similarly, the majority of insurers believed that average premiums were lower in 2004 as a result of tort reforms, with the estimated savings ranging from 1–5 per cent to 6–10 per cent.

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1 As this report covers data for the full year 2004, it supersedes the ACCC’s fourth public liability and professional indemnity insurance monitoring report dated January 2005.
There were 22 direct insurers active in the professional indemnity insurance sector in Australia during 2004. Of these, the four largest earned 52 per cent of premium revenue, indicating that supply of this class of insurance is not highly concentrated.

Based on data provided by five of these insurers (which accounted for 50 per cent of premium revenue for that class of insurance), the ACCC found the following:

- The average premium for professional indemnity insurance decreased by 4 per cent in real terms in 2004. Insurers expect premiums to fall further in 2005.

- On average, insurers’ standard professional indemnity insurance policy provided holders with a greater amount of coverage in 2004 than in 2002 due to cover limits being higher on average and the level of excess being lower on average.

- The average size of claims settled continued to rise—by over 60 per cent in 2004. However, the main driver of this increase was a small number of high-cost claims. The average cost of claims settled under $1 million did not change in 2004.

- Although the number of professional indemnity claims reports incurred by insurers has been relatively stable since 2001, the frequency of claims has declined from more than 16 per cent in 2001 to about 12 per cent in 2004.

- The underwriting financial performance from professional indemnity insurance in 2004 is expected to be similar to that written in 2003, with a gross combined ratio of 95 per cent and a net combined ratio of 80 per cent.

- Most of the monitored insurers believed that tort reforms had either no, or minimal, impact on the number and size of professional indemnity claims as at 31 December 2004. The main reason given was that the reforms predominately relate to personal injury claims, to which they had little exposure.

- In general, insurers thought tort reforms had not affected professional indemnity insurance premiums in 2004. Rather, the fall in premiums was mainly driven by competition. However, two insurers expect reforms to result in lower costs and premiums in the future.

Data from the Victorian County Court and NSW District Court on the number of personal injury writs and civil claims lodged shows that claimants in both states rushed to file claims with courts before reforms came into effect. Many of the claims that would otherwise have been filed after the cut-off date were brought forward so that the net effect of reforms on the number of claims filed with courts will only become clear over the next few years. However, the additional data available since the ACCC’s last monitoring report shows that the number of claims being lodged with courts has remained low.

Information provided by the Health Insurance Commission indicates that the amount of money it recovered from people who receive compensation for injury or illness decreased significantly in 2004–05.

Data on the availability and cost of public liability insurance for community groups and the not-for-profit sector is not available. However, inquiries by the ACCC indicate that there are now several organisations that provide insurance for this sector.
Both the Law Council of Australia and the Insurance Council of Australia have recently commissioned reports that discuss insurers’ profitability and the effect of tort reforms. The ACCC has not conducted a detailed review of the data, assumptions or findings of either of these reports as part of its monitoring program. However, it notes the following:

- Tort law is a matter of public policy for Australian governments to determine, taking into account various competing factors such as the ability of injured parties to receive adequate compensation when appropriate, and the overall cost of the system that provides that compensation.
- The financial performance of an insurer depends on several factors, including underwriting performance, general expenses and investment returns. Investment returns are inherently volatile, and underwriting performance can also vary significantly from year to year.
- The pricing of long-tailed classes of insurance such as public liability and professional indemnity is more complicated than for many other products, since the actual cost of providing insurance and the average level of investment returns only become known many years after the product is sold.
- However, in light of the structure of the public liability and professional indemnity insurance sectors in Australia, the basic principle of competition that applies to any business operating in a market supplied by many firms would appear to equally apply to insurers—consistently price above a competitive rate and the insurer will lose sales to rivals; consistently price below that rate and revenues will not provide sufficient return to maintain equity in that line of business.
1 Introduction

1.1 Background

Since 2002 Commonwealth, state and territory governments have pursued a framework of reform in response to rising premiums and reduced availability of public liability and professional indemnity insurance. The reforms were implemented to achieve one or more of the following objectives:

- cost reduction
- cost containment
- increased certainty and predictability of costs of claims for insurers
- management of community expectations about personal responsibility and risk.

The reforms aimed at public liability insurance are focussed mainly on minimising personal injury claims costs by implementing caps and thresholds on court-awarded settlements, provisions for structured settlements, changes to negligence laws and minimising legal costs. The reforms aimed at professional indemnity insurance include proportionate liability for economic loss and professional standards legislation.

1.2 Ministerial request

At the 30 May 2002 ministerial meeting on public liability insurance, participating ministers unanimously agreed to an ongoing role for the ACCC in monitoring the insurance industry. They agreed that the ACCC’s role was crucial to monitoring the progress of reforms designed to address the problems of rising public liability and general insurance premiums.

On 5 July 2002 the then Parliamentary Secretary to the Treasurer, Senator the Hon. Ian Campbell, asked the ACCC to monitor costs and premiums in the public liability and professional indemnity sectors of the insurance industry on a six-monthly basis over a two year period. He asked that the ACCC consider the impact on insurance premiums of measures taken by governments to reduce and contain legal and claims costs and to improve the data available to insurers to evaluate and price risk. Senator Campbell indicated that this would contribute to a greater understanding of market developments and premium pricing in long-tail classes of insurance.

On 17 February 2005 the Minister for Revenue and Assistant Treasurer, the Hon. Mal Brough, announced that he had asked the ACCC to continue to monitor costs and premiums in these classes of insurance for a further three years and to report annually. The ACCC’s role is not a direction under the prices surveillance provisions of the Trade Practices Act 1974.

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2 The then Minister for Revenue, Senator the Hon. Helen Coonan, joint communiqué ministerial meeting on public liability, 30 May 2002, p. 2.

3 Several other regulatory bodies oversee the activities of insurance companies. Regulatory arrangements were outlined in detail in Appendix A of the ACCC’s Public liability and professional indemnity insurance—third monitoring report—July 2004.

4 Public liability and professional indemnity insurance are typically referred to as long-tail classes of insurance because many years may pass between the period for which cover was provided and the date at which claims arising from incidents during that period are finally settled.

5 Part VIIA of the Trade Practices Act 1974 enables the Australian Government to direct the ACCC to formally monitor prices, costs and profits relating to the supply of goods and services by a specified person and to report to the Minister as specified. Part VIIA replaces the Prices Surveillance Act 1983, which was repealed when the main parts were incorporated into the Trade Practices Act on 1 March 2004.
This is the fifth ACCC public liability and professional indemnity insurance monitoring report in accordance with these requests. The Australian Government released the first four reports on 4 August 2003, 23 February 2004, 12 August 2004 and 17 February 2005 respectively. These are available via the ACCC website at www.accc.gov.au.

The second and fourth reports were interim reports based, respectively, on data for the first six months of 2003 and 2004. As this fifth report covers the full year 2004 it supersedes the fourth report dated January 2005.

1.3 Scope of the ACCC’s monitoring role

Senator Campbell’s request in 2002 indicated that the ACCC would not be expected to form a view about the adequacy or appropriateness of reform measures, as this is a matter for state and territory governments. In extending the period of monitoring, the Hon. Mal Brough did not request any change to the scope of the ACCC’s role.

The ACCC’s monitoring relates to public liability and professional indemnity insurance written in Australia. Consumers seeking insurance cover in Australia can also access cover from insurers located overseas. However, insurance business written outside Australia is not included within the scope of the ACCC’s monitoring framework.

In Australia, public liability insurance is usually provided to household consumers as part of their home and contents insurance policies. The public liability component of these policies is relatively small. It is the stand-alone public liability insurance policies provided to individuals and organisations for commercial purposes that have raised major problems of affordability and availability. The ACCC is therefore only monitoring commercial public liability policies. In most industries, and especially for smaller businesses, public liability and products liability insurance are sold as a combined product with a single premium. Discussion and data about public liability insurance in this report therefore refers to public and products liability insurance combined, except where otherwise indicated.

Within professional indemnity insurance, there is a sub-class relating to medical indemnity. Before 1 July 2003, medical defence organisations (MDOs) offered medical indemnity to medical practitioners. They were not classified as insurance companies and therefore were not regulated by the Australian Prudential Regulation Authority (APRA). Under the Australian Government’s medical indemnity framework introduced on 1 July 2003, MDOs can no longer offer medical indemnity insurance to medical practitioners. Instead, only an insurer authorised by APRA to conduct insurance business can offer such insurance. The ACCC has excluded medical indemnity insurance policies written by these medical indemnity providers from this report because this form of indemnity insurance is part of a separate monitoring program undertaken by the ACCC. However, some general insurers provide medical indemnity to hospitals and ancillary staff, such as nurses and other medical staff, as part of their professional indemnity business and this is included within the scope of this report.

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7 As part of the Prime Minister’s press release ‘A New Medical Indemnity Insurance Framework’, of 23 October 2002, it was announced that the ACCC would monitor medical indemnity premiums to assess whether they are actuarially and commercially justified.
1.4 Approach to monitoring

The ACCC requested information from insurers identified as major participants in the public liability and professional indemnity insurance sectors in Australia. A list of insurers included in this report can be found at appendix A. Information has also been gathered from sources other than the monitored insurers—this is included in chapter 6.

The ACCC’s monitoring of public liability insurance is based on information provided by eight insurers. The premium revenue of these insurers represented 71 per cent of the total premium revenue for public (and product) liability insurance as measured by APRA data for the year ending 31 December 2004.

Monitoring of professional indemnity insurance is based on information provided by five insurers, which represented 50 per cent of that class as measured by APRA data for the year ending 31 December 2004.

The ACCC asked insurers to provide information about policies, premiums, costs and profitability. Insurers were also asked about the impact of reforms to date, as well as their expectations of the effect of reforms on costs and premiums for 2005 and subsequent years.

This report is based on information provided by insurers current as at 31 December 2004. Similarly, the ACCC focused on reforms that were announced and implemented by the Commonwealth, state and territory governments up to 31 December 2004.

Unless otherwise noted, all data is based on calendar years.

1.5 Qualifications

The information provided by insurers is presented in this report at an aggregate level. The ACCC recognises that insurance companies do not operate in a uniform manner. Each company has its own profit targets, capital structure, distribution channels, policy terms and conditions, target markets and objectives. Where necessary, the ACCC qualifies certain aspects of its analysis throughout the report.

The historical analysis in this report may not be directly comparable with that in the first four reports as a result of updating of incident year data for the period between 1997 and 2004.

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8 The ACCC altered its monitoring sample after the first report, with one insurer being excluded from both the public liability and professional indemnity monitoring programs because its book of business in both classes was deemed to be outside the scope of the ACCC’s monitoring program. Another insurer was excluded from the professional indemnity monitoring program because it had ceased writing this class in 2003. All historical analysis contained in this report has been updated to reflect these changes. This is unlikely to distort the results from those found in the first monitoring report because of the relatively small market shares of these two insurers.

9 Some of the information collected by the ACCC is on an incident year basis. That is, the data is allocated back to the corresponding year in which the incident leading to a claim occurred. Accordingly, incident year data is continually updated as claims arise and are settled in the years following the incident year.
1.6 Report outline

This report contains a further five chapters and three appendixes.

Chapter 2 outlines the reform process of Commonwealth, state and territory governments for public liability and professional indemnity insurance and identifies those reforms that were implemented up to 31 December 2004.

Chapter 3 examines claims frequency and costs, premiums, terms and conditions of policies and underwriting financial performance for public liability insurance to year ending 31 December 2004.

Chapter 4 examines claims frequency and costs, premiums, terms and conditions of policies and underwriting financial performance for professional indemnity insurance to year ending 31 December 2004.

Chapter 5 discusses insurers’ views on the actual and expected impact of government reforms on claims costs and premiums for both public liability and professional indemnity insurance.

Chapter 6 presents information on public liability insurance gathered from sources other than insurers.

Appendix A lists the insurers that participated in the ACCC’s monitoring program.

Appendix B outlines Commonwealth, state and territory government tort reform as at 31 December 2004 affecting public liability and professional indemnity insurance.

Appendix C discusses the ACCC’s monitoring methodology for examining trends in claims costs and frequencies, premiums, terms and conditions of policies and underwriting financial performance.
2 Reforms affecting public liability and professional indemnity insurance

Commonwealth, state and territory governments agreed to a series of reforms to address concerns about the affordability and availability of public liability and professional indemnity insurance. These reforms include changes to the application of tort law, the use of structured settlements, legal system reforms, data collection and risk management strategies.

2.1 Ministerial meetings

Commonwealth, state and territory ministers and the President of the Australian Local Government Association (the ministers) have held eight meetings since 2002 to discuss the problems of rising premiums and reduced availability of public liability and professional indemnity insurance and to consider reforms aimed at addressing such issues.

Most recently, a ministerial meeting was held on 8 April 2005, at which ministers noted the significant progress being made by all jurisdictions including state and territory personal injury laws, amendments to the Trade Practices Act 1974, professional standards legislation and proportionate liability. Ministers called on the insurance industry to ensure that the full benefits of tort law reforms are passed on to consumers. The meeting also noted APRA's new national claims and policies database and the ACCC's continued role in monitoring public liability and professional indemnity insurance.¹⁰

2.2 Reforms implemented as at 31 December 2004

Table 2.1 identifies the major initiatives implemented by Commonwealth, state and territory governments as at 31 December 2004. A detailed summary of reforms is at appendix B.

The major types of reforms implemented include the capping of damages for economic loss (that is, loss of past and/or future income), non-economic loss (that is, pain and suffering) as well as the capping of legal costs. Other reforms include the introduction of minimum thresholds of impairment for access to non-economic loss, limitation periods for personal injury claims, provision for contributory negligence, provision for structured settlements, provision for good Samaritans and volunteers, and also the provision that saying ‘sorry’ is not an admission of guilt. Waivers for risky activities and provisions disallowing exemplary or punitive damages have also been introduced.

Most jurisdictions have now also introduced proportionate liability (for economic loss) provisions as well as professional standards legislation.

¹⁰ The Minister for Revenue, the Hon. Mal Brough, MP, joint communiqué ministerial meeting on public liability, 8 April 2005.
<table>
<thead>
<tr>
<th>Reform</th>
<th>C'TH</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>SA</th>
<th>WA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cap on general damages (e.g. pain and suffering)</td>
<td>✓</td>
<td>✓ a</td>
<td>✓ c</td>
<td>✓ d</td>
<td>✓ e</td>
<td></td>
<td></td>
<td></td>
<td>✓ f</td>
</tr>
<tr>
<td>Minimum threshold of impairment to access general damages</td>
<td>✓ g</td>
<td>✓ g</td>
<td>✓ h</td>
<td></td>
<td>✓ j</td>
<td>✓ k</td>
<td>✓ l</td>
<td>✓ m</td>
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<tr>
<td>Cap on damages for economic loss (e.g. loss of past and/or future income)</td>
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<td>✓ o</td>
<td></td>
<td>✓ p</td>
<td>✓ q</td>
<td>✓ r</td>
<td>✓ o</td>
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<tr>
<td>Limitation period for personal injury cases</td>
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<td>✓ u</td>
<td>✓ u</td>
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<td>✓ v</td>
<td>✓ w</td>
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<td>✓ aa</td>
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<tr>
<td>Waivers for risky activities</td>
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<td>bb</td>
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<tr>
<td>No exemplary or punitive damages</td>
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<td></td>
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<tr>
<td>Cap on award of legal costs</td>
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<td>✓</td>
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<td>gg</td>
<td>hh</td>
<td>✓ ii</td>
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<tr>
<td>Provision for contributory negligence</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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<tr>
<td>Protection for volunteers or ‘good Samaritans’</td>
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<td>✓</td>
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<tr>
<td>Provision for structured settlements</td>
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<td>✓</td>
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<tr>
<td>Protection for expression of regret/apology</td>
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<td>✓</td>
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</tr>
<tr>
<td>Provisions for quick resolution of claims</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>kk</td>
</tr>
<tr>
<td>Proportionate liability (economic loss)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td>mm</td>
</tr>
<tr>
<td>Professional standards legislation</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td>nn</td>
<td>oo</td>
<td>pp</td>
<td>qq</td>
</tr>
</tbody>
</table>

Table 2.1 Major reforms implemented by governments—as at 31 December 2004
a $250,000 indexed to CPI.
b $350,000 indexed to AWE.
c $371,380 indexed to CPI.
d $250,000.
e $241,500 indexed to CPI.
f $350,000 indexed to AWE.
g Fifteen per cent of a most extreme case.
h For injury impairment greater than 5 per cent; psychiatric injury impairment greater than 10 per cent.
i No threshold, assessed on sliding scale.
j If a person suffers seven days of significant impairment or $2,750 medical expenses assessed on a sliding scale.
k $12,000 indexed. Damages less than $12,000 no award for general damages; damages between $12,000 and $36,500 award is amount by which damages exceed $12,000; damages greater than $36,500 but less than $48,500 award is $12,000 less (damages assessed minus $36,500).
l $4000 for claims less than $20,000.
m Degree of permanent impairment of 5 per cent.
n Two times rate of AWE, discount rate (5 per cent) on lump sums.
o Three times rate of AWE, discount rate (5 per cent) on lump sums.
p $2.2m indexed to CPI, discount rate (5 per cent) on lump sums.
q Three times rate of AWE, discount rate (6 per cent) on lump sums.
r 4.25 times rate of AWE, discount rate (7 per cent) on lump sums.
s Three times rate of AWE.
t Three years from date of discoverability, 12 years from occurrence (exceptions for minors and incapacitated persons).
u Three years from discovery, 12 years from occurrence (exceptions for minors and disability).
v Existing limitation period of three years from cause of action under s. 11, Limitation of Actions Act 1974.
w Existing limitation period of three years from cause of action under s. 36, Limitations of Actions Act 1936.
x The Limitation Bill 2004 was introduced in to Parliament on 20 October 2004. Under the current law, a cause of action for a personal injury claim accrues when the injury or disease occurs. However, this bill would create a new test and a claim would accrue when the person becomes aware that he or she has sustained a not insignificant personal injury or when the first manifestation consistent with the person having sustained a not insignificant personal injury.
y Tasmania’s Limitations Act 1974 was recently amended to include new limitation periods consistent with the recommendations contained in the Ipp report. As such, damages for personal injury now must be brought within either three years from the date of discoverability, or 12 years commencing on the date of the act or omission which it is alleged resulted in the personal injury or death that is the subject of the action.
z Existing limitation period of three years from date on which cause of action accrues under s. 12, Limitation Act 2000.
aa Three years from cause of action, notice of claim must be given before filing within nine months of occurrence or four months of consulting a lawyer.

bb Although Queensland has no provisions for waivers of risky activities, the *Civil Liability Act 2003* provides no proactive duty to warn of obvious risks and no liability for harm suffered from obvious risks of dangerous recreational activities (ss. 15 and 19).

cc Although Tasmania has no provisions for waivers of risky activities, the *Civil Liability Act 2003* provides that there is no proactive duty to warn of obvious risks (s. 17); no liability for harm suffered from obvious risks of dangerous recreational activities (s. 20) and a public authority has no duty of care in relation to recreational activities if there is a risk warning (s. 39).

dd Liability may be limited only in relation to equine activities as defined in the *Civil Laws (Wrongs) Amendment Act 2003*. The Act also contains general principles in relation to precautions against risk.

ee The greater of 20 per cent or $10 000 for personal injury damages <$100 000.

ff Nil for claims <$30 000; $2500 for claims <$50 000 if certain circumstances are met.

gg Maximum legal fees chargeable by lawyers are set by the Legal Costs Committee under the *Legal Practice Act 2003*.

hh Specific provisions in the *Personal Injuries (Civil Claims) Act 2003* dealing with caps on legal costs (ss. 18 and 20) had not commenced as at 31 December 2004.

ii For claims <$50 000 max costs are greater of 20 per cent of amount recovered or $10 000.

jj Provisions for volunteers, but no specific provisions for good Samaritans. However, legislation does provide protection of persons performing first aid or other aid or assistance to a person in distress.

kk The court has the power to make rules as to this matter under the *Personal Injuries (Civil Claims) Act 2003*.

ll Provisions relating to proportionate liability are contained in the *Civil Liability Amendment Act 2003*. These provisions received assent on 9 April 2003 and commenced on 11 March 2005.

mm The Civil Liability Amendment (Proportional Liability) Bill 2004 was introduced in to Parliament on 19 October 2004.

nn The *Professional Standards Act 2004* received royal assent on 13 September 2004 but provisions relating to professional standards had not commenced as at 31 December 2004.

oo The *Professional Standards Act 2004* received assent on 25 November 2004 but had not commenced as at 31 December 2004.


qq The Professional Standards Bill 2005 was introduced into Parliament on 15 March 2005.

rr The Professional Standards Bill 2004 was introduced into Parliament in October 2004.
3 Public liability insurance

This chapter presents the ACCC’s findings on trends in claims frequency and costs, premiums, terms and conditions of insurance policies and underwriting financial performance for public liability insurance.

Monitoring of public liability insurance is based on information provided by eight insurers, which represented 71 per cent of premium revenue for that class as measured by APRA data for the year ending 31 December 2004. The ACCC’s data analysis methodology is outlined in appendix C.

3.1 Introduction

3.1.1 What is public liability insurance?

Public liability insurance protects individuals, businesses and organisations against the financial risk of being found liable to a third party for death or injury, loss or damage of property or ‘pure economic’ loss resulting from negligence by the insured.

Stand-alone public liability insurance policies are provided to individuals and organisations for commercial purposes. These commercial policies are the focus of the ACCC’s monitoring. In most industries, and especially for smaller businesses, public liability and products liability are sold as a combined product with a single premium. Statistics are therefore usually only available for public and products liability combined.

A more detailed discussion of the features of public liability insurance can be found in the ACCC’s July 2003 and July 2004 monitoring reports.

3.1.2 Industry participants

Data provided to the ACCC by APRA for the year ending 31 December 2004 indicates that there were 42 direct insurers active in the public liability class during this period. The four insurers with the largest share earned 48 per cent, which indicates that the public liability insurance sector is not highly concentrated. When markets are supplied by a large number of firms, competitive pressures restrain firms from being able to exert market power—that is, on average, they are not able to earn excessive profits.

3.2 Claims frequency and costs

3.2.1 Claims frequency

Chart 3.1 examines the total number of claim reports incurred for each incident year (including both reported claims and IBNRs), and the frequency of claim reports incurred when compared to total policies.

The frequency of claim reports incurred has declined from more than 3 per cent in 1998 to just over 2 per cent in 2002, and has remained relatively stable since then. The trend in the number of claims reports has been similar.

11 Public liability insurance tends to be part of households’ home and contents insurance policies—these are not included in the ACCC’s monitoring.

Chart 3.1  Claim reports incurred and the frequency of claim reports incurred—public liability

![Chart 3.1 showing claim reports incurred and frequency]

Source: Derived by ACCC from responses provided by six insurers.

Chart 3.2 shows the frequency of claims reports incurred broken down into personal injury and death claims and property damage claims. The number of personal injury and death claims is more likely to be affected by tort reform than the number of property damage claims.

The trend in the frequency of claims reports incurred for both personal injury claims and property damage claims is similar to the overall trend, although there has been a small increase since 2002 in the frequency of property damage claims and a slight decrease in the frequency of personal injury claims.

Chart 3.2  Frequency of claim reports incurred—public liability—personal injury and death claims and property damage claims

![Chart 3.2 showing frequency of personal injury and property damage claims]

Source: Derived by ACCC from responses provided by five insurers.

13 This analysis is based on data from five insurers rather than the six in chart 3.1.
3.2.2 Claims costs

The average size of claims settled (in real terms) is the total claims settlement costs by settlement year adjusted to 31 December 2004 values divided by the total number of claims settled by settlement year.

The average size of claims is a trailing indicator because it is examined on a settlement year basis. That is, not all claims settled in the years after reforms will be affected by the reforms because the legislation that applies to claims is the legislation in place at the time the claim was lodged with the courts. Therefore, claims lodged before reforms were implemented, but settled after, are not expected to be affected by the reforms. Movements in this indicator may therefore not be representative of the impact of reforms.

Chart 3.3 shows the average size of claims settled has increased in most years over the monitoring period. However, in 2004 there was no substantial change in the average size of claims.

**Chart 3.3 Average size of claims settled—public liability**

![Chart showing the average size of claims settled in real terms by jurisdiction.](chart)

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by seven insurers.

Chart 3.4 shows the average size of claims settled in real terms by jurisdiction. In most years, New South Wales and the Australian Capital Territory have had the highest average claim size and Tasmania the lowest. Between 2003 and 2004 the average claim size decreased in Victoria, Queensland and Tasmania but increased in the other jurisdictions.
Chart 3.4  Average size of claims settled by state and territory—public liability

Notes:  Data shown in real terms adjusted to 31 December 2004 values using AWE index.  
Source:  Derived by ACCC from responses provided by seven insurers.

Chart 3.5 shows the average size of claims settled in real terms for both personal injury and death claims and property damage claims for the period 1997 to 2004.

On average, personal injury and death claims have been about five times larger than property damage claims.

Accordingly, in 2004 personal injury and death claims accounted for 72 per cent of the cost of claims settled, even though they were only 36 per cent of the total number of claims. Conversely, although 64 per cent of claims in 2004 were for property damage, these accounted for just 28 per cent of claims costs.

It is clear from comparing chart 3.3 with chart 3.5 that most of the change in the average size of claims settled over the monitoring period has been due to changes in the average size of personal injury and death claims, rather than claims for property damage.
Chart 3.5  Average size of claims settled—personal injury and death and property damage claims—public liability

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by five insurers.

Table 3.1 shows the proportion of total claims settlement costs and total number of claims settled within specified settlement band sizes for the settlement years 1997 to 2004.

The proportion of low-cost claims (that is, $50 000 or less) has fallen by 5 per cent by number (that is, from 97 per cent to 92 per cent) over the monitoring period, but has fallen by 17 per cent by cost (that is, from 45 per cent to 28 per cent).

Table 3.1  Proportion of total claims settled—by number and by cost—settlement year ending 31 December—public liability

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>$50 000 or less</td>
<td>By number</td>
<td>97</td>
<td>96</td>
<td>96</td>
<td>96</td>
<td>95</td>
<td>93</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>By cost</td>
<td>45</td>
<td>44</td>
<td>36</td>
<td>33</td>
<td>35</td>
<td>31</td>
<td>28</td>
</tr>
<tr>
<td>$50 001 to $500 000</td>
<td>By number</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>By cost</td>
<td>41</td>
<td>46</td>
<td>44</td>
<td>42</td>
<td>50</td>
<td>51</td>
<td>54</td>
</tr>
<tr>
<td>$500 001 or more</td>
<td>By number</td>
<td>0.1</td>
<td>0.1</td>
<td>0.2</td>
<td>0.2</td>
<td>0.2</td>
<td>0.3</td>
<td>0.3</td>
</tr>
<tr>
<td></td>
<td>By cost</td>
<td>14</td>
<td>10</td>
<td>20</td>
<td>25</td>
<td>15</td>
<td>18</td>
<td>18</td>
</tr>
</tbody>
</table>

Source: Derived by ACCC from responses provided by seven insurers.
This share of the total number of claims has been largely incorporated into the number of medium size claims, which as a proportion of settlement costs have risen over the monitoring period from 41 per cent to 49 per cent.

Although the number of high-cost claims is small in absolute terms, that is, less than half of 1 per cent, in 2004 they accounted for almost one quarter of the total cost of all claims.

The volatility in the significance of high-cost claims (as shown in table 3.1) has a marked effect on the total cost of claims settled in any one year and also on the average size of claims. For example, the decrease in the average size of claims settled in 2001 (as shown in chart 3.3) can be attributed to high-cost claims falling from 25 per cent of the total cost of claims in 2000 to 15 per cent in 2001.

In summary:

The frequency of claim reports incurred has declined from more than 3 per cent in 1998 to just over 2 per cent in 2002, and has remained relatively stable since then.

The trend in the frequency of claim reports incurred for both personal injury claims and property damage claims is similar to the overall trend, although there has been a small increase since 2002 in the frequency of property damage claims and a slight decrease in the frequency of personal injury claims.

The average size of claims settled has increased in most years over the monitoring period. However, in 2004 there was no substantial change in the average size of claims.

On average, personal injury and death claims have been about five times larger than property damage claims. Most of the change in the average size of claims settled over the monitoring period has been due to changes in the average size of personal injury and death claims rather than claims for property damage.

The proportion of the total number of claims settled and the total cost of claims settled that are medium and high-cost claims (that is, greater than $50 000) have increased over the monitoring period, whereas the significance of low-cost claims has reduced.

### 3.3 Premiums and terms and conditions of policies

This section examines the trend in the average premium for public liability insurance between 1997 and 2004. Although this provides an indication of how premiums have changed over the period, it may also reflect changes in the types of business written by insurers. Furthermore, changes in the average premium will not reflect changes in the premiums paid by all consumers.

#### 3.3.1 Average premium

Chart 3.6 shows the average premium\(^{14}\) for public liability insurance in real terms. The average premium is derived by dividing gross written premium (adjusted to 31 December 2004 values) by the number of policies written.

The average premium decreased from $1416 to $1363 in the 12 months to 31 December 2004. Previously, the average premium was stable in real terms between 1997 and 1999 at approximately $640 before increasing substantially to peak in 2003.

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\(^{14}\) Information contained in section 3.3 is not directly comparable with information in section 3.2 because premium and policy data was collected on an underwriting year basis whereas claims data was typically collected on an incident year and settlement year basis.
Chart 3.6 Average premium—public liability

![Average premium—public liability chart]

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by seven insurers.

Chart 3.7 shows the percentage change in the average premium which fell by 4 per cent in real terms in the period between year ending 31 December 2003 and year ending 31 December 2004, reversing the trend of substantial increases since 2000.

Factors identified by insurers as leading to reduced premiums in 2004 included increased capacity and thus competition in the market, changes to liability rate structures, tort reforms and improved risk management.

Chart 3.7 Percentage change in real average premium—public liability

![Percentage change in real average premium—public liability chart]

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by seven insurers.

The ACCC asked insurers what change they expected in premiums for the year ending 31 December 2005 compared with 2004. Most insurers believed that premiums would fall by at least 5 per cent, with one insurer anticipating a reduction of up to 20 per cent.
Chart 3.8 shows the average premium for public liability insurance on a state and territory basis for the period 1997 to 2004. New South Wales has consistently had the highest average premium over the monitoring period, and Tasmania has generally had the lowest. In general, all states and territories showed a similar trend in the average premium over the monitoring period.

Chart 3.9 shows the percentage change in average premiums in real terms by state and territory from 1998 to 2004. In 2004 the average premium decreased in all states other than Queensland, the Northern Territory and the Australian Capital Territory.

**Chart 3.8 Average premium by state and territory—public liability**

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index. Derived by ACCC from responses provided by seven insurers.

**Chart 3.9 Percentage change in real average premium by state and territory—public liability**

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index. Source: Derived by ACCC from responses provided by seven insurers.
### 3.3.2 Terms and conditions of policies

Insurance policies are not a homogeneous product—terms and conditions of policies that determine the ‘quality’ of the product can vary. The ACCC therefore collected information on the average cover limit\(^{15}\), the average level of excess\(^{16}\), and any changes to exclusions specified in insurers’ standard policy. Information collected relates to the period year ending 31 December 2002 to year ending 31 December 2004.

All eight insurers offered a standard policy for public liability insurance in 2004, which was available to all sectors in which the insurers wrote business, with the exception of two insurers. All insurers indicated that they wrote more than 75 per cent of their book of business under the standard policy.

The size of the average cover limit and average level of excess varies significantly across the monitored insurers. For example, in 2004 the average cover limit ranged from just over $7 million to approximately $20 million, and the average level of excess ranged from $250 to just under $50 000.

To aggregate these results, the ACCC first converted the average cover limit and average level of excess for each insurer into an index (with 2002 = 100), and then took an average of the index (weighted by premium revenue) across all insurers. This weighted average of each index is shown in chart 3.10.

The chart shows that the average cover limit for standard policies has increased by nearly 10 per cent since 2002, and the average level of excess has increased by around 20 per cent. The degree to which these factors led to more or less coverage depends on the particulars of the insureds’ individual policies.

The ACCC also asked insurers whether there had been any change to the exclusions incorporated in their standard policy in 2004. Two insurers indicated that they had either added or updated exclusions to their standard policy—one insurer added a ‘tobacco’ exclusion and clarified territorial limits; the other updated its standard policy to include a number of coverage exclusions required to ensure consistency with reinsurance coverage.

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\(^{15}\) Cover limits are set by the insurer on the amount of compensation it will pay in the event of a claim or series of claims arising within the period of insurance. It is the maximum amount of compensation that will be paid by the insurer, with any portion of any claims above this limit falling back to the insured.

\(^{16}\) An excess, set by the insurer or selected by the insured, is the amount of the claim that the insured is required to pay.
In summary:
The average premium for public liability insurance remained stable in real terms between 1997 and 1999 before increasing significantly between 2000 and 2003. In 2004 the average premium fell by 4 per cent. Most insurers expected premiums to fall further in 2005.
The average cover limit and average level of excess for standard policies were higher in 2004 than in 2002, by around 10 per cent and 20 per cent respectively. The degree to which these factors led to more or less coverage depends on the particulars of the insureds’ individual policies.

3.4 Underwriting financial performance

The ACCC examined insurers’ financial performance from underwriting public liability insurance by considering several ratios used in the insurance industry. These ratios provide an indication of how underwriting performance has changed over time.17

The ratios can be calculated both gross and net of reinsurance expenses and recoveries. The ACCC examined gross ratios because reinsurance costs and revenues (known as recoveries) may change substantially from one year to the next, which means that insurers’ net ratios could fluctuate from year to year. Net ratios are also examined because they show the actual underwriting financial performance of the insurers.

The ACCC examined underwriting performance by considering the loss ratio, the expense ratio, the reinsurance ratio and the combined ratio. These terms are defined in appendix C. Underwriting financial performance indicators could not be calculated before 2001 because of lack of data.

17 The ACCC’s analysis of underwriting performance will not necessarily be indicative of an insurer’s overall profit because of a number of factors:
   • It excludes general expenses because these cannot be attributed to any one class of insurance and will not be directly affected by tort law reform.
   • The use of uninflated and undiscounted expected future payments estimates, which, where possible, exclude the insurers’ expectations of normal ‘wage’ inflation (but include an estimate of superimposed inflation) and future investment income on their future payments provisions.
3.4.1 Loss ratio

The loss ratio shows the proportion of premiums that claims costs represent and can be calculated gross or net of reinsurance costs and recoveries.

The gross loss ratio is defined as claims payments by incident year (past payments adjusted into 31 December 2004 dollars using AWE, plus expected future payments in 31 December 2004 dollars on an uninflated and undiscounted basis)\(^\text{18}\) divided by earned premium inflated to 31 December 2004 dollars by AWE.

The net loss ratio effectively takes reinsurance and other recoveries out of the claims payments and subtracts the outwards reinsurance expenses from the earned premium.

Because the calculation of loss ratios by incident year takes into account both past claims payments and expected future payments (payments that will be made on claims that the insurer has incurred at the reporting date but which have not yet been settled) these ratios are estimates. This is because the expected future payments are based on an actuarial estimate of not only unfinalised reported claims costs, but also IBNR claims costs. Therefore loss ratios may become more or less favourable for the insurers as experience emerges.\(^\text{19}\)

Chart 3.11 shows the gross and net loss ratios since 2001. In 2004 the gross loss ratio was 53 per cent and the net loss ratio was 50 per cent, both marginally higher than in 2003.

**Chart 3.11 Gross and net loss ratios—public liability**

Notes: Derived by ACCC from responses provided by six insurers.

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\(^{18}\) That is, not taking into account normal ‘wage’ inflation where possible (but including an estimate of superimposed inflation) or investment returns.

\(^{19}\) This also means that the historical loss ratios change as experiences emerges. Over time, expected future payments will become actual claims, be finalised and become actual payments. Deviations between the estimate and the actual amount finalised can lead to loss ratios changing over time until all claims are finalised.
3.4.2 Expense ratio

The expense ratio is the proportion of premium that brokerage and underwriting costs represent. The gross expense ratio is underwriting and brokerage expenses by underwriting year divided by the gross written premium by underwriting year. The net expense ratio is underwriting and brokerage expenses divided by the net written premium (which is the gross written premium less reinsurance expenses).\(^{20}\)

Chart 3.12 shows the gross and net expense ratios since 2001. The gross expense ratio decreased from 28 to 23 per cent over the period 2001 to 2003 before rising marginally to 24 per cent in 2004. Similarly, the net expense ratio fell from 32 per cent in 2001 to 26 per cent in 2003 before rising marginally to 27 per cent in 2004.

3.4.3 Reinsurance ratio

The reinsurance ratio is the reinsurance expense by underwriting year divided by gross written premium by underwriting year. Reinsurance is calculated as a separate ratio because reinsurance is a different type of expense to underwriting and brokerage in that it is somewhat discretionary, and because it is a major component of total expenses.

Chart 3.13 shows the reinsurance ratios since 2001. The ratio remained stable between 2001 and 2003, ranging between 12 and 13 per cent. The reinsurance ratio fell to 10 per cent in 2004.

The ACCC also asked insurers what their retention for reinsurance coverage had been for the 12 months to 31 December 2004. The retention is the amount of risk that the insurer keeps on its own accounts before the reinsurer provides coverage. It is similar to the excess applied in standard insurance policies.

\(^{20}\) The loss ratio is calculated using earned premium, while the expense ratio and the reinsurance ratio are calculated using written premium. Although there is a small timing inconsistency in adding them together to calculate the combined ratio, this is not considered material to the ACCC’s conclusions.
Four of the eight insurers had not changed their retention rates during 2004. One insurer decreased its retention rate by approximately 17 per cent, whereas the remaining three insurers increased their retention rates by between 17 and 100 per cent. Thus, although the reinsurance ratio fell in 2004, the amount of reinsurance cover received by some insurers decreased.

**Chart 3.13  Reinsurance ratio—public liability**

![Chart 3.13](image)

Notes: Derived by ACCC from responses provided by six insurers.

### 3.4.4 Combined ratio

The gross combined ratio is calculated by adding together the gross loss ratio, the gross expense ratio and the reinsurance ratio. The net combined ratio is the sum of the net loss ratio and the net expense ratio—that is, it deducts the reinsurance expense from premiums and deducts reinsurance recoveries from claims payouts.

A combined ratio greater than 100 per cent implies an underwriting loss whereas a combined ratio less than 100 per cent implies an underwriting profit.

Charts 3.14 and 3.15 show the gross and net combined ratios since 2001.

The gross combined ratio fell significantly from 118 per cent in 2001 to 84 per cent in 2003, before rising to 88 per cent in 2004. The net combined ratio fell from 112 per cent in 2001 to 75 per cent in 2003 before increasing slightly to 77 per cent in 2004.

These results indicate that insurers expect a slight decrease in the underwriting performance of public liability insurance written in 2004.
In summary:

Both the gross combined ratio and net combined ratio decreased significantly between 2001 and 2003. However, in 2004 the gross combined ratio rose by 4 percent to 88 per cent, and the net combined ratio rose by 2 per cent to 77 per cent. This indicates that insurers expect a slight decrease in the underwriting performance of public liability insurance written in 2004.
3.5 Conclusion

There were 42 direct insurers active in the public liability insurance sector in Australia during 2004. Based on data provided by eight of these insurers (which accounted for 71 per cent of premium revenue for that class of insurance), the ACCC found the following:

- The frequency of claim reports incurred has declined from more than 3 per cent in 1998 to just over 2 per cent in 2002, and has remained relatively stable since then.
  - The trend in the frequency of claim reports incurred for both personal injury claims and property damage claims is similar to the overall trend, although there has been a small increase since 2002 in the frequency of property damage claims and a slight decrease in the frequency of personal injury claims.

- The average size of claims settled has increased in most years over the monitoring period. However, in 2004 there was no substantial change in the average size of claims.
  - Most of the change in the average size of claims settled over the monitoring period has been due to changes in the average size of personal injury and death claims rather than claims for property damage.

- The average premium for public liability insurance remained stable in real terms between 1997 and 1999 before increasing significantly between 2000 and 2003. In 2004 the average premium fell by 4 per cent. Most insurers expect premiums to fall further in 2005.

- The average cover limit and average level of excess for standard policies were higher in 2004 than in 2002 by about 10 per cent and 20 per cent respectively. The degree to which these factors led to more or less coverage depends on the particulars of the insureds’ individual policies.

- The gross combined ratio and the net combined ratio both decreased significantly between 2001 and 2003, indicating improved underwriting performance. However, in 2004 the gross combined ratio rose by 4 per cent to 88 per cent, and the net combined ratio rose by 2 per cent to 77 per cent. This indicates that insurers expect a slight decrease in the underwriting performance of public liability insurance written in 2004.
4 Professional indemnity insurance

This chapter presents the ACCC’s findings on trends in claims frequency and costs, premiums, terms and conditions of policies and underwriting financial performance for professional indemnity insurance.

Monitoring of professional indemnity insurance is based on information provided by five insurers, which represented 50 per cent of premium revenue for that class as measured by APRA data for the year ending 31 December 2004. The ACCC’s data analysis methodology is outlined in appendix C.

4.1 Introduction

4.1.1 What is professional indemnity insurance?

Professional indemnity insurance indemnifies professional people for their legal liability to their clients and others relying on their advice and/or services. It provides indemnity cover in the event that a client suffers a loss, either material, financial or physical, that is directly attributable to negligent acts of the professional.21

The nature of professional indemnity claims differs according to the profession being indemnified. Accountants, lawyers, investment advisers and valuers, for example, are usually sued for economic loss caused by advice provided. Claims against architects and engineers often relate to some physical damage leading to economic loss. Personal injury may also be involved.

A more detailed discussion of the features of professional indemnity insurance can be found in the ACCC’s July 2003 and July 2004 monitoring reports.22

4.1.2 Industry participants

Data provided to the ACCC by APRA for the year ending 31 December 2004 indicates that there were 22 direct insurers active in the professional indemnity insurance sector during this period.23 The largest four insurers earned 52 per cent of total premium revenue for the professional indemnity class of insurance in Australia, which indicates that supply of this class of insurance is not highly concentrated.

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23 The ACCC has excluded from this analysis the premium revenue of medical indemnity providers as these insurers do not typically underwrite other lines of business.
4.2 Claims frequency and costs

4.2.1 Claims frequency

Chart 4.1 examines the total number of claim reports incurred for each incident year (including both reported claims and IBNRs), and the frequency of claim reports incurred when compared with total policies.

Although the number of professional indemnity claims reports incurred by insurers has been relatively stable since 2001, the frequency of claims has declined from over 16 per cent in 2001 to about 12 per cent in 2004. This is because the number of policies written by the monitored insurers has increased.

Chart 4.1 Claim reports incurred and the frequency of claim reports incurred—professional indemnity

Source: Derived by ACCC from responses provided by four insurers.

4.2.2 Claims costs

Chart 4.2 shows the average size of claims settled (in real terms) for the period 1997 to 2004. The average size of claims settled has continually increased since 1997, with the largest rise in 2004 when the average size of claims settled rose by over 60 per cent. However, as discussed below, most of this increase was due to a small number of very large claims (predominantly with one insurer).
Chart 4.2  Average size of claims settled—professional indemnity

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by five insurers.

Table 4.1 shows the proportion of total claims settlement costs and total number of claims settled within specified settlement band sizes for the settlement years 1997 to 2004.

Table 4.1 Proportion of total claims settled—by number and by cost—settlement year ending 31 December—professional indemnity

<table>
<thead>
<tr>
<th>Claim size band</th>
<th>Proportion of total claims settled (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$50 000 or less</td>
<td></td>
</tr>
<tr>
<td>By number</td>
<td>89</td>
</tr>
<tr>
<td>By cost</td>
<td>10</td>
</tr>
<tr>
<td>$50 001 to $500 000</td>
<td></td>
</tr>
<tr>
<td>By number</td>
<td>11</td>
</tr>
<tr>
<td>By cost</td>
<td>57</td>
</tr>
<tr>
<td>$500 001 or more</td>
<td></td>
</tr>
<tr>
<td>By number</td>
<td>0.1</td>
</tr>
<tr>
<td>By cost</td>
<td>33</td>
</tr>
</tbody>
</table>

Source: Derived by ACCC from responses provided by five insurers.
The table shows that over the monitoring period:

- the proportion of low-cost claims ($50,000 or less) has increased by number but fluctuated by cost—in 2004 the proportion of low-cost claims by number remained the same as 2003 at 93 per cent but the proportion by cost fell from 15 per cent to 10 per cent

- the proportion of medium-cost claims ($50,001 to $500,000) has fallen by number and by cost—in 2004 the proportion by number remained the same at 6 per cent but the proportion of medium-cost claims by cost fell from 38 per cent to 24 per cent

- the proportion of high-cost claims ($500,001 or more) has increased significantly in terms of both numbers and costs, but is volatile in any given year—in 2004 the proportion of high-cost claims by number increased from half a per cent to 1 per cent and the proportion by cost increased from 47 per cent to 66 per cent.

This significant increase in the number of high-cost claims over the monitoring period has affected the average size of claims. This is highlighted in chart 4.3, which shows the average size of all claims settled for less than $1 million as well as the average size of all claims settled (as shown in chart 4.2).

The chart shows that the average size of all claims settled is affected by a small number of high-cost claims. For example, in 2004 there were 27 claims over $1 million in the sample, whereas in 2003 there were only four.

Chart 4.3 also shows that the trend in the average cost of claims settled for less than $1m has increased over the monitoring period, but remained stable between 2003 and 2004.
Chart 4.3  Average size of claims settled—all claims and claims under $1 million—professional indemnity

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by five insurers.

In summary:
Although the number of professional indemnity claims reports incurred by insurers has been relatively stable since 2001, the frequency of claims has declined from over 16 per cent in 2001 to about 12 per cent in 2004.
The average size of claims settled has continually increased in real terms since 1997, with the largest increase of over 60 per cent in 2004. The main driver of this increase, particularly in 2004, was the rise in the number and cost of high-cost claims.

4.3 Premiums and terms and conditions of policies

This section examines the trend in the average premium\textsuperscript{24} for professional indemnity insurance between 1997 and 2004. Although this provides an indication of how premiums have changed over the period, it may also reflect changes in the type of business written by insurers. Furthermore, changes in the average premium will not reflect changes in the premiums paid by all consumers.

\textsuperscript{24} This analysis of premiums may not be directly comparable to the claims trend analysis because premium and policy data was collected on an underwriting year basis whereas claims data was typically collected on an incident year and settlement year basis.
4.3.1 Average premium

Chart 4.4 shows the average premium in real terms for professional indemnity insurance between 1997 and 2004. The average premium is derived by dividing gross written premium (adjusted to 31 December 2004 values) by the number of policies written.

The average premium decreased in real terms from $10,129 to $9,735 in the 12 months to 31 December 2004. This reversed the trend of increases in the average premium over the previous four years.

The trend in average premiums is illustrated again in chart 4.5, which shows the percentage change in the average premium in real terms from 1998 to 2004. The average premium decreased by 4 per cent in real terms in 2004.

Of the five insurers monitored by the ACCC, the average premium in 2004 decreased for three insurers and increased for two insurers. Those that had higher premiums cited several factors, including increasing costs (such as reinsurance costs, capital costs, increases in claim notifications and exposure on policies), past underperformance (that is, previously premiums were too low) and the negative impact of the judicial interpretation of the Insurance Contracts Act 1984.

The decrease in premiums over the period was mainly attributed to more insurers entering the professional indemnity market leading to increased capacity in the market and more competition. The continuing positive economic environment was also cited as a reason.

Chart 4.4 Average premium—professional indemnity

[Bar chart showing average premiums from 1997 to 2004]

Notes: Data shown in real terms adjusted to 31 December 2004 values using AWE index.
Source: Derived by ACCC from responses provided by four insurers.
The ACCC asked insurers what change they expected in premiums for the year ending 31 December 2005 compared with 2004. All insurers expected premiums to decrease in 2005, with the size of the decrease varying with profession.

### 4.3.2 Terms and conditions of policies

The ACCC asked insurers about the professional indemnity policies they offered to determine if the terms and conditions had changed. Specifically, the ACCC examined changes in the average cover limit and the average level of excess as well as exclusions in standard policies.

The standard policy was available to all sectors in which the monitored insurers wrote business during 2004, with more than 76 per cent of their book of business written under a standard policy.

The ACCC constructed a weighted index of both the average cover limit and average level of excess for professional indemnity insurance using the same method to that discussed in section 3.3.2. This is shown in chart 4.6, which indicates that the average cover limit in 2004 was approximately 50 per cent higher than in 2002, and the average level of excess was almost 10 per cent lower than in 2002. This indicates that, on average, policy holders were receiving more coverage in 2004 than in 2002.

Only one insurer stated that it had added exclusions to its standard policy in 2004.
In summary:
The average premium for professional indemnity insurance fell in 1998 and 1999, before increasing significantly from 2000 onwards until peaking in 2003. In 2004, the average premium decreased by 4 per cent in real terms. Insurers expect premiums to fall further in 2005.

The average cover limit was higher in 2004 than in 2002, whereas the average level of excess was lower. This indicates that, on average, policy holders received more coverage in 2004 than in 2002.
4.4 Underwriting financial performance

The ACCC examined insurers’ financial performance from underwriting professional indemnity insurance in terms of the loss ratio, the expense ratio, the reinsurance ratio and the combined ratio. These ratios are defined in appendix C.

4.4.1 Loss ratio

The loss ratio is the proportion of premiums that claims costs represent, and can be calculated gross or net of reinsurance costs and recoveries. Chart 4.7 shows the gross and net loss ratios since 2001.

**Chart 4.7 Gross and net loss ratios—professional indemnity**

The gross loss ratio fell from 78 per cent in 2001 to 49 per cent in 2003 before rising marginally to 52 per cent in 2004. The net loss ratio exhibited a similar pattern, falling from 86 per cent in 2001 to 51 per cent in 2003 and 2004.

4.4.2 Expense ratio

The expense ratio is the proportion of premium that brokerage and underwriting costs represent. Chart 4.8 shows the gross and net expense ratios for professional indemnity insurance since 2001.

The gross expense ratio has remained relatively stable since 2001 ranging between 22 and 23 per cent. Similarly, the net expense ratio also remained relatively stable over the period, ranging between 29 and 32 per cent.
4.4.3 Reinsurance ratio

The reinsurance ratio is the proportion of premiums that the reinsurance expense represents. Chart 4.9 shows the reinsurance ratio fell significantly from 33 per cent in 2001 to 21 per cent in 2002 and has remained relatively stable since then.

The ACCC asked insurers what their retention was for reinsurance coverage for the 12 months to 31 December 2004. Two of the five insurers indicated that their retention rates had not changed. Retention rates for the other three insurers had increased by 20 to 67 per cent, which indicates that the level of reinsurance coverage declined during 2004.
4.4.4 Combined ratio

The gross combined ratio is calculated by adding together the gross loss ratio, the gross expense ratio and the reinsurance ratio. The net combined ratio is the sum of the net loss ratio and the net expense ratio—that is, it deducts the reinsurance expense from premiums and deducts reinsurance recoveries from claims payouts.

Charts 4.10 and 4.11 show the gross and net combined ratios since 2001.

The gross combined ratio fell from 132 per cent in 2001 to 94 per cent in 2003, before rising marginally to 95 per cent in 2004 due to the slight rise in the gross loss ratio. The net combined ratio has followed a similar trend, but remained constant at 80 per cent in 2004.

These results suggest that insurers expect little change in the underwriting performance of professional indemnity insurance written in 2004 compared with business written in 2003.

**Chart 4.10 Gross combined ratio—professional indemnity**

![Chart showing gross combined ratio from 2001 to 2004](image)

Source: Derived by ACCC from responses provided by four insurers.
In summary:
Both the gross combined ratio and net combined ratio have decreased significantly since 2001, when insurers expected an underwriting loss.

In 2004, the gross combined ratio (95 per cent) and net combined ratio (80 per cent) remained similar to 2003 levels, indicating that insurers expect little change in the underwriting performance of professional indemnity insurance in 2004 compared with 2003.
4.5 Conclusion

There were 22 direct insurers active in the professional indemnity insurance sector in Australia during 2004. Based on data provided by five of these insurers (which accounted for 50 per cent of premium revenue for that class of insurance), the ACCC found that:

- Although the number of professional indemnity claims reports incurred by insurers has been relatively stable since 2001, the frequency of claims has declined from more than 16 per cent in 2001 to about 12 per cent in 2004.

- The average size of claims settled has continually increased in real terms since 1997, with the largest increase of over 60 per cent in 2004. The main driver of this increase (particularly in 2004) was the rise in the number and cost of high-cost claims.

- The average premium for professional indemnity insurance decreased by 4 per cent in real terms in 2004. Insurers expect premiums to fall further in 2005.

- The average cover limit was higher in 2004 than in 2002, whereas the average level of excess was lower. This indicates that, on average, policy holders received more coverage in 2004 than in 2002.

- Both the gross combined ratio and net combined ratio have decreased significantly since 2001, when insurers expected an underwriting loss. In 2004, the gross combined ratio (95 per cent) and net combined ratio (80 per cent) remained similar to 2003 levels, indicating that insurers expect little change in the underwriting performance of professional indemnity insurance in 2004 compared with 2003.
5 Impact of government reforms

5.1 Introduction
The ACCC was asked by the Australian Government to monitor public liability and professional indemnity insurance costs and premiums, and assess to the extent possible the impact on premiums of measures taken by governments to reduce and contain legal and claims costs. Governments have indicated that they expect savings as a result of the reforms to be passed on to consumers in the form of more affordable insurance premiums.

Insurers were asked to provide information on the effect of tort reforms on claims costs and premiums in 2004, as well as anticipated future savings on claims costs and premiums.

5.2 Impact of reforms on public liability insurance
This section reports insurers’ views on the actual and expected impact of reforms on claims costs and premiums for public liability insurance.

5.2.1 Impact of reforms on claims
The ACCC asked insurers to what extent tort reforms had affected the number and size of claims in the 12 months to 31 December 2004, including quantifying the extent to which average claims costs were lower in 2004 than they would have been without tort reforms.

Of the eight insurers monitored by the ACCC, five indicated that they have observed a fall in the number of claims between the year ending 31 December 2003 and year ending 31 December 2004 as a result of tort reforms. Of these, one insurer estimated that its claims costs were 16–20 per cent lower in 2004 as a result of tort reforms, two estimated lower claims costs of 6–10 per cent and the other two insurers estimated average claims costs were 1–5 per cent lower.

The three remaining insurers stated that there had been no impact of tort reform on the number and size of their claims in 2004. This was either because these insurers could not isolate the impact of reforms, or because of the nature of their portfolios.

The ACCC asked insurers if they anticipated the expected savings for claims costs as a result of tort reforms to be ‘higher’, ‘the same’ or ‘lower’ over the next two to three years compared to current savings. Most insurers anticipated savings to be the same or lower.
5.2.2 Impact of reforms on premiums

The ACCC asked insurers to what extent tort reforms had affected premiums in the 12 months to 31 December 2004.

Two insurers thought that average premiums have been 6–10 per cent lower, and four insurers estimated that average premiums have been 1–5 per cent lower in 2004 as a result of tort reforms than they would have been without tort reforms. The remaining two insurers thought reforms had not changed average premiums in 2004.

Some insurers noted that it was difficult to isolate the effect of tort reforms from general competitive pressures, either because of the nature of the premiums written by the company or because some insurers’ premiums had previously made allowance for tort reform. One insurer had made specific allowance in its premiums of around 6 per cent savings due to tort reforms in 2004.

Insurers were asked if they anticipated expected savings in premiums as a result of tort reforms to be ‘higher’, ‘the same’ or ‘lower’ over the next two years compared with current savings. About half thought there would be no change in the level of savings, one expected savings to be higher, another thought savings would be lower, and one insurer was uncertain.

**In summary:**

Of the eight insurers monitored by the ACCC, five indicated that the number and cost of claims were lower in 2004 as a result of tort reforms than they would have been without the reforms, with the estimated savings ranging from 1–5 per cent to 16–20 per cent. Two insurers thought that average premiums have been 6–10 per cent lower and four insurers estimated that average premiums have been 1–5 per cent lower in 2004 as a result of tort reforms than they would have been without tort reforms.
5.3 Impact of reforms on professional indemnity insurance

This section reports insurers’ views on the actual and expected impact of reforms on claims costs and premiums for professional indemnity insurance.

5.3.1 Impact of reforms on claims

Most insurers believed that tort reforms had either no, or minimal, impact on the number and size of claims in the 12 months to 31 December 2004. The main reason given was that the reforms predominately relate to personal injury claims, to which they had little exposure.

Insurers were asked if they anticipated savings for claims costs as a result of tort reforms to be ‘higher’, ‘the same’ or ‘lower’ over the next two to three years compared with current savings. Two of the five insurers believed savings would be higher.

5.3.2 Impact of reforms on premiums

The ACCC asked insurers to what extent tort reforms had affected premiums in the 12 months to 31 December 2004. Four insurers believed that tort reforms had no effect. One insurer noted that there were other drivers of the changes to premiums, such as increased capacity and thus competition in the market. Another stated that the perception that tort reforms will have an effect had encouraged more insurers into the professional indemnity market in Australia, which had led to more competition reducing premiums by as much as 20 per cent for some policies.

Insurers were asked if they expected savings in premiums as a result of tort reforms to be ‘higher’, ‘the same’ or ‘lower’ over the next two to three years compared with current savings. Two insurers anticipated savings to be higher.

In summary:

Most insurers believed that tort reforms had either no, or minimal, impact on the number and size of professional indemnity claims in the 12 months to 31 December 2004. The main reason given was that the reforms predominately relate to personal injury claims, to which they had little exposure.

In general, insurers believed that tort reforms had not affected premiums for professional indemnity insurance in 2004. Rather, competition was the main driver of the fall in premiums.

Two insurers expected reforms to result in lower costs and premiums in the future.
6 Other sources of information

This chapter presents information on public liability insurance from several sources outside the ACCC’s monitoring program, namely:

- the number of personal injury writs and civil claims lodged with courts in Victoria and New South Wales
- the amount of compensation recovered by the Health Insurance Commission
- the availability of insurance for the not-for-profit sector
- recent reports on the profitability of insurers.

6.1 Personal injury writs and civil claims

The Victorian County Court and the District Court of NSW provided data on the number of personal injury writs served and the number of civil claims registrations in recent years. The ACCC notes that this data relates only to those claims and writs lodged with the courts, not the number of claims lodged directly with insurers. Only a small proportion of claims lodged with insurers involve litigation.

Chart 6.1 shows the number of ‘public liability’ and ‘slipping’ personal injury writs served in the Victorian County Court from 1 October 1999 to 31 March 2005.

In the three years between 1 October 1999 and 30 September 2002, the number of personal injury writs classified as ‘public liability’ or ‘slipping’ served in the Victorian County Court was on average approximately 1000 per year. However, in the 12 months to 30 September 2003, the number of writs served jumped to almost 2300 before falling to less than 100 in the following 12 months. This trend continued in the six months to 31 March 2005, when the number of personal injury writs was also less than 100.

The data suggests that claimants in Victoria rushed to file claims preceding the introduction of reforms, thereby significantly increasing the number of claims filed in 2003 as claims that would ordinarily have been filed later were brought forward.

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25 Although ‘slipping’ type incidents are often considered public liability claims, the Victorian County Court identifies them as a separate category.
Chart 6.1 Number of public liability and slipping personal injury writs served in the Victorian County Court*

![Chart 6.1](chart61.png)

Notes: * Data for 2005 covers the six-month period 1 October 2004 to 31 March 2005.
Source: Constructed from data sourced from Victorian County Court.

Chart 6.2 shows the number of civil claims registrations in the NSW District Court since 1996. The District Court deals with civil matters, including public liability and medical indemnity claims, with a monetary value up to $750 000, as well as motor vehicle accident personal injury matters. It also deals with claims for equitable recovery of money or damages under various pieces of legislation, including family law.

The number of civil claims registrations in New South Wales displays a similar, though less pronounced, trend to that in Victoria, partly because it incorporates a wider range of types of claims. The NSW District Court’s 2004 Annual Review notes the following on the number of registrations:

- The Motor Accidents Compensation Act, which commenced in 1999, limited access to the court in relation to motor accident claims. The impact of the amendments has been a gradual (although substantial) reduction in these types of claims, which formerly represented a significant proportion of the court’s civil caseload.

- Legislative changes in relation to work-related accidents and medical negligence prompted a rush of filings in 2001 during the year prior to the changes.

- Further legislative changes aimed at reducing civil litigation (personal injury claims) prompted a rush of filings in the first half of 2002, with a marked drop occurring in the latter part of the year after the amendments became effective.
6.2 Compensation recoveries by HIC

The Health Insurance Commission (HIC) has a program to recover the cost of care provided to people who receive compensation in relation to injury or illness, including payments arising from motor vehicle accidents, workers compensation and public liability. The amount of HIC recoveries may therefore be affected by tort reforms.

The Compensation Recovery program began in 1996 and is aimed at preventing double-dipping in Medicare and nursing home benefits/residential care subsidies paid by the government in relation to an injury or illness when a person receives compensation for that injury or illness. The program is administered under the *Health and Other Services (Compensation) Act 1995* (the HOSC Act).

Following a review of the HOSC Act, changes to the legislation were implemented from 1 January 2002 to streamline the operation of the program and reduce administrative costs. One of the major amendments was to exempt all compensation claims of $5000 or less. This change was expected to reduce the number of settlements notified to the HIC by about 21 per cent, and reduce gross revenue recovered by about 10 per cent.

Chart 6.3 shows the amount of HIC compensation recoveries over the period 1996–97 to 2004–05.

Both the number of cases finalised and the amount of compensation recovered have declined significantly since 2001–02, when the HIC recovered $42.2 million from almost 80 000 cases. The 10 per cent decline in recoveries to approximately $38 million in 2002–03 and 2003–04 appears to be due to the change in policy in 2002 to only recover payments from compensation claims greater than $5000.

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26 The amendments also changed the legislative requirement for HIC to be notified before judgments or settlements to within 28 days of a claim for compensation reaching judgement or settlement.

However, the further decline in the amount of recoveries of 26 per cent in 2004–05 to $28 million is consistent with tort reforms affecting the number and size of compensation payments.

**Chart 6.3  HIC compensation recoveries**

![Chart showing compensation recoveries from 1996–97 to 2004–05](chart_image)

**Notes:**
- Cases finalised are those that were finalised and from which any refundable benefits were recovered by HIC.
- Source: Data supplied by Health Insurance Commission

### 6.3  Not-for-profit sector

Concern has been expressed about the availability and cost of public liability insurance for the not-for-profit sector/community groups. A broad range of organisations fall within this general classification, including religious organisations, professional bodies, arts groups and community groups.

The ACCC asked the eight insurers in the monitoring program if they collected separate data on public liability insurance claim costs and premiums for not-for-profit/community groups. Most insurers stated that they either did not write policies for such groups or did not differentiate between businesses and not-for-profit organisations that purchase public liability insurance, and were therefore not able to provide disaggregated data.

On the issue of availability of insurance for the not-for-profit sector, the ACCC is aware of several organisations that either provide, or help provide, insurance for not-for-profit organisations, including the Community Care Underwriting Agency (CCUA), Community Related Insurance and Superannuation Program (CRISP), the Council of Social Service of NSW (NCOSS) Community Cover, Catholic Church Insurances Limited (CCI) and EIG-Ansvar.

CCUA is a joint venture that only writes public liability insurance for the not-for-profit sector in Australia for organisations with a turnover of no more than $5 million per annum. The joint venture partners include the insurance companies QBE, IAG and Allianz.

CRISP is a program of the NSW Meals on Wheels Association and is managed by Austcover Pty Ltd Australian Financial Services. CRISP is available to any not-for-profit group within Australia.
Brokers Aon Risk Services and NCOSS have created NCOSS Community Cover, which is a bulk buying program that helps a range of not-for-profit organisations obtain public liability insurance policies through licensed insurance companies. The program is being expanded and aims to establish a not-for-profit insurance company.

CCI offers a full range of insurance products, including protection for property, motor vehicles, liability personal accident and workers’ compensation insurance. These products are available for parishes, schools and other education facilities, hospitals, nursing homes and other health care services, welfare organisations and other church or religious institutions in Australia.

The Ecclesiastical Insurance Group (EIG) acquired the Australian, New Zealand and UK subsidiaries of Ansvar Insurance to form EIG-Ansvar. EIG-Ansvar provides insurance primarily for church groups, but also provides insurance for care homes, retirement villages and independent schools in Australia.

6.4 Insurers’ financial performance

Two recent reports by consulting actuaries discuss insurers’ profitability and the effect of tort reforms. These reports were produced by Cumpston Sarjeant Pty Ltd28, which was commissioned by the Law Council of Australia, and Finity Consulting29, which was commissioned by the Insurance Council of Australia.

The ACCC has not reviewed the data, assumptions or findings of either of these reports as part of its monitoring program. However, the ACCC notes the following in respect of some of the issues discussed in these reports:

- Tort law is a matter of public policy for Australian governments to determine, taking into account various competing factors such as the ability of injured parties to receive adequate compensation when appropriate, and the overall cost of the system that provides that compensation.

- The financial performance of an insurer depends on several factors, including underwriting performance, general expenses and investment returns. Investment returns are inherently volatile, and underwriting performance can also vary significantly from year to year.

- The pricing of long-tailed classes of insurance such as public liability and professional indemnity is more complicated than for many other products, since the actual cost of providing insurance and the level of investment returns only become known many years after the product is sold.

- However, in light of the structure of the public liability and professional indemnity insurance sectors in Australia, the basic principle of competition that applies to any business operating in a market supplied by a large number of firms would appear to equally apply to insurers—consistently price above a competitive rate and the insurer will lose sales to rivals; consistently price below that rate and revenues will not provide sufficient return to maintain equity in that line of business.

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28 Cumpston Sargeant, *High insurer profits allow better benefits to the injured?*, 1 June 2005.
Appendixes
A Insurers that participated in the ACCC’s monitoring program

The following insurers participated in the ACCC’s monitoring program for this report:

- ACE Insurance Limited
- Allianz Australia Insurance Limited
- CGU Insurance Limited
- QBE Insurance (Australia) Limited
- QBE Commercial Limited
- Suncorp Metway Insurance Limited
- Vero Insurance Limited
- Zurich Australia Insurance Limited.

All eight insurers were included in the ACCC’s public liability insurance monitoring program. Their combined premium revenue represented 71 per cent of the public (and product) liability class of insurance, as measured by APRA data for the year ending 31 December 2004.

Five of these insurers were included in the ACCC’s professional indemnity insurance monitoring program. Their combined premium revenue represented 50 per cent of the professional indemnity class of insurance, as measured by APRA data for the year ending 31 December 2004.

The ACCC acknowledges that all insurers responded to the ACCC’s information request, although there was no statutory requirement for them to comply.
B Tort reforms as at 31 December 2004

B.1 Introduction
This appendix outlines tort reforms introduced by Australian, state and territory governments up to 31 December 2004, and the progress of these reforms to 1 June 2005.

B.2 Government initiatives introduced as at 31 December 2004

B.2.1 The Commonwealth


The Trade Practices Amendment (Liability for Recreational Services) Bill 2002 was introduced into Parliament on 27 June 2002. It received royal assent on 19 December 2002 and commenced on the same day. It amended the *Trade Practices Act 1974* such that in the case of ‘recreational services’ it is possible to contract out of the statutory warranty to provide due care and skill. It allows individuals who participate in recreational or sporting activities to waive their rights under the *Trade Practices Act 1974* if they suffer personal injury as a consequence of the provider’s failure to supply the service with due care and skill.

The *Commonwealth Volunteers Protection Act 2003* was introduced into Parliament on 23 October 2002. It was given royal assent on 24 February 2003 and commenced on 24 August 2003. The Act protects volunteers from civil liability for acts that the volunteer has done in good faith in doing voluntary work organised by and for the Commonwealth or a Commonwealth authority.

The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2003* was introduced into Parliament on 4 December 2003. The Act amends the *Trade Practices Act 1974*, the *Corporations Act 2001* and the *Australian Securities and Investment Commissions Act 2001* to allow proportionate liability to apply to claims for damages from economic loss or property damage arising from misleading or deceptive conduct. The Act was passed by the House on 16 February 2004 and introduced to the Senate on 1 March 2004. The Senate passed the Act with proposed amendments on 22 June 2004. The House subsequently agreed to some amendments but did not accept others. The Senate did not insist on amendments disagreed to, but made further amendments on 24 June 2004. The House agreed to further Senate amendments on 25 June 2004. The Act received royal assent on 30 June 2004. Section 3, which relates to proportionate liability commenced on 26 July 2004.

The Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004\[30\] was introduced into Parliament on 19 February 2004. The Act ensures that a nationally consistent approach is taken so that limitation periods and caps on damages arising from personal injury or death apply consistently across Australia. It introduces an indexed cap of $250,000 on damages for non-economic loss. The Act was passed by the House on 25 March 2004 and by the Senate (with amendments) on 11 May 2004. The Senate amendments were not accepted by the House on 21 June 2004. The Senate did not insist on the amendments, but made further amendments on 25 June 2004. The House agreed to the further Senate amendments on 25 June 2004. The Act received royal assent on 13 July 2004 and commenced on the same day.

The Trade Practices Amendment (Personal Injuries and Death) Bill 2004 was introduced into Parliament on 9 December 2004. This Bill will prevent individuals, and the ACCC, in a representative capacity, from bringing actions for damages for personal injuries or death resulting from contraventions of Division 1 of the Trade Practices Act 1974.

B.2.2 New South Wales

The Civil Liability Act 2002 was introduced on 28 May 2002 and received royal assent on 18 June 2002. It has been in force retrospectively since 20 March 2002. The main provisions of the Act relate to implementing caps on damages and thresholds for personal injury damages claims. The Act provides:

- general damages capped at $350,000, indexed to AWE for NSW
- a threshold for general damages of 15 per cent impairment of the most extreme case then assessed on a sliding scale
- damages for economic loss capped at three times the rate of AWE for NSW
- a claimant must prove realistic future earnings
- a discount rate of 5 per cent to apply to lump sum payments for future economic loss
- limitations on damages for gratuitous attendant care services
- no interest be awarded on general damages or damages for gratuitous attendant care services
- damages claims under the Compensation to Relatives Act 1987 may be reduced to incorporate contributory negligence of the deceased person
- no exemplary or punitive damages
- facilitation of structured settlements for payment of damages
- limits on legal cost claims to the greater of $10,000 or 20 per cent for amounts recovered for personal injury claims that are less than $100,000
- new requirements on lawyers and penalties apply when the court finds the claim or defence to be unmeritorious
- costs be awarded on an indemnity basis if incurred after the failure to accept an offer of compromise.

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- general principles for standard of care 31
- general principles in relation to causation
- no proactive duty to warn of obvious risk
- no liability for materialisation of inherent risk
- no liability for harm suffered from obvious risks of dangerous recreational activities
- no duty of care for recreational activity where there is a risk warning
- waiver of contractual duty of care for recreational activities
- standard of care for professionals
- no liability if a professional acted in a manner widely accepted by the profession as competent professional practice (‘peer opinion’)
- liability based on non-delegable duties
- standard of contributory negligence for apportioning liability
- contributory negligence can reduce damages by 100 per cent
- damages may be awarded for future superannuation entitlements
- courts may have reference to previous court decisions when determining amounts for general damages
- further amendments in relation to facilitation of structured settlements for payment of damages
- damages may be recovered for personal injuries arising from mental or nervous shock
- limitation of recovery for pure mental harm arising from shock
- standard of duty of care in relation to mental harm
- proportionate liability for economic loss
- outline of liability of public authorities
- effect of intoxication on duty and standard of care
- no civil liability for acts in self defence against unlawful conduct
- exclusion of liability for criminal activity
- protection from liability for volunteers and good Samaritans who act in good faith
- expression of regret not an admission of liability
- amendments to limitation periods

• three years from date of discoverability
• 12 years from date of occurrence (which may be extended by the court)
• specific provisions in relation to minors injured by close relatives and those with disabilities (minors and/or those with incapacity).

The amendments provide:
• no civil liability for acts in self defence if the conduct to which the person was responding would have been unlawful if that person had not been suffering a mental illness at the time
• criminals not to be awarded damages
• limitation of damages if loss results from serious offence committed by a mentally ill person
• damages may be awarded for the birth of a child but only in certain circumstances
• amendments concerning proportionate liability for economic loss (not in force)
• limits liability of police officers and health care officials exercising functions in good faith under the Mental Health Act 1990.

The Professional Standards Act 1994 was given royal assent on 12 December 1994. The Act establishes limited liability for professionals prefaced on provisions aimed at:
• minimising claims against professionals by improving professional standards
• requiring risk management strategies and compulsory insurance cover
• providing for appropriate complaint and disciplinary mechanisms.

The Professional Standards Amendment Act 2004 was introduced on 1 September 2004 and received royal assent on 3 November 2004. The Act commenced on 15 November 2004. The Act amends the Professional Standards Act 1994 by making changes to definitions, increasing the flexibility of schemes approved under the Act, and it enables different insurance standards to be set for members within an occupational association.

B. 2.3 Victoria

• in establishing a breach of the duty of care the court must consider whether the injured person was intoxicated or engaged in illegal activity
• an expression of regret does not represent an admission of liability
• a cap on general damages of $371,380 indexed to Melbourne CPI
• a cap on damages for economic loss of three times the rate of AWE for Victoria
• a discount rate of 5 per cent to apply to lump sum payments for future economic loss
• facilitation of structured settlements for payment of damages
• protection from liability for volunteers and good Samaritans who act in good faith
• food donors are protected from liability where they have donated food to charities in good faith
• waivers limiting liability in relation to the supply of recreational services
• new powers under the *Essential Services Commission Act 2001* for the Essential Services Commission to collect insurance data to ensure transparency and fairness in the pricing of premiums.

The *Limitation of Actions Amendment Act 2002* was introduced into Victorian Parliament on 16 October 2002. It was given assent on 4 November 2002 and commenced on 5 November 2002. The Act amends the *Limitations of Actions Act 1958*. The amendments provide:

• to limit the period within which certain actions for damages for personal injury and death can be brought
• limitation period set at:
  • three years after cause of action accrued
  • six years for a person under a disability.


• proportionate liability for economic loss
• a 5 per cent impairment threshold for general damages, with certain exceptions\(^\text{32}\)
• a 10 per cent psychiatric impairment threshold for general damages
• no threshold where the fault concerned is, or relates to, an intentional act that is done with intent to cause death or injury or sexual assault/misconduct
• procedures for assessment of impairment
• procedures for claims for general damages
• procedures of medical panels for assessing impairment
• limits on awards for damages for provision of gratuitous attendant care services
• amendments to limitation periods:
  • three years from date of discoverability
  • six years from date of discoverability in the case of a person under a disability
  • 12 years from date of occurrence (with court discretion to extend this period)
  • specific provisions in relation to minors injured by close relatives and those with disabilities (minors and/or those with incapacity).

\(^{32}\) Loss of a foetus or loss of a breast is automatically considered ‘significant injuries’.
On 28 October 2003 the Wrongs and Other Acts (Law of Negligence) Act 2003 was introduced into Parliament, and received royal assent on 2 December 2003. It amends the Wrongs Act 1958, the Wrongs and Limitations of Actions Acts (Insurance Reform) Act 2003 (in relation to proportionate liability), the Victorian Managed Insurance Authority Act 1996 and the Building Act 1993. The Act commenced, with the exception of ss. 6, 14(2) and Part V on 3 December 2003. Section 6 (transitional provisions) came into operation retrospectively on 1 October 2003. Section 14(2) (psychological or psychiatric injury arising from the loss of a child) is deemed to have come into operation on 21 May 2003. Part V (amendments to the Buildings Act 1993) came into operation on 1 January 2004. The amendments provide:

- general principles in relation to duty of care
- general principles in relation to causation
- limits liability in relation to obvious risks and voluntary assumption of risks
- no liability for materialisation of inherent risk
- standard of care for professionals and those professing to have a particular skill
- no liability if a professional acted in a manner widely accepted by the profession as competent professional practice (‘peer opinion’)
- limits liability based on non-delegable duty
- standard of care for contributory negligence
- contributory negligence can reduce damages by 100 per cent
- standard of duty of care in relation to mental harm
- limitation on recovery of damages for pure mental harm arising from shock
- liability for economic loss for mental harm
- limits liability for public authorities
- limits on damages for provision of gratuitous care
- courts may have reference to previous court decisions when determining amounts for general damages
- revises and extends procedures applying to determination of whether a claimant’s injury satisfies the threshold requirements for eligibility (should negligence be proved) for awarding of general damages.

The Professional Standards Act 2003 was introduced on 14 October 2003 and was given royal assent on 2 December 2003. It became effective on 8 June 2004. The Act provides:

- limitation of liability for members of occupational associations in certain circumstances
- facilitation of improvement in the standards of services provided by those members
- establishment of the Professional Standards Council
- requires risk management strategies for council approval of occupational associations and allows associations to require compulsory insurance for members
- complaint and disciplinary mechanisms.

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33 Based on recommendations in the Ipp Review of the Law of Negligence.
B.2.4 Queensland


- pre-court procedures for speedy resolution of personal injury claims
- a requirement for the mandatory early notification of claims following an injury or the appearance of symptoms
- a requirement for the mandatory exchange of information (including medical reports) to facilitate early settlement and avoid litigation
- special provisions for notification of claims in relation to injuries to children arising from medical treatment
- outline of obligations on parties in relation to exchange of information
- requirements for compulsory conferences
- provision for non-compliance if urgent proceedings needed
- restrictions on legal advertising, including the banning of 'no win—no fee' advertising
- limits on legal costs that can be awarded in specified circumstances
- facilitation of structured settlements
- provides that expressions of regret made before court proceedings have started are inadmissible
- cap on damages for economic loss of three times AWE for Qld
- exclusion of jury trials in personal injury claims
- no exemplary, punitive or aggravated damages
- liability does not attach to a person rendering first aid or other assistance to person in distress in an emergency
- sets out that future economic loss be discounted by 5 per cent.


34 Subsequently replaced by provisions in the Civil Liability Act 2003.
35 ibid.
36 ibid.
37 ibid.
38 ibid.
39 ibid.
40 ibid.
The Civil Liability Act 2003 was introduced into Parliament on 11 March 2003 and received royal assent on 9 April 2003. The commencement of the Act was in three stages, with ss. 1–2, Ch. 2 pt 1 div. 7, pt 3 div. 2, pt 4, ch. 3 pts 2, 4, ss. 53–64 and 56–60, ch. 4 pts 1–2, ch. 5, ch. 6 sch 1 commenced on 9 April 2003. Chapter 2, Part 2 (proportionate liability) commenced on 11 March 2005. The remaining section commenced retrospectively on 2 December 2002. Provisions from the Personal Injuries Proceedings Act 2002 were relocated to this Act so as to bring all relevant (similar) provisions together. The main provisions of the Act provide:

- general principles for standard of care\(^{41}\)
- general principles for causation
- no proactive duty to warn of obvious risk
- no liability for materialisation of inherent risk
- no liability for personal injury suffered from obvious risks of dangerous recreational activities
- proactive and reactive duty of doctor to warn of risk
- standard of care for professionals
- no breach of duty if professional acted in a manner widely accepted by the profession as competent professional practice (‘peer opinion’)
- standard of care in relation to contributory negligence
- contributory negligence can reduce damages by 100 per cent
- protection for persons and entities performing duties to enhance public safety
- provisions in relation to proportionate liability
- limitations on liability of public authorities
- protection for volunteers who undertake community work in good faith\(^{42}\)
- limits on liability for damages for injuries sustained during criminal activity
- presumption of contributory negligence if person who suffers harm is intoxicated or relied on care and skill of person known to be intoxicated
- damages for economic loss following failed sterilisation or contraceptive procedures or contraceptive advice
- no exemplary, punitive or aggravated damages\(^{43}\)
- a cap on general damages based on an assessment of injury, with a maximum of $250 000
- no interest on general damages
- a cap on damages for economic loss of three times the rate of AWE for Qld\(^{44}\)
- facilitation of structured settlements\(^{45}\)
- expressions of regret do not represent admission of liability.\(^{46}\)

\(^{41}\) Based on recommendations in the Ipp Review of the Law of Negligence.

\(^{42}\) Relocating and expanding the provisions of the Personal Injuries Proceedings Act 2002.

\(^{43}\) Replacing those provisions of the Personal Injuries Proceedings Act 2002.

\(^{44}\) ibid.

\(^{45}\) ibid.

\(^{46}\) ibid.
The *Professional Standards Act 2004* was assented to on 13 September 2004. This Act enables professionals to limit damages payouts in return for more accountable standards of performance. Sections 1 and 2 commenced on the date of assent, but the remainder of the Act did not commence until 1 July 2005.

### B.2.5 South Australia

The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* received royal assent on 3 August 2001 and commenced on 16 August 2001. It reforms the law relating to contributory negligence and the apportionment of liability and amends the then *Wrongs Act 1936*. Legislation to adopt proportionate liability in relation to economic loss and property damage claims is currently before Parliament, the *Law Reform (Contributory Negligence and Apportionment of Liability) Amendment Bill 2004*.

The *Statutes Amendment (Structured Settlements) Act 2002* was introduced to South Australian Parliament on 12 September 2002, and commenced on 1 December 2002. It provides for facilitation of structured settlements for payment of damages.

The *Recreational Services (Limitation of Liability) Act 2002* was introduced on 5 September 2002 and came into operation on 1 July 2003. It provides that:

- the duty of care owed by providers of recreational services may be modified and governed by registered code
- after two years the South Australian economics and finance committee must investigate and report to the South Australian Parliament on how this Act affects the availability and cost of insurance for providers of recreational services.

The *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* was introduced on 14 August 2002. It received assent on 28 November 2002 and commenced on 1 December 2002. The Act amended what was then known as the *Wrongs Act 1936*. The amendments provide:

- a threshold for general damages of at least seven days impairment or medical expenses incurred of $2750
- a cap on general damages at $241,500 (indexed to Adelaide CPI) and assessed on a sliding scale
- damages may be awarded for mental or nervous shock only in certain circumstances
- a cap on damages for future economic loss of $2.2 million (indexed to Adelaide CPI)
- a discount rate of 5 per cent to apply to lump sum payments for future economic loss
- no interest to be awarded on general damages or damages for future economic loss
- limits on awards for damages for provision of gratuitous services
- limits on liability for damages for injuries sustained during criminal activity
- a presumption of contributory negligence where an injured person was intoxicated or a person relied on the care and skill of a person known to be intoxicated
- a presumption of contributory negligence if a person was not wearing a seatbelt or safety helmet as required by law

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47 The name of the *Wrongs Act 1936* was subsequently changed to the *Civil Liability Act 2003* by the *Law Reform (Ipp Recommendations) Act 2003* discussed later.

48 The name of the *Wrongs Act 1936* was subsequently changed to the *Civil Liability Act 2003* by the *Law Reform (Ipp Recommendations) Act 2003* discussed later.
• damages able to be reduced where contributory negligence is present
• protection for a good Samaritan who acts in good faith
• an expression of regret does not represent an admission of liability.

The Law Reform (Ipp Recommendations) Bill 2003 was introduced to South Australian Parliament on 2 April 2003, and commenced on 1 May 2004. It amends the Wrongs Act 1936, the Limitation of Actions Act 1936 and the Motor Vehicles Act 1959. Specifically it changes the name of the Wrongs Act 1936 to the Civil Liability Act 2003. The amendments incorporate recommendations of the Ipp Review of the Law of Negligence and provide:

• general principles for standard of care
• provisions regarding precautions against risk
• standard of duty of care in relation to mental harm
• general principles in relation to causation
• no duty to warn of obvious risk
• standard of care for professionals and those professing to have a particular skill
• no liability if a professional acted in a manner widely accepted by the profession as competent professional practice (‘peer opinion’)
• limitation of liability for road authorities
• exclusion of liability for criminal conduct (replacing previous amendments contained in the Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002)
• standard of contributory negligence for apportioning liability
• limitations on damages for mental harm
• limitations on the award of damages for the costs of raising a child in certain circumstances
• special provisions regarding extending limitation periods for children
• general powers to extend limitation periods.

The Professional Standards Act 2004 was introduced to the South Australian Parliament on 12 November 2003. The Bill was debated by the House on 30 June 2004 and amendments adopted on 22 July 2004. The Bill has received assent on 25 November 2004 but has not yet commenced. It provides:

• establishment of a Professional Standards Council
• provisions for establishment of occupational associations
• limitation of liability for members of occupational associations in certain circumstances
• occupational associations may compel their member to insure
• risk management strategies may be required for approval of an association by the council.
B.2.6 Western Australia

The Civil Liability Act 2002 was introduced into Parliament on 14 August 2002, and received royal assent on 20 November 2002. It commenced on 1 January 2003, and provides for:

- a cap on damages for economic loss of three times AWE for WA
- facilitation of structured settlements for payment of damages
- a threshold for general damages of $12 000 (indexed to the Wage Cost Index for WA)
- a threshold of $5000 on damages for gratuitous care services (indexed to the Wage Cost Index for WA)
- a cap on damages for gratuitous care services to three times the rate of AWE in WA
- restrictions on advertising by lawyers of personal injury services.

The Fire and Emergency Services Legislation Amendment Act 2002 protects volunteer fire units and marine rescue units and their members from civil liability.

The Volunteers (Protection from Liability) Act 2002 was introduced on 19 June 2002 and commenced upon royal assent on 1 January 2003. It provides:

- protection for volunteers from civil liability when undertaking community work
- community organisations may incur the civil liability on behalf of the volunteer.

The Insurance Commission of Western Australia Amendment Act 2002 allows for the establishment of a Community Insurance Fund (CIF) and for the Commission to provide insurance to eligible not-for-profit organisations. Since its inception, the CIF has provided cover to more than 60 organisations including tourist railways, charity events, community festivals, toy libraries and youth clubs that were unable to obtain affordable insurance in the private sector.

The Civil Liability Amendment Act 2003 was introduced into Parliament on 20 March 2003, and received royal assent on 30 October 2003. It commenced on 1 December 2003 (except for ss. 9 and 14, the proportionate liability provisions, which commenced on 1 December 2004). The Act provides:

- general principles for duty of care
- general principles in relation to causations
- no liability for harm from obvious risks of dangerous recreational activities
- no liabilities for recreational activity where there is a risk warning
- waiver of contractual duty of care for recreational activities
- a presumption of contributory negligence when a person who suffers harm is intoxicated
- no duty to warn of obvious risk
- no liability for harm from inherent risk
- duty of care in relation to mental harm
- liability relating to carrying out public functions
- protection for good Samaritans who act in good faith
- an expression of regret does not represent an admission of liability
- provisions in relation to proportionate liability for economic loss
- courts may have reference to previous court decisions when determining amounts for general damages.
The Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Amendment Act 2003 was given royal assent on 17 April 2003 and commenced on the same day. The Act amends the Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947 so as to provide that in certain circumstances, damages recoverable by a person who sues for breach of a contractual duty of care are to be reduced to the extent of any contributory negligence by the person.

The Limitation Bill 2004 was introduced into Parliament on 20 October 2004. This Bill changes the common law test in relation to when a cause of action accrues for damages relating to personal injury. Under the current law, a cause of action for a personal injury claim accrues when the injury or disease occurs. However, this Bill would create a new test and a claim would accrue when the person becomes aware that he or she has sustained a not insignificant personal injury or when the first manifestation consistent with the person having sustained a not insignificant personal injury.

This Bill also provides:

- that limitation periods provided for under this Bill apply only to causes of action that accrue on or after the commencement day
- a different limitation period for different causes of action such as asbestos-related disease and the publication of defamatory matter
- a limitation period of six years from injuries sustained in the course of childbirth after the commencement of this Bill
- a default limitation period of six years.

The Limitation Legislation Amendment and Repeal Bill 2004 was introduced at the same time as the Limitation Bill 2004 and makes consequential amendments to this Bill. It also repeals the Limitation Act 1935 but saves that Act in respect of causes of action which accrued before the commencement day. This Bill lapsed when Parliament was dissolved on 23 January 2005. The Limitation Legislation Amendment and Repeal Bill 2005 has since been introduced on 7 April 2005.

Western Australia introduced the Professional Standards Act 1997 on 12 March 1997. It received royal assent on 18 September 1997 and commenced on that day. The Act provides for the limitation of liability of members of occupational associations in certain circumstances and to facilitate improvement in the standards of services provided by those members.

The Civil Liability Amendment Act 2004 was introduced into Parliament on 4 June 2004 and commenced on the date of assent, 9 November 2004. The Act amends the Civil Liability Act 2002 to make further provision in respect of proportionate liability.

B.2.7 Tasmania

The Civil Liability Act 2002 was introduced into the Tasmanian Parliament on 1 October 2002. It received assent on 19 December 2002 and commenced on 1 January 2003. The Act provided:

• a presumption of contributory negligence when a person is intoxicated
• limits on liability for damages for injuries sustained during criminal activity
• facilitation of structured settlements for payment of damages
• an expression of regret does not represent an admission of liability.

Tasmania’s Civil Liability Amendment Act 2003 implemented recommendations from the Ipp Review. The Act amended the Civil Liability Act 2002. The amendments commenced on the date of royal assent, 4 July 2003. The amendments provide:

• general principles for standard of care
• general principles in relation to causation
• no duty to warn of obvious risks
• no liability for harm suffered from obvious risks of dangerous recreational activities
• specification of proactive and reactive duty of registered medical practitioner to warn of risk
• standard of care for professionals and those professing to have a particular skill
• no liability if a professional acted in a manner widely accepted by the profession as competent professional practice (‘peer opinion’)
• standard of contributory negligence for apportioning liability
• damages may be awarded for loss of future superannuation entitlements
• damages for future economic loss capped at 4.25 times AWE for Australia
• threshold for general damages of $4000 (indexed to Hobart CPI), if amount assessed is between $4000 and $20 000 (both indexed to Hobart CPI) then general damages awarded are calculated by formula
• courts may have reference to previous court decisions when determining amounts for general damages
• damages may be awarded for mental or nervous shock
• limitations on recovery for pure mental harm arising from shock
• standard of duty of care in relation to mental harm
• general principles of duty of care for public authorities
• a public authority does not owe a duty of care for recreational activities when a risk warning was given
• protection for volunteers who do community work.
The *Civil Liability Amendment (Proportional Liability) Act 2005* was introduced into Parliament on 19 October 2004 and received royal assent on 12 April 2005. The Act:

- provides that a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting that proportion of the damage or loss claimed
- sets out liability when proceedings involve both an apportionable claim and a claim that is not an apportionable claim
- establishes a duty of the defendant to inform the plaintiff about concurrent wrongdoers.

The Professional Standards Bill 2005 was introduced into Parliament on 15 March 2005. This Bill provides for:

- the creation of schemes that limit the civil liability of professionals and others
- facilitate the improvement of the occupational standards of professionals and others
- protects consumers of services provided by professionals and others
- establishes the Professional Standards Council to supervise the preparation and approval of schemes and to assist in the improvement of occupational standards and protection.

Tasmania’s *Limitations Act 1974* was recently amended to include new limitation periods consistent with the recommendations contained in the Ipp report. As such, damages for personal injury now must be brought within either three years from the date of discoverability, or 12 years commencing on the date of the act or omission which it is alleged resulted in the personal injury or death that is the subject of the action.

**B.2.8 Australian Capital Territory**

The *Civil Law (Wrongs) Act 2002* was introduced to the ACT Legislative Assembly on 20 August 2002. Sections 1 and 2 of the Act commenced on 10 October 2002, and Chapter 10 began on 1 January 2003. The remainder of the Act commenced on various dates between 1 November 2002 and 1 July 2003. The Act provides:

- protection for volunteers and good Samaritans who act in good faith
- outlines the effect the death of the plaintiff or defendant may have on a cause of action
- outlines proceedings against and contributions between wrongdoers
- outlines liability and damages for a person’s death in relation to a wrongful act or omission that causes death
- damages may be awarded for injuries from mental harm or nervous shock
- a presumption of contributory negligence if an injured person is intoxicated or relied on a person who is intoxicated
- exclusion of liability for criminal activity
- presumption of contributory negligence for not wearing a seatbelt or safety helmet
- cap on damages for economic loss of three times AWE for the ACT
- damages may be awarded for loss of capacity to perform domestic services
- apportionment of liability for contributory negligence
- facilitation of structured settlements for payment of damages
- replaces common law rules regarding the standard of care that an occupier of premises must show to people entering the premises in relation to the state of the premises
• limits on legal costs; for claims $50,000 or less, the maximum costs allowed is the greater of 20 per cent of the amount recovered or $10,000

• establishes a regime for neutral evaluation of cases to resolve disputes more quickly and cheaply

• requires insurers to report annually to the ACT Government.


• temporary exclusion of liability for terrorism-associated risks

• limitation of liability for acts of terrorism.


• an expression of regret does not represent an admission of liability

• standard of duty of care in relation to mental harm

• general principles for duty of care for negligence

• general principles in relation to precautions against risk

• general principles in relation to causation

• contributory negligence can reduce damages by 100 per cent

• outlines pre-court procedures in relation to notice of claim, obligations on parties to give documents and information, need for urgent proceedings and expert medical evidence

• courts may have reference to previous court decisions when determining amounts for general damages

• outlines liability for public authorities

• provisions regarding costs in damages claims if there is no reasonable prospect of success

• includes mediation to be an option along with neutral evaluation of cases

• limitation of liability for injury or death of participant in equine activity

• amends the Limitation Act 1985 so that the limitation period is three years from the cause of action

• special provisions apply in relation to limitation periods for injuries to children

• a limitation period of six years applies for injuries to children as a result of provision of health services.

The Civil Law (Wrongs) (Thresholds) Amendment Bill 2003 was introduced to the ACT Parliament on 11 December 2003, but was discharged on 16 October 2004. It proposed to amend the Civil Law (Wrongs) Act 2002. The provisions in the Bill restricted the awards that may be made for general damages for a personal injury from the provision of a health service by a doctor. The Bill set maximums for such general damages.

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49 The Civil Law (Wrongs) Amendment Act 2003 was repealed, however, the repeal of an amending law does not affect the continuing operation of the amendments.

50 The Civil Law (Wrongs) Amendment Act 2003 (No 2) was repealed, however, the repeal of an amending law does not affect the continuing operation of the amendments.
The Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004 was introduced to Parliament on 24 June 2004. It was passed on 26 August 2004 and Sections 1 and 2 commenced on 8 September 2004 with the remainder commencing on 8 March 2005. The Act amends the Civil Law (Wrongs) Act 2002 to implement proportionate liability and professional standards in the Australian Capital Territory. It replaces the use of the concept of joint and several liability as a means of compensating claimants with the concept of proportionate liability as a means for compensating claimants in legal claim for economic loss or property damage. The Act also introduces professional standards for industry associations, in return for financial limits on liability for damages in relation to an action under the law of negligence, contract or misleading conduct for economic loss. In accordance with the Legislation Act 2001, the Act was repealed after all sections commenced. This does not however affect the continuing operation of the amendments.

B.2.9 Northern Territory

The Consumer Affairs and Fair Trading Amendment Act 2003 was introduced to the Northern Territory Legislative Assembly on 20 August 2002. It received assent on 18 March 2003 and commenced 1 May 2003. It amends the Consumer Affairs and Fair Trading Act to replicate changes being made to the Trade Practices Act 1974. The amendments provide waivers limiting liability in relation to supply of recreational services.

The Personal Injuries (Liabilities and Damages) Act 2003 was introduced to the Northern Territory Legislative Assembly on 17 October 2002 and commenced 1 May 2003. The Act provides:

- protection for volunteers and good Samaritans who act in good faith
- limits on liability for damages for injuries sustained during criminal activity
- an expression of regret does not represent an admission of liability
- a presumption of contributory negligence if an injured person was intoxicated or relied on a person who was intoxicated
- damages may be reduced if contributory negligence is established
- no awards for aggravated or exemplary damages in respect of a personal injury
- cap on damages for economic loss of three times AWE for the Northern Territory
- a discount rate of 5 per cent to apply to lump sum payments for future economic loss
- damages may be awarded for provision of gratuitous services
- cap on general damages of $350 000 adjusted by the percentage change in AWE for the Northern Territory
- a threshold so that general damages may only be awarded if a person suffers permanent impairment of 5 per cent or more
- general damages may be awarded on a sliding scale depending on the degree of impairment
- no interest to be awarded on general damages or damages for gratuitous services
- facilitation of structured settlements for payment of damages.
The *Personal Injuries (Civil Claims) Act 2003* was assented to on 29 May 2003. Sections 1–4, 6, 12–15 and 22 commenced on 1 July 2003. The remaining provisions have not yet commenced. The Act provides:

- further facilitation of structured settlements for payment of damages
- Judges of the Supreme Court of the Northern Territory may make rules for regulating and prescribing practice and procedures in relation to claims and other specified topics.

The *Legal Practitioners Amendment (Costs and Advertising) Act 2003* received assent 29 May 2003 and amends the Legal Practitioners Act. Sections 1–6 commenced on 1 July 2003; sections 7–11 commenced on 1 June 2004. The amendments provide:

- requirements regarding disclosure of costs
- requirement that lawyers provide an estimate of costs before coming to a costs agreement with a client
- restrictions on law firms advertising for personal injury claims
- power to the Law Society to make rules regulating or prohibiting legal advertising.

The *Professional Standards Act 2004* was passed in December 2004. This Act seeks to legislate professional indemnity insurance, specifically to cover professionals such as accountants, lawyers and engineers against claims by clients and others relying on their advice or services. It commits the Northern Territory to national professional standards legislation and allows occupational associations to establish schemes, which must be approved by the Professionals Standards Council, that limit the liability of members that participate in the scheme.

The *Proportionate Liability Act* was passed in the Legislative Assembly on 23 March 2005 and is to commence from 1 June 2005. This Act replaces the common law rule that imposes joint and several liability for economic loss or damage to property caused by concurrent wrongdoers with rules that limit the liability of each concurrent wrongdoer to reflect the extent of the wrongdoer’s responsibility for the loss or damage, and for related purposes.
C Monitoring methodology

The ACCC used several indicators to examine costs, premiums and financial performance, as outlined below.

C.1 Claims frequency and costs

• Claims frequency—the number of claim reports incurred by incident year as a proportion of the total number of policies for the corresponding underwriting year. This indicator provides an indication of whether insurers incur (that is, have received and expect to receive) more or fewer claim reports for the same number of policies over time.

• Average size of claims—the total amount of settlement costs adjusted to 31 December 2004 values divided by the total number of claims settled in any one year. It shows how the average size of claims has changed over time in real terms.

• Distribution of settlement numbers and costs between settlement size bands—this indicator shows whether changes in the average size of claims can be attributed to all size bands or changes in the distribution of settlements across various size bands.

C.2 Premiums and terms and conditions of policies

• Average premium—the total gross written premium written by underwriting year adjusted to 31 December 2004 values, divided by the number of policies for that year. This indicates the average premium that was paid across the period by policy holders.

• Average cover limit—the revenue weighted average of an index (with 2002 = 100) of each insurer’s average cover limit on standard policies.

• Average level of excess—the revenue weighted average of an index (with 2002 = 100) for each insurer’s average level of excess on standard policies.

C.3 Underwriting performance

The overall financial performance of insurance companies is determined by their underwriting and investment activities. However, the ACCC’s role is to monitor costs and premiums of public liability and professional indemnity insurance rather than investment activities, and therefore it focuses on the underwriting performance of insurers in these classes of insurance. Also, general expenses are excluded from the ACCC’s methodology as they can not be attributed to any one class of insurance and will not be directly affected by tort law reform. Wherever possible the ACCC used uninflated and undiscounted expected future payments because insurers’ expectations regarding normal ‘wage’ inflation and investment income will not be directly affected by tort reforms.

51 The total number of claim reports for any one incident year that may result in a liability for the insurer. This includes claims already reported and those unreported (IBNRs).

52 The ACCC calculated a weighted average of an index constructed for each insurer rather than an average of absolute values because both the average cover limit and average level of excess vary significantly across the monitored insurers.
Insurers’ underwriting performance was examined using the following ratios:

- **Loss ratio**—the total amount of claims costs (including the claims administration expenses) paid or payable (including expected future claims costs) on all incurred claims in current dollar values (that is, before inflating or discounting expected future payments provisions) as a proportion of earned premium.

- **Expense ratio**—the sum of brokerage expenses and underwriting expenses as a proportion of gross written premium.

- **Reinsurance ratio**—reinsurance expense as a proportion of gross written premium.

- **Combined ratio**—the sum of the loss ratio, the expense ratio and the reinsurance ratio. This ratio shows whether the sum of all costs (claims costs and expenses) is greater or less than premiums. For example, a combined ratio greater than 100 per cent implies an underwriting loss; a ratio less than 100 per cent implies an underwriting profit.