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Public liability and professional indemnity insurance

F O U R T H
M O N I T O R I N G R E P O R T

Public liability and professional indemnity insurance

Fourth monitoring report

January 2005



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Abbreviations

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investment Commission
AWE	average weekly earnings
IBNER	incurred but not enough reported
IBNR	incurred but not reported
LIV	Law Institute of Victoria
LSNSW	Law Society of New South Wales
MDO	medical defence organisation
TPA	the <i>Trade Practices Act 1974</i>

Glossary of terms

This glossary contains a brief description of common terms used in the insurance industry that appear in this report.

Term	Meaning
agent	an insurance intermediary whose principal is an insurer
book of business	the number, size and type of accounts (policyholders) that an insurer underwrites
broker	an intermediary who places the risks of parties seeking insurance with insurers and whose principal is the insured
brokerage expenses	commissions, brokerage and similar charges paid or payable by the insurer to agents or brokers
claims payments	the payments that have been made on all claims at a particular date
combined ratio	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
earned premium	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 months worth of that premium after six months has elapsed
excess	the amount of the loss that will be paid by the insured party before the insurer pays the claim
expected future payments	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)
expense ratio	the percentage of gross written premium that is represented by the costs of writing the business, excluding claims costs, reinsurance costs and general expenses
gross written premium	the total premiums underwritten by an insurer during a period, before the deduction of reinsurance expense
incident	an incident resulting in a loss that may develop into a claim against the insured
incident year	the year in which an incident occurs
incurred claims	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)

incurred but not enough reported claims (IBNERS)	a provision in an insurer's book that recognises that estimates for reported claims may be inadequate
incurred but not reported claims (IBNRs)	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
long-tail classes	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
loss ratio	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
net combined ratio	the combined ratio net of reinsurance expenses and recoveries
net written premium	gross written premium less reinsurance expenses
personal injury or death claims	a claim relating to an incident that results in the injury or death of a third party
property damage claim	a claim relating to an incident that results in the damage of third party property
reinsurance	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
reinsurance expenses	the amount of premium ceded to reinsurers for reinsurance during a period
reinsurance ratio	the percentage of gross written premium represented by the cost of reinsurance
report	the notification of an incident or loss that may develop into a claim against the insured
report year	the year in which an insurer is notified of an incident or loss that may develop into a claim against the insured
retention rate	the amount of risk retained by a reinsured after placing reinsurance
settlement	when parties to a claim agree to finalise the claim or a court gives a verdict, the claim is said to have been settled
settlement year	the year in which a claim is settled
superimposed inflation	the rate of inflation of claims costs by reason of factors other than economic/investment factors, for example court awards and legislative amendments
underwriting expenses	costs attributable to the underwriting of specific classes of insurance
underwriting year	the year in which the policy was issued or renewed
unearned premium	premium received before the balance date but which relates to risks after that date

Summary

The Australian Government asked the Australian Competition and Consumer Commission to monitor costs and premiums in the public liability and professional indemnity classes of insurance on a six monthly basis over two years. The ACCC was asked to especially consider government measures aimed at reducing and containing legal and claims costs and improving the data available to insurers to evaluate and price risk. The ACCC was also asked, to the extent possible, to assess the impact on premiums of these measures.

This report updates a subset of the information contained in the ACCC's third monitoring report by including an additional six months of data from insurers. It also updates information about insurers' experience and expectations on the impact of reforms on costs and premiums in 2004 and subsequent years.

Public liability insurance

The ACCC found the average size of claims settled decreased by 11 per cent between year ending 31 December 2003 and half year ending 30 June 2004. This decrease resulted from a fall in the average size of personal injury and death claims rather than property damage claims.

Over the same period, the average premium decreased by 15 per cent, reversing the trend of substantial increases experienced since 2000. In the half year to 30 June 2004, few changes were made to insurers' standard public liability insurance policies. However, both the average cover limit and average level of excess increased significantly in 2003. The degree to which these factors will lead to more or less coverage will depend on the particulars of the insureds' individual policies.

The ACCC also examined the underwriting financial performance of public liability insurers. In the six months to 30 June 2004, both the gross combined ratio (91 per cent) and the net combined ratio (82 per cent) were higher than in the year ending 31 December 2003 (84 and 76 per cent respectively). This indicates declining underwriting performance by insurers and was largely driven by underwriting expenses rising faster than premium revenue.

Most insurers indicated that they had experienced a fall in the frequency of claims between the period year ending 31 December 2003 and half year ending 30 June 2004. Most believed that this resulted from changes to portfolio mix as well as higher levels of excess, although one insurer noted that reforms may be acting to remove small claims.

The ACCC asked insurers to update their expectations of the impact of reforms on costs and premiums at 31 December 2004. The ACCC found that insurers' expectations had not changed substantially from those reported in the third monitoring report. The reasons given included that too few claims had been settled under the new legislation to identify any clear impact on claims costs and uncertainty about the ultimate impact of tort reforms.

Five insurers expected premiums to remain stable in 2005, while two anticipated reductions in premiums of up to 10 per cent. Most insurers expected reforms to have an impact on claims costs and premiums going forward, although they considered it too early to determine the extent to which this may be the case. Some insurers were concerned that the degree to which reforms will be successful will depend on the courts with regards to awarding damages, as well as the degree to which plaintiff lawyers find ways to circumvent reforms.

Data provided by the Law Institute of Victoria and the Law Society of New South Wales on the number of personal injury writs served and the number of civil claims shows that claimants in both states rushed to file claims with courts before reforms were introduced. This meant that many of the claims that would otherwise have been filed in 2003 and 2004 were brought forward to 2002. Accordingly, the net effect of reforms on the number of claims filed with courts will only become clear over the next few years.

Professional indemnity insurance

The ACCC found that between year ending 31 December 2003 and half year ending 30 June 2004, the average size of claims settled increased by 21 per cent, continuing the trend across the monitoring period.

However, over the same period the real average premium fell by 17 per cent, counter to the trend since 2000.

Average cover limits fell slightly in 2003. However, in the first six months of 2004, the average cover limit increased due to a substantial change by one insurer. Over the period year ending 31 December 2002 to half year ending 30 June 2004, average levels of excess fell significantly. The degree to which these factors will lead to more or less coverage will depend on the particular circumstances of the insured.

In terms of underwriting financial performance, in the six months to 30 June 2004, both the gross combined ratio (105 per cent) and the net combined ratio (92 per cent) were higher than for the year ending 31 December 2003 (98 per cent and 85 per cent respectively). The main driver of this reduction in underwriting performance was an increase in claims costs relative to premium revenue.

Regarding their experience and expectations of the impact of reforms, the general response from insurers was that reforms enacted to 30 June 2004 have focused primarily on personal injury and death claims and therefore they still did not expect reforms to have an impact on costs and premiums in 2004 and they had not adjusted their outstanding claims provision.

However, most insurers believe that proposed reforms such as changes to the *Insurance Contracts Act 1984* and the introduction of professional standards legislation at the Commonwealth level¹ will have an impact in the future.

¹ The *Treasury Legislation Amendment (Professional Standards) Act 2004* commenced on 13 July 2004.

1 Introduction

1.1 Background

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

The reforms aimed to satisfy one or more of the following objectives:

- cost reduction
- cost containment
- increased certainty and predictability of costs of claims for insurers—considered critical in containing premium increases in the short to medium term
- management of community expectations about personal responsibility and risk.²

The reforms aimed at public liability insurance are focused 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, all 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.³

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 ongoing work would contribute to a greater understanding of market developments and premium pricing in long-tail classes of insurance.⁴ The ACCC's role was not a direction under the prices surveillance provisions of the *Trade Practices Act 1974*.⁵

This report is the fourth ACCC report to the Australian Government in accordance with this request.

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. This is 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 1974* on 1 March 2004.

1.3 Previous ACCC insurance monitoring reports

The Australian Government released the ACCC's first monitoring report into public liability and professional indemnity insurance on 4 August 2003. This report examined changes in costs and premiums in both classes of insurance between years ending 31 December 1997 and 31 December 2002. It also presented information about insurers' expectations regarding the impact of reforms on costs and premiums in 2003 and subsequent years. The ACCC's second monitoring report was released by the Australian Government on 23 February 2004 and updated a subset of the information contained in the first report by including an additional six months of data.⁶

On 12 August 2004 the Australian Government released the ACCC's third report. This report monitored premiums, costs and expected underwriting financial performance⁷ to 31 December 2003. It also provided a summary of insurers' expectations regarding the impact of reforms on costs and premiums in 2004 and subsequent years, as well as the actual impact of reforms on insurers' emerging claims experience at 31 December 2003.

The ACCC found that for **public liability insurance**:

- The average premium (adjusted to 31 December 2003 dollars) was stable between 1997 and 1999 at around \$620, then increased substantially between 1999 and 2002. In 2003 premiums rose by a further 17 per cent to \$1366.
- The frequency of claims reported decreased between 1998 and 2002, followed by a marginal increase in 2003.
- The average size of claims settled in real terms (adjusted to 31 December 2003 dollars) increased from \$10 800 to \$15 202 between 1997 and 2002. In 2003 the average size of claims settled further increased to \$17 768, an increase of 17 per cent. The increase in the average size of claims settled appears to be driven by a trend towards an increasing number and cost of personal injury and death claims relative to property damage claims.
- The net combined ratio⁸ decreased from 112 per cent in 2001 to 85 per cent in 2002. It further decreased to 79 per cent in 2003.
- Most insurers had observed a fall in claims frequency in their emerging claims experience. They noted that it was unclear to what extent this was due to the impact of reforms because of substantial changes made to their underwriting operations in recent years.
- Most insurers expected reforms to affect public liability insurance costs and premiums in the short term. Data from four insurers indicated that while costs and premiums were still expected to rise in 2004, the increase in claims costs would be constrained by 6 per cent, which would lead to a concomitant constraint on premium increases of 4 per cent. Four insurers also told the ACCC that on the basis of the reforms they had reduced their outstanding claims provisions.
- All but one insurer expected reforms to have an impact on costs and premiums in the medium term, once the reforms begin to significantly affect their claims experience.⁹ Also, some insurers commented that the savings expected in 2004 premiums were conservative, and that the reforms may have a larger impact in the medium term.

⁶ Copies of these reports can be found at the ACCC's website, www.accc.gov.au

⁷ The overall financial performance of insurance companies is determined by their underwriting and investment activities.

⁸ The 'net combined ratio' shows whether the sum of all costs is greater than or less than total premium. A net combined ratio greater than 100 per cent indicates that insurers expect to make an underwriting loss, whereas a ratio less than 100 per cent indicates that insurers expect an underwriting profit.

⁹ Many insurers indicated that the reforms were not expected to have an immediate impact on their claims experience because public liability is a long-tailed class of insurance and the reforms were not retrospective.

- However, five insurers commented that the level of any savings realised may be eroded, to an extent, in the long term through circumvention of the reforms. They generally cited their experience of reforms in other classes of insurance. Insurers noted that the impact of reforms may be eroded by plaintiffs shifting claims costs to other heads of damage, escalating claims costs within heads of damage, new types of claims emerging, and the shifting of claims to different jurisdictions.

The ACCC found that for **professional indemnity insurance**:

- The average premium (adjusted to 31 December 2003 dollars) decreased between 1997 and 1999 from \$4922 to \$3731. Premiums then increased each year to \$8494 in 2002, and increased a further 15 per cent to \$9778 in 2003. This compares to an increase in 2002 of 29 per cent.
- The frequency of claims as a proportion of the number of policies written remained largely unchanged early in the monitoring period before decreasing in recent years.
- The average size of claims settled (adjusted to 31 December 2003 dollars) increased each year across the period, from \$6067 to \$15 411 between 1997 and 2002. The average size of claims settled rose a further 41 per cent in 2003 to \$21 713.
- The net combined ratio decreased from 113 per cent in 2001 to 91 per cent in 2002. It further decreased to 87 per cent in 2003.
- Insurers believed that reforms enacted to 31 December 2003 focused specifically on personal injury and death claims, with reforms focused on professional indemnity insurance not yet implemented by the Commonwealth.¹⁰ As such, none of the insurers had adjusted their short term expectations of costs and premiums for 2004, or their outstanding claims provisions. However, insurers noted that they expected the reforms aimed at professional indemnity insurance, when enacted, to have an impact on costs and premiums in the medium term.

1.4 Scope of the ACCC's monitoring role

Senator Campbell's request 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.

The ACCC's monitoring analysis 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. Insurance business written outside Australia was not included in 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

¹⁰ The *Treasury Legislation Amendment (Professional Standards) Act 2004* was introduced into parliament on 4 December 2003 and commenced on 13 July 2004. It amends a number of acts to support the states and territories that implement professional standards legislation. The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, which implements proportionate liability for economic loss and property damage, was passed by parliament and received royal assent on 30 June 2004. Section 3 of the Act, which relates to proportionate liability, commenced on 26 July 2004.

and products liability insurance have been sold as a combined product with a single premium.¹¹ Discussion about public liability insurance in this report, including data, refers to public and products liability 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.¹² 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.

1.5 Approach to monitoring

The ACCC approached a number of general insurers identified as major participants in the public liability and professional indemnity insurance markets in Australia and requested information on their cost and premium structures.

For its first report, the ACCC included nine insurers in its monitoring program for public liability insurance. Seven of these insurers were also asked to provide information on their professional indemnity business.

For subsequent reports, the ACCC requested updated information from most of these insurers, with eight insurers monitored in the case of public liability insurance and five monitored regarding professional indemnity insurance.¹³ A list of insurers included in this report can be found at appendix A.

The premium revenue of the eight insurers that provided information on public liability insurance represented 64 per cent of the public (and product) liability class, as measured by APRA data for the year ending 30 June 2004. The five insurers that provided information on professional indemnity insurance represented 50 per cent of that class, as measured by APRA data for the year ending 30 June 2004.

The ACCC's fourth information request asked insurers to provide an update of information about policies, premiums and costs as well as qualitative information about their product. In addition, insurers were asked about the impact of reforms on their emerging experience as well as whether their expectations of the effect of reforms on costs and premiums for 2004 and subsequent years had changed.

¹¹ Trowbridge Consulting, 'Public Liability Insurance, analysis for meeting of ministers on 27 March 2002', March 2002, p. 2.

¹² 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.

¹³ 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 later sections of 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.

This report is based on information provided by insurers that was current at 30 June 2004. Similarly, the ACCC focused on reforms that were announced and implemented by the Commonwealth, state and territory governments up to 30 June 2004. In effect, this report updates the findings contained in the third monitoring report by including an additional six months of data.

In addition to information provided by the insurers, for this report the ACCC also gathered information from the Law Institute of Victoria, the Law Society of New South Wales and a major retailing corporation.

1.6 Qualifications

The information that insurers provided 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 ACCC also notes that data for the years 1997 to 2003 is based on calendar years ending 31 December. However information presented in this report referring to 2004 is for the six months to 30 June 2004 unless otherwise indicated.

The historical analysis in this report may not be directly comparable with that in the first three reports as a result of updating of incident year data¹⁴ for the period between 1997 and 2003.

1.7 Report outline

This report contains six 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 30 June 2004. Further details of these reforms can be found at appendix B.

Chapter 3 examines trends in costs, premiums and underwriting financial performance as well as non-price factors for public liability insurance between year ending 31 December 1997 and half year ending 30 June 2004 based on data provided by insurers.

Chapter 4 examines trends in costs, premiums and underwriting financial performance as well as non-price factors for professional indemnity insurance between year ending 31 December 1997 and half year ending 30 June 2004 based on data provided by insurers.

Chapter 5 looks at the insurers' estimates of the impact of government reforms by examining insurers' emerging claims experience as well as their expectations of the reforms' impact on costs and premiums for 2004 and the medium to longer term.

Chapter 6 reports on information relating to public liability insurance gathered from sources other than insurers.

¹⁴ Some of the information collected by the ACCC was 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. As incident year data evolves over time due to claims arising and being settled in the years following the incident year, the ACCC has sought an update of this data.

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

Appendix B outlines all Commonwealth, state and territory government tort reform as at 30 June 2004 affecting public liability and professional indemnity insurance.

Appendix C outlines the ACCC's monitoring methodology for examining trends in claims costs, expenses, premiums and financial performance.

2 Reforms affecting public liability and professional indemnity insurance

Commonwealth, state and territory governments participated in several joint ministerial meetings between 2002 and early 2004 and agreed to a series of reforms to address the perceived problems of affordability and availability of public liability and professional indemnity insurance. These reforms included changes to the application of tort law, the use of structured settlements, legal system reforms, data collection and risk management strategies.

This report examines reforms implemented to 30 June 2004. The ACCC determined that reforms announced but not implemented before 30 June 2004 fell outside the scope of this report. However, for completeness these reforms are listed in appendix B.

2.1 Ministerial meetings

Commonwealth, state and territory ministers and the President of the Australian Local Government Association (the ministers) have held seven meetings since 2002. These meetings have discussed the problems of rising premiums and reduced availability of public liability and professional indemnity insurance and considered reforms aimed at addressing such issues. Most recently, a ministerial meeting was to be held in September 2004. However, as the federal election was called on 31 August 2004, this meeting had not taken place at the time of going to print.

2.2 Commonwealth, state and territory tort law reforms implemented as at 30 June 2004

Table 2.1 identifies the major initiatives implemented by Commonwealth, state and territory governments as at 30 June 2004. A detailed summary of reforms is at appendix B.

The table shows that the major types of reforms implemented by 30 June 2004 include the capping of damages for economic loss (i.e. loss of past and/or future income), non-economic loss (i.e. 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. A number of jurisdictions have now also introduced proportionate liability (for economic loss) provisions as well as professional standards legislation.

Table 2.1 Major reforms implemented by governments—as at 30 June 2004

Major reforms	Commonwealth	NSW	VIC	QLD	SA	ACT	NT	WA	TAS
Cap on general damages (e.g. pain and suffering)	✓ ^a \$250 000 indexed to CPI	✓ \$350 000 indexed to AWE	✓ \$371 380 indexed to CPI	✓ \$250 000	✓ \$241 500 indexed to CPI		✓ \$350 000 indexed to AWE		
Minimum threshold of impairment to access general damages	✓ ^a 15% of a most extreme case	✓ 15% of a most extreme case	✓ For injury impairment > 5%. (Psychiatric injury impairment > 10%)	✗ No threshold, assessed on sliding scale	✓ If a person suffers 7 days of significant impairment or \$2750 medical expenses assessed on a sliding scale		✓ Degree of permanent impairment of 5%	✓ \$12 000 indexed ^b	✓ \$4000 for claims less than \$20 000
Cap on damages for economic loss (e.g. loss of past and/or future income)	✓ ^a 2 times rate of AWE, discount rate (5%) on lump sums	✓ 3 times rate of AWE, discount rate (5%) on lump sums	✓ 3 times rate of AWE, discount rate (5%) on lump sums	✓ 3 times rate of AWE, discount rate (5%) on lump sums	✓ \$2.2m indexed to CPI, discount rate (5%) on lump sums	✓ 3 times rate of AWE	✓ 3 times rate of AWE, discount rate (5%) on lump sums	✓ 3 times rate of AWE, discount rate (6%) on lump sums	✓ 4.25 times rate of AWE, discount rate (7%) on lump sums
Limitation period for personal injury cases	✓ ^a 3 years from date of discoverability, 12 years from occurrence (exceptions for minors and incapacitated persons)	✓ 3 years from date of discoverability, 12 years from occurrence (exceptions for minors and incapacitated persons)	✓ 3 years from discovery, 12 years from occurrence (exceptions for minors and disability)	n/a ^c	n/a ^d	✓ 3 years from cause of action, notice of claim must be given before filing within 9 months of occurrence or 4 months of consulting a lawyer	n/a ^e		n/a ^f
Waivers for risky activities	✓	✓	✓	✗ ^g	✓	✓ ^h		✓	✗
No exemplary or punitive damages	✓ ^a	✓		✓			✓		

Cap on award of legal costs	✓ The greater of 20% or \$10 000 for personal injury damages <\$100 000	✓ Nil for claims <\$30 000; \$2500 for claims <\$50 000 if certain circumstances are met	✓ For claims <\$50 000 max costs are greater of 20% of amount recovered or \$10 000	✓ ⁱ	n/a ^k
Provision for contributory negligence	✓	✓	✓	✓	✓
Protection for volunteers or 'good Samaritans'	✓	✓	✓	✓	✓
Provision for structured settlements	✓ ^a	✓	✓	✓	✓
Protection for expression of regret/apology	✓	✓	✓	✓	✓
Provisions for quick resolution of claims		✓	✓	✓ ^m	
Proportionate liability (economic loss)	✓ ⁿ	✓	✓ ^q		✓
Professional standards legislation	✓ ^s	✓	✓ ^v	✓	✓ ^w

a The *Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004* commenced on 13 July 2004.

b 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 (damages assessed—\$36 500).

c Existing limitation period of three years from cause of action under s. 11, *Limitation of Actions Act 1974*.

d Existing limitation period of three years from cause of action under s. 36, *Limitations of Actions Act 1936*.

- e Existing limitation period of three years from date on which cause of action accrues under s. 12, *Limitation Act 2000*.
- f Existing limitation period of three years from date on which cause of action accrues under s. 5, *Limitation Act 1974*.
- g While 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, 19).
- h 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.
- i While 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).
- j Specific provisions in the *Personal Injuries (Civil Claims) Act 2003* dealing with caps on legal costs (ss. 18 and 20) have not yet commenced.
- k Maximum legal fees chargeable by lawyers are set by the Legal Costs Committee under the *Legal Practice Act 2003*.
- l 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.
- m Certain provisions in the *Personal Injuries (Civil Claims) Act 2003* relating to obligations of parties for the quick resolution of claims have not yet commenced.
- n The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, which implements proportionate liability for economic loss and property damage was passed by parliament and received royal assent on 30 June 2004. Parts of Schedule 3, which relates to proportionate liability, commenced on 26 July 2004.
- o Both the *Civil Liability Amendment (Personal Responsibility) Act 2002* and the *Civil Liability Amendment Act 2003* contain provisions regarding proportionate liability. Both Acts have received royal assent and provisions relating to proportionate liability commenced on 1 December 2004.
- p Provisions relating to proportionate liability are contained in the *Civil Liability Amendment Act 2003*. These provisions received assent on 9 April 2003 but as at 25 September 2004, had not yet commenced.
- q Sections 1 and 2 of the *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004* commenced on 8 September 2004 but the remainder of the Act has yet to commence. Default commencement date is 8 March 2005.
- r Provisions relating to proportionate liability are contained in the *Civil Liability Amendment Act 2003*. These provisions commenced on 1 December 2004.
- s The *Treasury Legislation Amendment (Professional Standards) Act 2004* commenced on 13 July 2004.
- t The *Professional Standards Act 2004* received royal assent on 13 September 2004 but provisions relating to professional standards had not yet commenced as at 28 November 2004.
- u The Professional Standards Bill 2003 was introduced into parliament on 12 November 2003 but has not yet been passed.
- v Sections 1 and 2 of the *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004* commenced on 8 September 2004 but the remainder of the Act has yet to commence. Default commencement date is 8 March 2005.
- w The *Professional Standards Act 1997* commenced on 18 September 1997. On 30 June 2004 the government introduced the *Professional Standards Amendment Act 2004* to make that legislation consistent with the New South Wales *Professional Standards Act 1994*. This Act received assent on 28 September 2004 but is awaiting commencement.

3 Public liability insurance—costs, premiums and financial performance

3.1 Introduction

This chapter presents the ACCC's findings on trends in costs, premiums and underwriting financial performance in respect of public liability insurance. The extent to which non-price factors (such as levels of excess, cover limits and exclusions) have changed is also examined.

The third monitoring report also included claims frequency data. However, as this report includes only an additional six months of data, reporting on claims frequency may produce misleading results.¹⁵

The ACCC's data analysis methodology is examined in appendix C.

3.2 Claims costs and other expenses

3.2.1 Average size of claims settled

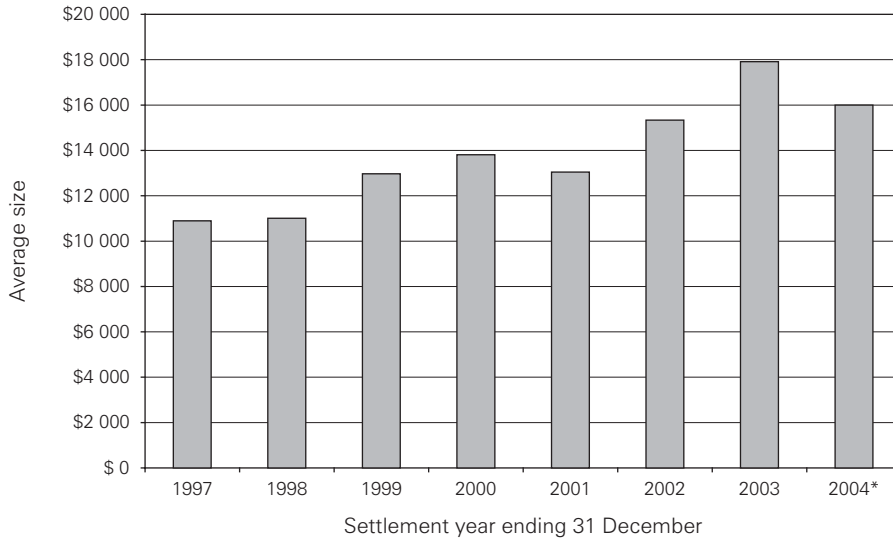
Chart 3.1 shows the average size of all claims settled (in real terms), which is the total claims settlement costs by settlement year divided by the total number of claims settled by settlement year.

The ACCC notes that average size of claims is a trailing indicator as it is examined on a settlement year basis. That is, not all claims settled in the years after the reforms were implemented will be affected by the reforms. This is 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. As such, movements in this indicator may not be representative of the impact of reforms.

The average size of claims settled decreased by 11 per cent between year ending 31 December 2003 and half year ending 30 June 2004, falling from \$17 912 to \$15 996. As discussed in more detail below, this has been due to a fall in the average size of settled claims for personal injury and death claims rather than changes in the average size of property damage claims.

¹⁵ Claims frequency examines the number of claim reports as a proportion of the number of policies written, which is likely to be subject to seasonal influences. (For example, many insurance policies are renewed at the end of the financial year).

Chart 3.1 Average size of claims settled—real terms—public liability—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by seven insurers.

Chart 3.2 shows the average size of claims settled in real terms for both personal injury and death claims and property damage claims.

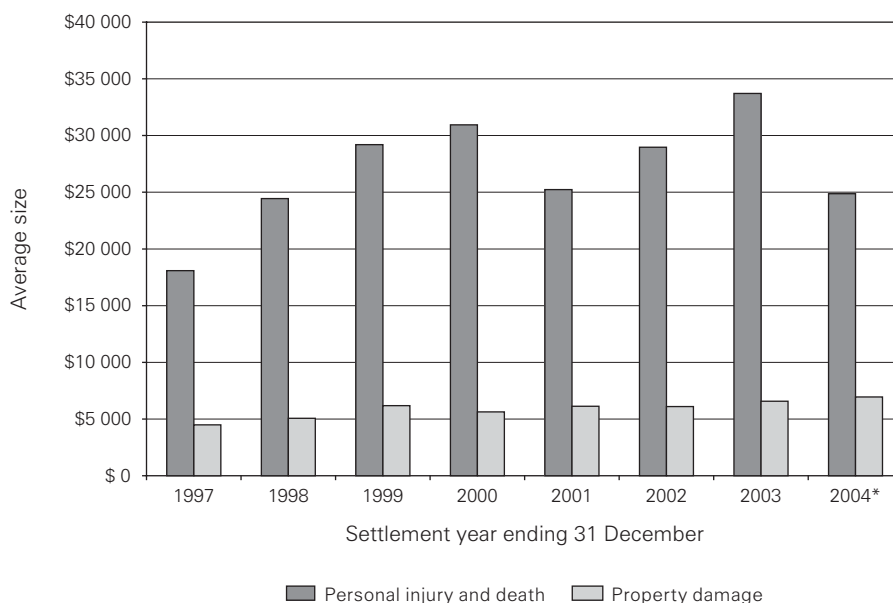
Personal injury and death claims are more likely than property damage claims to be affected by tort reform.

Over the monitoring period, the average size of personal injury and death claims settled has remained significantly higher than the average size of property damage claims.

The average size of personal injury and death claims settled fell by 26 per cent between year ending 31 December 2003 and half year ending 30 June 2004.

The average size of property damage claims settled increased by 6 per cent between year ending 31 December 2003 and half year ending 30 June 2004.

Chart 3.2 Average size of claims settled—real terms—personal injury and death and property damage claims—public liability—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by five insurers.

In summary:

The average size of claims settled decreased by 11 per cent between year ending 31 December 2003 and half year ending 30 June 2004, falling from \$17 912 to \$15 996.

This recent decrease has been due to a fall in the average size of settled claims for personal injury and death claims rather than property damage claims.

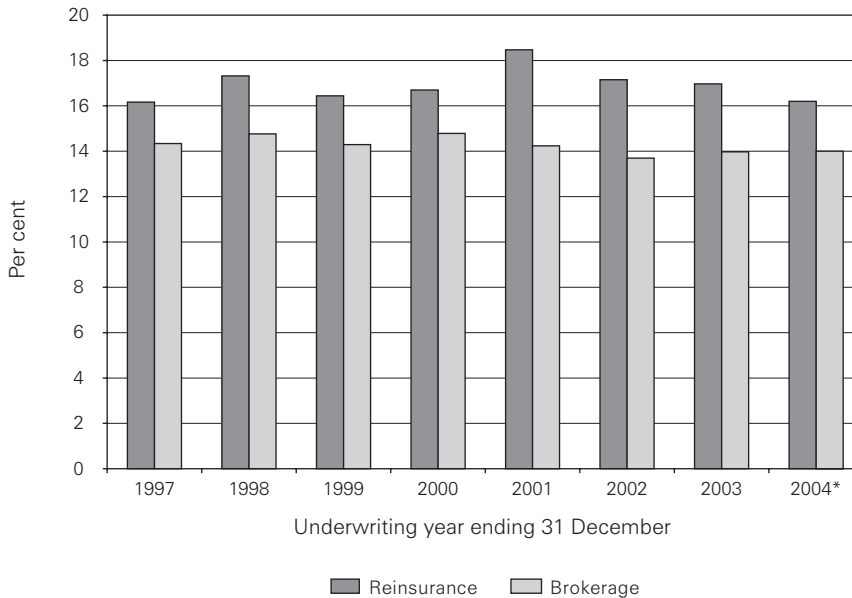
3.2.2 Other expenses

This section examines the other cost components of public liability insurance by looking at trends in reinsurance, brokerage and underwriting expenses.

Chart 3.3 shows reinsurance and brokerage expenses as a proportion of gross written premium over the period 1997 to 30 June 2004.¹⁶

¹⁶ Expenses are compared with gross written premium because the premium written in any one year will be used to pay for all costs of acquiring, writing and servicing insurance business.

Chart 3.3 Reinsurance expense and brokerage expense as a proportion of gross written premium—public liability—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by five insurers.

Over the period 1997 to 30 June 2004, reinsurance expense as a proportion of gross written premium has remained fairly stable, ranging between 16 and 19 per cent, although a downward trend is observable since 2001. This peak in 2001 may be the result of the collapse of HIH as well as the events of 11 September 2001. Brokerage expenses have remained stable at around 14 per cent of gross written premium.

Although reinsurance expense as a proportion of gross written premium has remained relatively stable, this does not take into account changes in the amount of cover being received for the reinsurance. The retention rate is the amount of risk that an insurer is liable for before the reinsurer provides coverage, and is similar to the excess applied in standard insurance policies.

As part of its fourth monitoring request, the ACCC asked insurers what their retention rate of reinsurance coverage had been for the period year ending 31 December 2003 to half year ending 30 June 2004. Of the five insurers included in chart 3.3, four indicated that their retention rate had not changed while the remaining insurer indicated that its retention rate had increased by 20 per cent. This indicates that for most insurers, reinsurance costs have remained relatively in line with increases in gross written premium.

In respect of underwriting expenses, most insurers did not provide sufficient data to allow the ACCC to conduct similar trend analysis. However, five insurers provided partial data for the period 2001 to 30 June 2004, which showed that underwriting expenses as a proportion of gross written premium decreased between 2001 and 2003, from 12 per cent in 2001 to 8 per cent in 2003. Underwriting expenses as a proportion of gross written premium increased to 12 per cent between year ending 31 December 2003 and half year ending 30 June 2004. This is due to underwriting expenses increasing as a proportion of gross written premium for all but one insurer.

In summary:

As a proportion of gross written premium, brokerage and reinsurance expenses have remained fairly constant over the period. Furthermore, the majority of insurers indicated that their level of retention had not changed between year ending 31 December 2003 and half year ending 30 June 2004.

Underwriting expenses increased as a proportion of gross written premium between year ending 31 December 2003 and half year ending 30 June 2004.

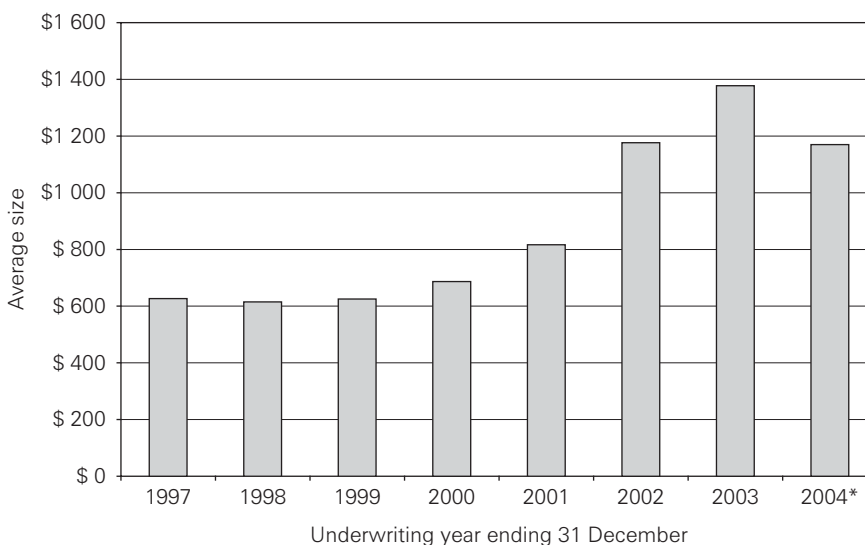
3.3 Premiums

This section examines trends in average premiums¹⁷ between 1997 and 30 June 2004. Although this provides an indication of how premiums have changed over the period, it may also reflect changes in the insurers' portfolios. Furthermore, changes in the average premium will not reflect changes in the premiums paid by all consumers.

Chart 3.4 shows the average premium in real terms. Average premium is derived by dividing gross written premium by the number of policies written.

The average real premium decreased to \$1170 in the six months to 30 June 2004. Previously, the average premium was stable in real terms between 1997 and 1999 at approximately \$620 before increasing substantially to \$1377 in 2003.

Chart 3.4 Average premium—real terms—public liability—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

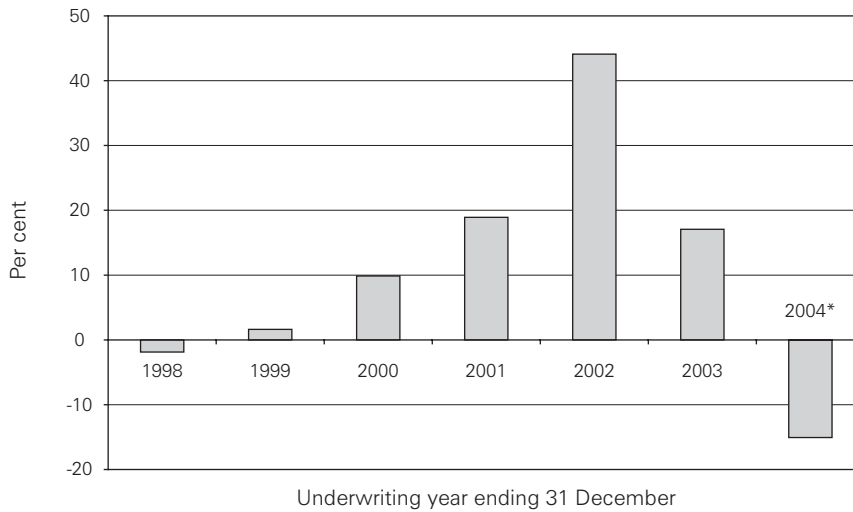
Derived by ACCC from responses provided by seven insurers.

¹⁷ 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. Therefore, information contained in section 3.3 may not correspond directly with the information in section 3.2.

Chart 3.5 shows the percentage change in the average annual premium in real terms for the period year ending 31 December 1998 to half year ending 30 June 2004.

The real average premiums fell by 15 per cent in the period between year ending 31 December 2003 and half year ending 30 June 2004, reversing the trend of substantial increases since 2000. The real average premium decreased for most insurers.

Chart 3.5 Percentage change in real average premium—public liability—1998 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by seven insurers.

In summary:

The real average premium fell by 15 per cent between year ending 31 December 2003 and half year ending 30 June 2004, reversing the trend of substantial increases since 2000.

3.4 Terms and conditions of policies

Insurers can compete not only on price but also on the terms and conditions of policies. The ACCC therefore examined whether the terms and conditions of public liability insurance policies offered had changed. Information collected relates to the period year ending 31 December 2002 to half year ending 30 June 2004.

The ACCC examined three indicators:

- the minimum, maximum and average cover limits¹⁸ offered in standard policies
- the minimum, maximum and average levels of excess¹⁹ offered in standard policies
- changes made to exclusions specified in the standard policy.

In the third monitoring report the ACCC found that all eight insurers offered a standard policy for public liability insurance in 2002 and 2003. In 2003 this standard policy was generally available to all sectors in which the insurer wrote business (with the exception of one insurer). Typically all insurers used the standard policy for the majority of their business, with seven insurers indicating that they wrote more than 75 per cent of their book of business under the standard policy (the remaining insurer indicated that it wrote between 51 and 75 per cent of its book of business under the standard policy). This did not change in the first six months of 2004.

3.4.1 Cover limits

Between year ending 31 December 2002 and half year ending 30 June 2004, most insurers had not changed either the minimum or maximum cover limits on their standard policies. Across six insurers, five reported increases in the average cover limit with most of this increase occurring in 2003.

This indicates that insureds may, on average, be receiving a greater amount of coverage through increased cover limits.²⁰

3.4.2 Levels of excess

In the six months to 30 June 2004 no significant changes were made to insurers' minimum and maximum levels of excess compared to 2003.

Across six insurers, the majority of insurers increased their average levels of excess significantly between years ending 31 December 2002 and 31 December 2003. However, in the six months to 30 June 2004, four of the insurers made no changes to their average level of excess, one increased its average level of excess while the other decreased its average level of excess.

This indicates that in the six months to 30 June 2004, on average, insureds may have been receiving a lower level of coverage than in 2002 due to higher levels of excess.

¹⁸ 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.

¹⁹ An excess, set by the insurer or selected by the insured, is the amount of the claim that the insured is required to pay.

²⁰ It should be noted that as many claims never exceed the cover limit, increases in its levels are unlikely to significantly impact on the amount of money that the insured receives in the event of a claim.

3.4.3 Exclusions

The ACCC requested information from insurers on what additional exclusions had been incorporated into their standard policy. Seven insurers indicated that in 2003 they had made changes, generally relating to asbestosis, terrorism and information technology. Only one insurer indicated that it had added exclusions to its standard policy in the first six months of 2004.

In summary:

In the half year to 30 June 2004, few changes were made to insurers' standard public liability insurance policies. However, both the average cover limit and average level of excess increased significantly in 2003. The degree to which these factors will lead to more or less coverage will depend on the particular circumstances of the insured.

3.5 Underwriting financial performance

The ACCC examined insurers' financial performance from underwriting public liability insurance by considering a number of ratios commonly used in the insurance industry. These ratios provide an indication of how underwriting performance²¹ has changed over time.

The ratios used by the ACCC 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 in terms of 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 the lack of available data.

3.5.1 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 30 June 2004 dollars using AWE, plus expected future payments in 30 June 2004 dollars on an uninflated and undiscounted basis)²² divided by earned premium inflated to 30 June 2004 dollars by AWE.²³

²¹ The ACCC's analysis of underwriting performance may not necessarily be indicative of an insurer's overall profit because of a number of factors:

- The exclusion of general expenses from the ACCC's methodology because they 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.

²² That is, not taking into account normal 'wage' inflation where possible (but including an estimate of superimposed inflation) or investment returns.

²³ The data used to prepare the loss ratios includes an allowance for claims administration expenses in past payments and the expected future payments. This estimate was not included in data used to prepare the loss ratios for the first monitoring report.

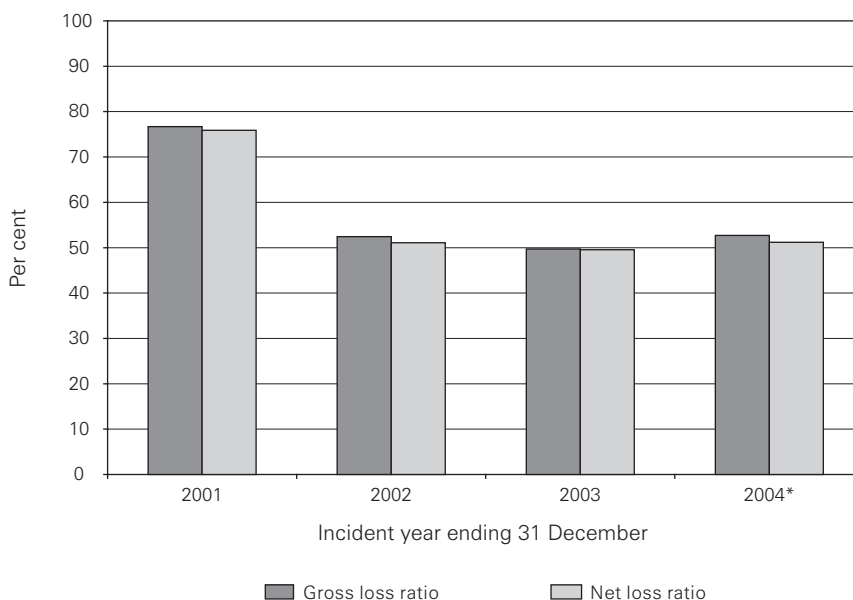
The net loss ratio effectively takes reinsurance and other recoveries out of the claims payments and subtracts the outwards reinsurance expenses from the earned premium.

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.²⁴

Chart 3.6 shows the gross and net loss ratios since 2001.

The gross loss ratio has been relatively stable—ranging between 50 and 53 per cent—since it declined significantly in 2002. The trend in the net loss ratio has been similar.

Chart 3.6 Gross and net loss ratios—public liability—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by six insurers.

²⁴ This also means that the historical loss ratios change as experience 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.

3.5.2 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).

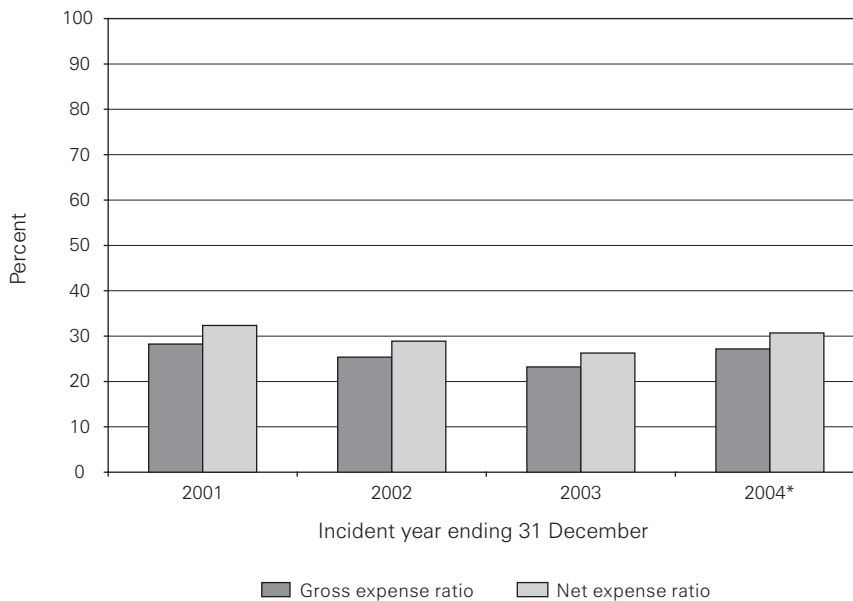
Chart 3.7 shows the gross and net expense ratios since 2001.

The gross expense ratio increased to 27 per cent for the half year ending 30 June 2004, having decreased from 28 to 23 per cent over the previous three years.

Similarly, the net expense ratio increased to 31 per cent for the half year ending 30 June 2004, having fallen from 32 per cent in 2001 to 26 per cent in 2003.²⁵

The ACCC found that the increased expense ratio in the first six months of 2004 was mainly the result of increasing underwriting expenses relative to premium.

Chart 3.7 Gross and net expense ratio—public liability—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by six insurers.

²⁵ The expense ratio is calculated using the same insurers as those contained in the loss and reinsurance ratios for consistency purposes when calculating the combined ratio (the sum of the three ratios). As such, the ACCC has used a different sample to that used for chart 3.3. Although this means that the results are not comparable in terms of absolute numbers, it is comparable in terms of general trends.

3.5.3 Reinsurance ratio

The reinsurance ratio shows the proportion of premiums that the reinsurance expense represents and 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 the expenses.

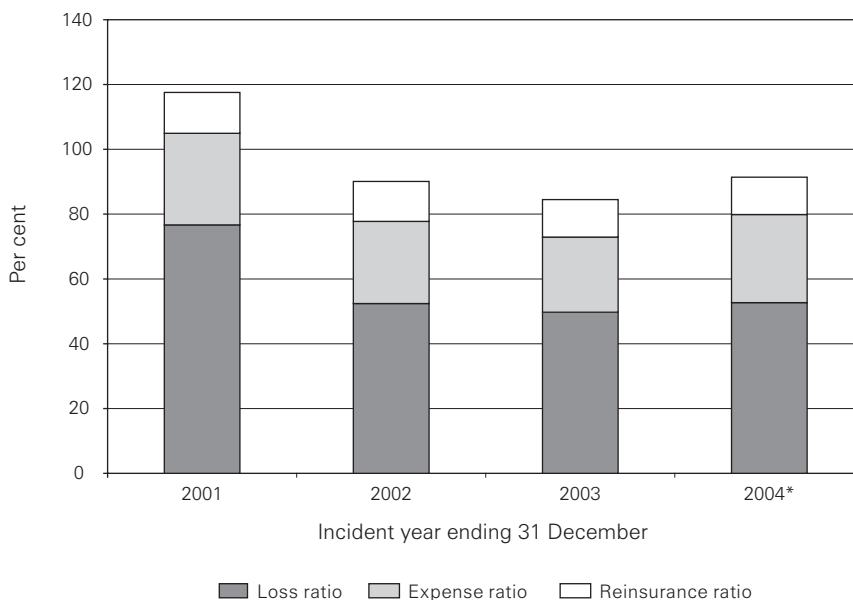
The ACCC found that the reinsurance rate remained stable across the period year ending 31 December 2001 to half year ending 30 June 2004, ranging between 12 and 13 per cent.²⁶

3.5.4 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 3.8 and 3.9 show the gross and net combined ratios since 2001.

Chart 3.8 Gross combined ratio—public liability—2001 to 2004*

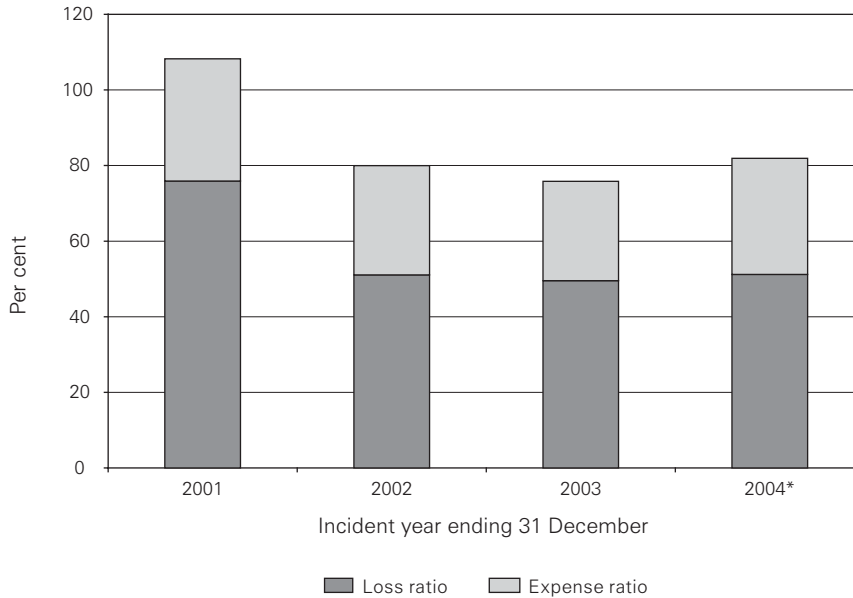


Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by six insurers.

²⁶ This is generally consistent with the trend shown in chart 3.3 which, although based on different insurers, showed that the reinsurance expense remained fairly constant for the period 2001 to 30 June 2004. The reinsurance ratio is calculated using the same insurers as those contained in the loss and expense ratios for consistency purposes when calculating the combined ratio (the sum of the three ratios). As such, the ACCC has used a different sample to that used for chart 3.3. While this means the result is not comparable in terms of absolute numbers, it is comparable in terms of general trends.

Chart 3.9 Net combined ratio—public liability—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by six insurers.

In the six months to 30 June 2004, both the gross combined ratio (91 per cent) and the net combined ratio (82 per cent) were higher than in the year ending 31 December 2003 (84 and 76 per cent respectively). This reverses the trend between 2001 and 2003.

These results indicate that insurers expect the underwriting performance of public liability insurance written in the half year ending 30 June 2004 to be less profitable than that written in 2003, with underwriting expenses increasing at a faster rate than premiums.

In summary:

In the six months to 30 June 2004, both the gross combined ratio (91 per cent) and the net combined ratio (82 per cent) were higher than in the year ending 31 December 2003 (84 and 76 per cent respectively). This indicates declining underwriting performance by insurers and was largely driven by underwriting expenses rising faster than premium revenue.

3.6 Conclusion

Based on data provided by insurers (with respect to public liability insurance) the ACCC found that:

- The average size of claims settled decreased by 11 per cent between year ending 31 December 2003 and half year ending 30 June 2004, falling from \$17 912 to \$15 996. This recent decrease has been due to a fall in the average size of settled claims for personal injury and death claims rather than property damage claims.
- As a proportion of gross written premium, brokerage and reinsurance expenses have remained fairly constant over the period. Furthermore, the majority of insurers indicated that their level of retention had not changed between year ending 31 December 2003 and half year ending 30 June 2004. Underwriting expenses increased as a proportion of gross written premium between year ending 31 December 2003 and half year ending 30 June 2004.
- The real average premium fell by 15 per cent between year ending 31 December 2003 and half year ending 30 June 2004, reversing the trend of substantial increases since 2000.
- In the half year to 30 June 2004, few changes were made to insurers' standard public liability insurance policies. However, both the average cover limit and average level of excess increased significantly in 2003. The degree to which these factors will lead to more or less coverage will depend on the particular circumstances of the insured.
- In the six months to 30 June 2004, both the gross combined ratio (91 per cent) and the net combined ratio (82 per cent) were higher than in the year ending 31 December 2003 (84 and 76 per cent respectively). This indicates declining underwriting performance by insurers and was largely driven by underwriting expenses rising faster than premium revenue.

4 Professional indemnity insurance—costs, premiums and financial performance

4.1 Introduction

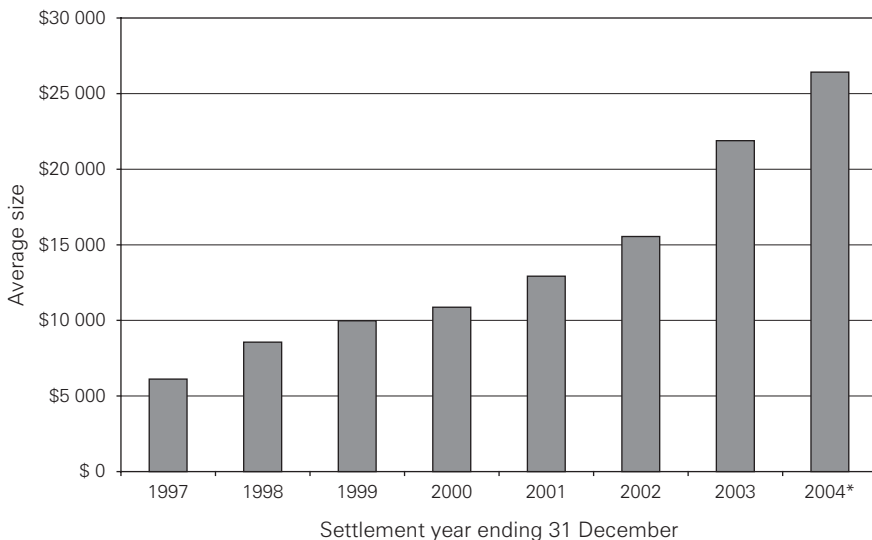
This chapter presents the ACCC's findings on costs, premiums and underwriting financial performance in respect of professional indemnity insurance. The extent to which non-price factors (such as levels of excess, cover limits and exclusions) have changed is also examined.

4.2 Claims costs and other expenses

4.2.1 Average size of claims settled

Chart 4.1 shows the average size of all claims settled per settlement year, in real terms.

Chart 4.1 Average size of claims for all claims settled—real terms—professional indemnity—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by five insurers.

Between year ending 31 December 2003 and half year ending 30 June 2004, the real average size of claims settled grew by 21 per cent to \$26 419. This is in keeping with the trend over the monitoring period, with the real average size of claims settled rising from \$6119 in 1997 to \$21 888 in 2003.

In summary:

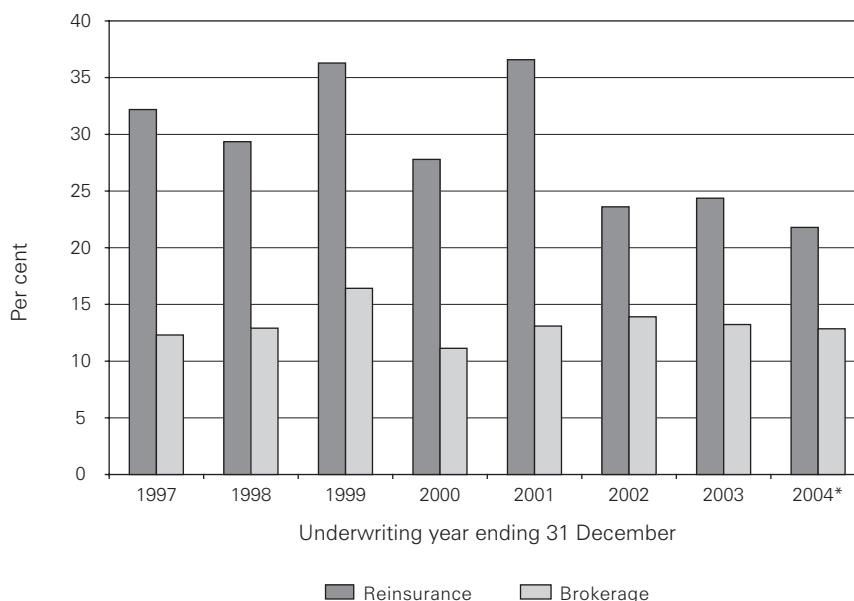
Between year ending 31 December 2003 and half year ending 30 June 2004, the average size of claims settled grew by 21 per cent to \$26 419. The average size of claims settled has increased each year over the monitoring period.

4.2.2 Other expenses

This section examines other cost components of professional indemnity insurance by looking at trends in reinsurance, brokerage and underwriting expenses.

Chart 4.2 shows reinsurance and brokerage expenses as a proportion of gross written premium.

Chart 4.2 Reinsurance expense and brokerage expense as a proportion of gross written premium—professional indemnity—1997 to 2004*



Notes: * 1 January to 30 June 2004.

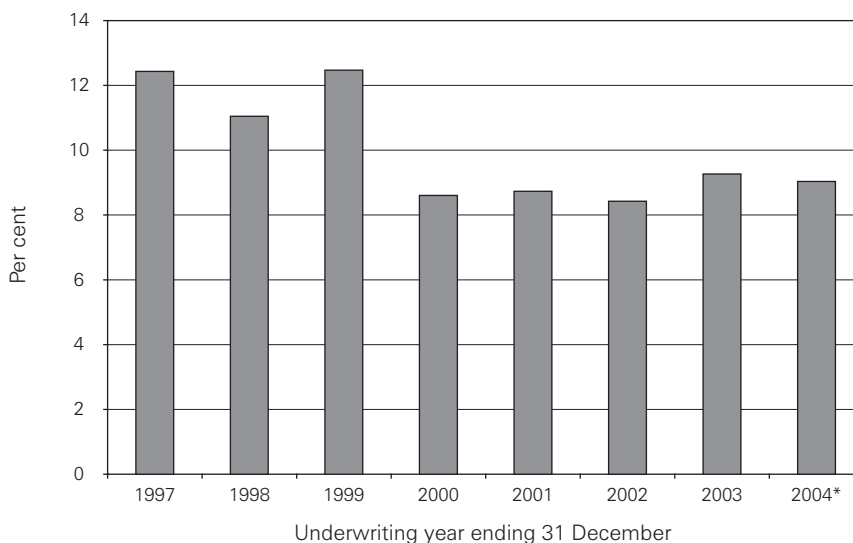
Derived by ACCC from responses provided by five insurers.

Reinsurance expense as a proportion of gross written premium has been relatively stable since 2002, ranging between 22 and 24 per cent. Brokerage as a proportion of gross written premium has remained steady at approximately 13 per cent since 2001.

Changes in reinsurance costs relative to gross written premium do not take into account changes in the amount of cover being received for the reinsurance. The ACCC asked insurers what their retention with respect to their reinsurance coverage had been for the half year ending 30 June 2004. Of the five insurers included in chart 4.2, two stated that their retention rates had not changed, while the remainder indicated that their retention rates had increased by between 20 and 67 per cent. This implies that for the majority of insurers, the level of reinsurance coverage declined in the period between year ending 31 December 2003 and half year ending 30 June 2004.

Chart 4.3 shows the trend in underwriting expense as a proportion of gross written premium.

Chart 4.3 Underwriting expense as a proportion of gross written premium—professional indemnity—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by four insurers.

Underwriting expense as a proportion of gross written premium was approximately 9 per cent for the half year ending 30 June 2004, consistent with the previous four years.

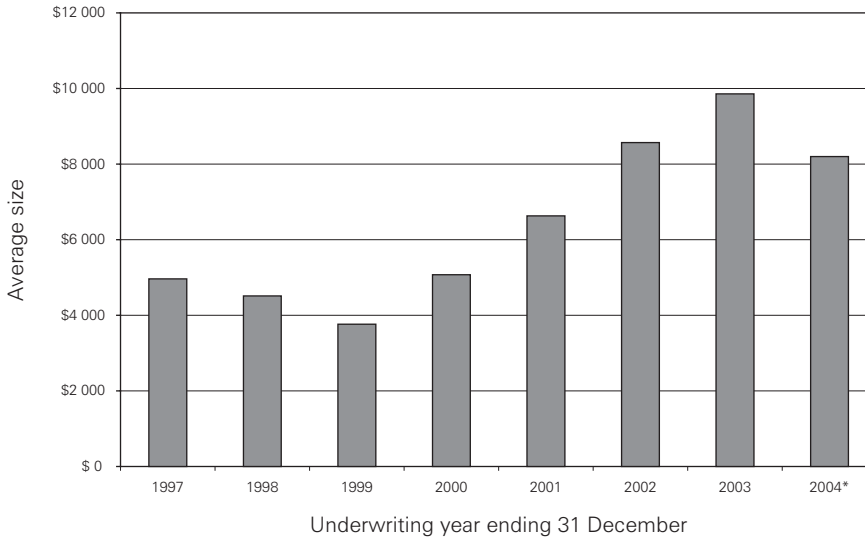
In summary:

Brokerage, reinsurance and underwriting expenses as a proportion of gross written premium have been stable in recent years. However, for three of the five insurers monitored, the level of reinsurance coverage declined in the period between year ending 31 December 2003 and half year ending 30 June 2004.

4.3 Premiums²⁷

This section examines trends in the average premium between 1997 and 30 June 2004.

Chart 4.4 Average premium—real terms—professional indemnity—1997 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by five insurers.

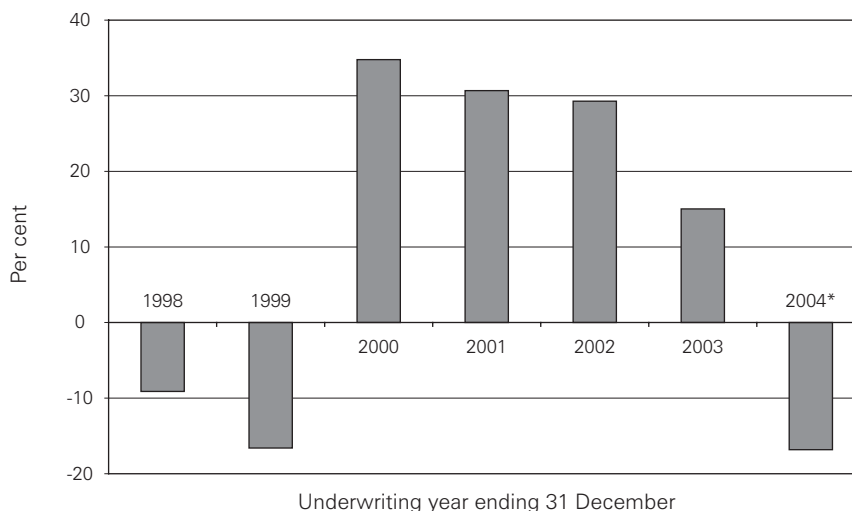
The average real premium decreased from \$9857 to \$8199 between year ending 31 December 2003 and half year ending 30 June 2004.

Chart 4.5 shows the percentage change in the annual average premium in real terms.

The real average premium fell by 17 per cent in the period between year ending 31 December 2003 and half year ending 30 June 2004. This reversed the trend of increases in the real average premium since 2000.

²⁷ 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 or settlement year basis. Therefore, information contained in section 4.3 may not correspond with the information in section 4.2.

Chart 4.5 Percentage change in real average premium—professional indemnity—1998 to 2004*



Notes: * 1 January to 30 June 2004.

Data is shown in real terms adjusted to 30 June 2004 values using AWE index.

Derived by ACCC from responses provided by five insurers.

In summary:

The real average premium fell by 17 per cent in the period between year ending 31 December 2003 and half year ending 30 June 2004. This reversed the trend of increases in the real average premium since 2000.

4.4 Terms and conditions of policies

Similar to section 3.4, the ACCC asked insurers about their professional indemnity policies offered to determine whether terms and conditions had changed. Specifically, the ACCC examined changes in cover limits, levels of excess and exclusions in standard policies.

Across four insurers, the standard policy was available to all sectors in which insurers wrote business in the first six months of 2004, with insurers indicating that they wrote more than 75 per cent of their book of business under a standard policy.

4.4.1 Cover limits

Between year ending 31 December 2002 and half year ending 30 June 2004, most insurers had not changed either the minimum or maximum cover limits on their standard policies.

Across four insurers, the average cover limit fell slightly in 2003. However, in the first six months of 2004, the average cover limit increased due to a substantial change by one insurer.

4.4.2 Levels of excess

Between year ending 31 December 2002 and half year ending 30 June 2004, few insurers made changes to the minimum and maximum levels of excess contained in their standard policies.

Across four insurers, the average level of excess fell significantly between 2002 and 30 June 2004, largely due to substantial reductions by two insurers. This indicates more coverage for insureds over the period.

4.4.3 Exclusions

In its previous monitoring report, the ACCC found that four insurers had made changes to the exclusions in their standard policies in 2003. In two cases, the changes to exclusions were aimed at correcting ambiguity in the current policy wording. Another insurer indicated that it was excluding deliberate corporate acts, and the remaining insurer incorporated an asbestosis exclusion in line with its reinsurance arrangements. In the first six months of 2004 no further changes were made.

In summary:

The average cover limit fell slightly in 2003. However, in the first six months of 2004, the average cover limit increased due to a substantial change by one insurer. Over the period year ending 31 December 2002 to half year ending 30 June 2004, average levels of excess fell significantly. The degree to which these factors will lead to more or less coverage will depend on the particular circumstances of the insured.

4.5 Underwriting financial performance

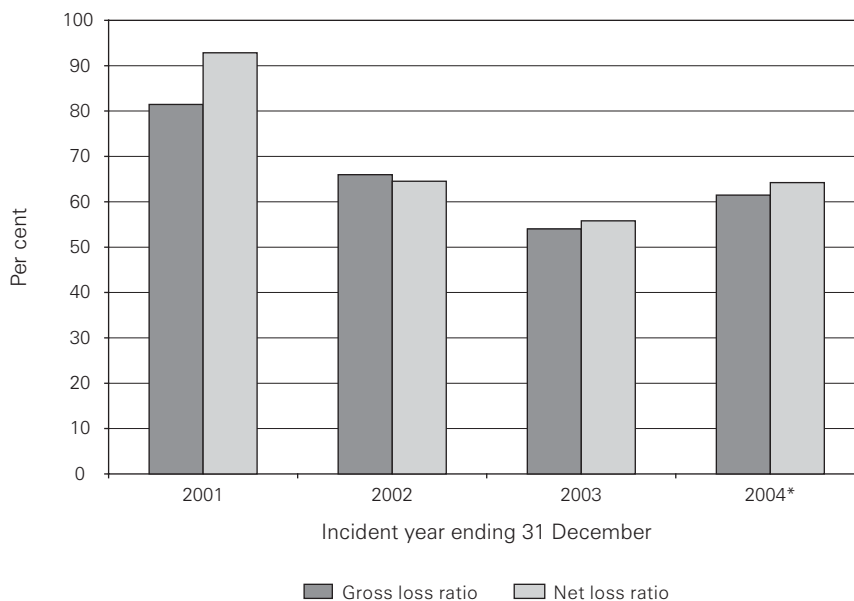
Similar to the analysis in section 3.5, the ACCC examined the underwriting financial performance of insurers writing professional indemnity in terms of the loss ratio, the expense ratio, the reinsurance ratio and the combined ratio. These ratios are defined in appendix C.

4.5.1 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.

Chart 4.6 shows the gross loss ratio and the net loss ratio. Between year ending 31 December 2003 and half year ending 30 June 2004, both the gross and net loss ratios increased when compared to 2003—from 54 to 61 per cent for the gross loss ratio and from 56 to 64 per cent for the net loss ratio. This reverses the trend of decreasing gross and net loss ratios between 2001 and 2003.

Chart 4.6 Gross and net loss ratio—professional indemnity—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by four insurers.

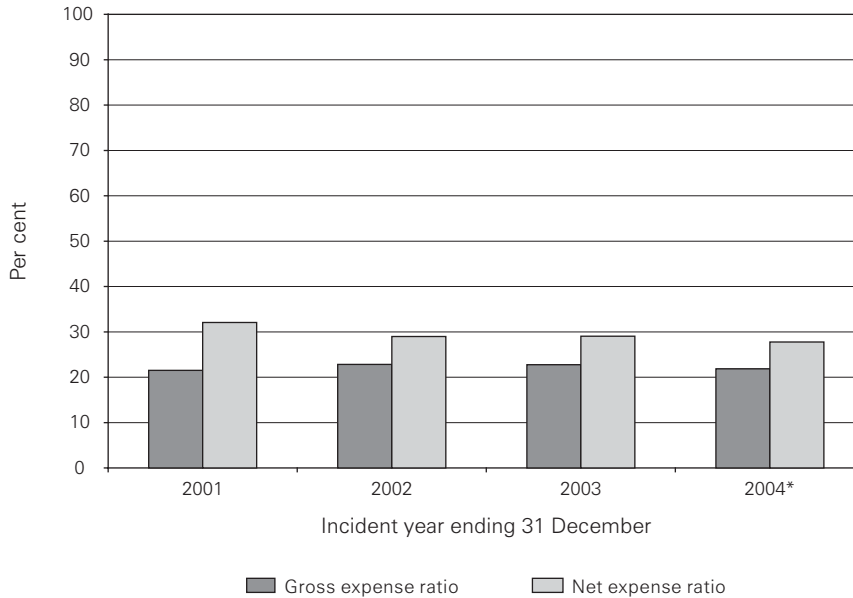
4.5.2 Expense ratio

The expense ratio is the proportion of premium that brokerage and underwriting costs represent.

Chart 4.7 shows the gross expense ratio and the net expense ratio. Both the gross and net expense ratios remained relatively stable in the six months to 30 June 2004.²⁸

²⁸ The expense ratio is calculated using the same insurers as those contained in the loss and reinsurance ratios for consistency purposes when calculating the combined ratio (the sum of the three ratios). As such, the ACCC has used a different sample to that used for section 4.2.2. Although this means that the results are not comparable in terms of absolute numbers, it is comparable in terms of general trends.

Chart 4.7 Gross and net expense ratio—professional indemnity—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by four insurers.

4.5.3 Reinsurance ratio

The reinsurance ratio shows the proportion of premiums that the reinsurance expense represents.

The reinsurance ratio fell significantly from 33 per cent in 2001 to 21 per cent in 2002 and has remained fairly stable since.²⁹

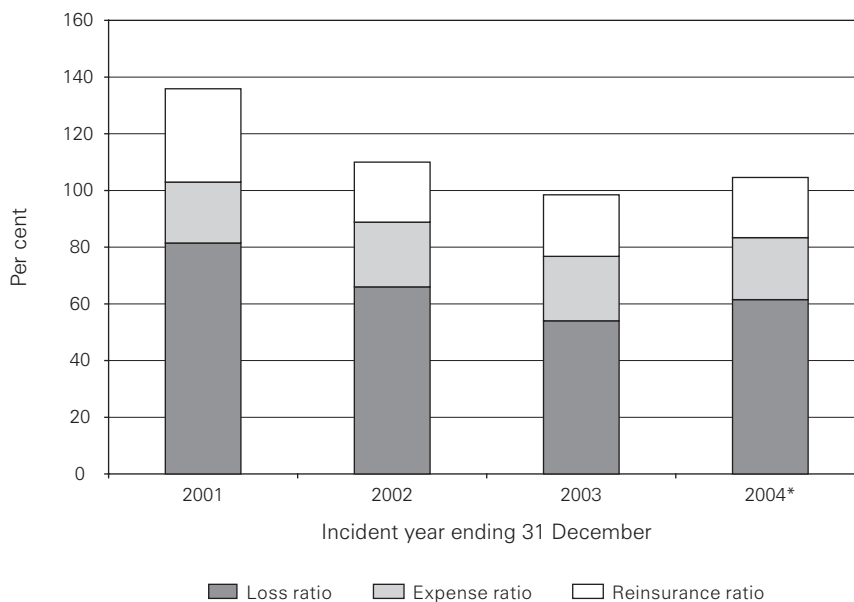
4.5.4 Combined ratio

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 4.8 and 4.9 show the gross combined ratio and the net combined ratio.

²⁹ This is generally consistent with the trend shown in chart 4.2 which, although based on different insurers, showed that the reinsurance expense as a proportion of gross written premium remained fairly stable in 2003 and the first six months of 2004 after a significant reduction in 2002. The reinsurance ratio is calculated using the same insurers as those contained in the loss and expense ratio for consistency purposes when calculating the combined ratio (the sum of the three ratios). As such, the ACCC has used a different sample to that used for chart 4.2. While this has meant the results may not be comparable in terms of absolute numbers, it is comparable in terms of trends.

Chart 4.8 Gross combined ratio—professional indemnity—2001 to 2004*



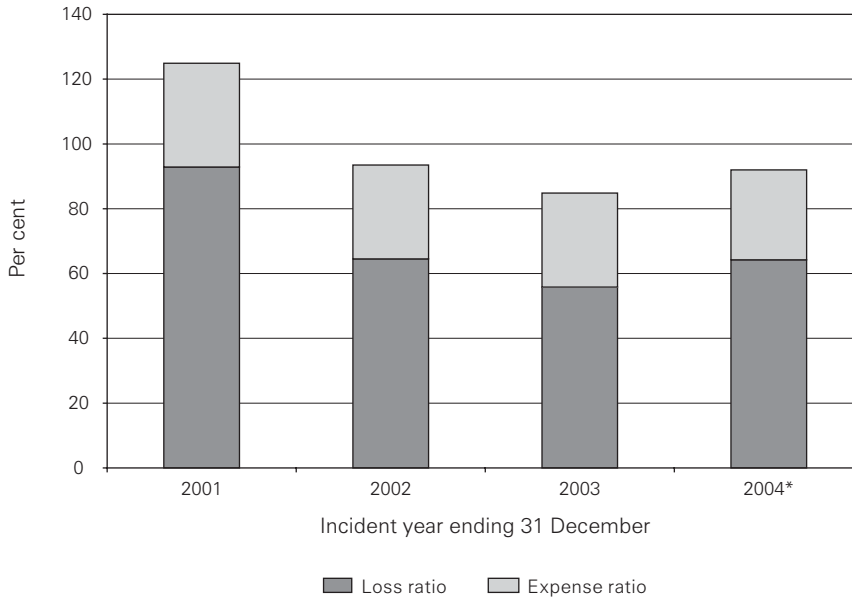
Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by four insurers.

In the six months to 30 June 2004, both the gross combined ratio (105 per cent) and the net combined ratio (92 per cent) were higher than for the year ending 31 December 2003 (98 per cent and 85 per cent respectively). Between 2001 and 2003, both the gross and net combined ratios fell.

These results suggest insurers expect declining underwriting performance for the six months to 30 June 2004 compared to business written in 2003, predominantly as a result of increasing claims costs relative to gross written premium.

Chart 4.9 Net combined ratio—professional indemnity—2001 to 2004*



Notes: * 1 January to 30 June 2004.

Derived by ACCC from responses provided by four insurers.

In summary:

In the six months to 30 June 2004, both the gross combined ratio (105 per cent) and the net combined ratio (92 per cent) were higher than for the year ending 31 December 2003 (98 per cent and 85 per cent respectively). The main driver of this reduction in underwriting performance was an increase in claims costs relative to premium revenue.

4.6 Conclusion

Based on professional indemnity insurance data provided by insurers, the ACCC found that:

- Between year ending 31 December 2003 and half year ending 30 June 2004, the average size of claims settled grew by 21 per cent to \$26 419. The average size of claims settled has increased each year over the monitoring period.
- Brokerage, reinsurance and underwriting expenses as a proportion of gross written premium have been stable in recent years. However, for three of the five insurers monitored, the level of reinsurance coverage declined in the period between year ending 31 December 2003 and half year ending 30 June 2004.
- The real average premium fell by 17 per cent in the period between year ending 31 December 2003 and half year ending 30 June 2004. This reversed the trend of increases in the real average premium since 2000.
- The average cover limit fell slightly in 2003. However, in the first six months of 2004, the average cover limit increased due to a substantial change by one insurer. Over the period year ending 31 December 2002 to half year ending 30 June 2004, average levels of excess fell significantly. The degree to which these factors will lead to more or less coverage will depend on the particular circumstances of the insured.
- In the six months to 30 June 2004, both the gross combined ratio (105 per cent) and the net combined ratio (92 per cent) were higher than for the year ending 31 December 2003 (98 per cent and 85 per cent respectively). The main driver of this reduction in underwriting performance was an increase in claims costs relative to premium revenue.

5 Impact of government reforms— insurers' experience and expectations

5.1 Introduction

The Australian Government asked the ACCC to monitor premiums in public liability and professional indemnity insurance to assess the impact of measures taken by governments to reduce and contain legal and claims costs and improve the data available to insurers to evaluate and price risk. 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.

5.2 Monitoring methodology

For its third monitoring report the ACCC asked insurers to provide a breakdown of premiums as at 31 December 2003 into actual cost components and to estimate how these components were expected to change as at 31 December 2004, both with and without taking government reforms into account. For this report, insurers were asked to update their expectations of costs and premiums for 31 December 2004, adjusted to take account of experience and reforms up to 30 June 2004.

The ACCC also asked insurers whether there is evidence of the reforms having an impact on their emerging claims experience to 30 June 2004 and, if so, to what extent they had reflected this and their expectations of the likely impact of reforms in their outstanding claims provisions.

5.3 Impact of government reforms on public liability insurance

This section reports on the impact of reforms on insurers' emerging claims experience, expectations for costs and premiums, and outstanding claims provisions in respect of public liability insurance.

5.3.1 Emerging claims experience

The ACCC asked insurers whether any significant patterns had emerged in their recent claims experience.

Of the eight insurers monitored by the ACCC, six indicated that they have observed a fall in the frequency of claims between year ending 31 December 2003 and half year ending 30 June 2004. However, most stated that this was the result of increased levels of excess and a change in portfolio mix, rather than the result of tort reform. One insurer suggested that claimants may be delaying reporting claims due to uncertainty surrounding changes to the law. Another insurer indicated that tort reforms were acting to remove smaller claims, although a fall in finalisation rates suggested that claims being reported were larger and more complex cases which take longer to settle. This insurer also noted that anecdotal evidence suggested that a large number of claims lodged with the courts had yet to be served³⁰ on insurers, thereby contributing to a lower number of claims.

³⁰ Ordinarily, plaintiffs file claims with the courts before serving them on insurers.

5.3.2 Expected impact of reforms on costs and premiums

The ACCC asked insurers to update their expectations of the effect of reforms on costs and premiums at 31 December 2004, and whether they expected savings in subsequent years.

Insurers' expectations regarding the short term impact of tort reforms on costs and premiums had not changed substantially from those reported in the ACCC's third monitoring report (see section 1.3). Reasons for this included that too few claims had been settled under the new legislation to identify any clear impact on claims costs and uncertainty about the ultimate impact of tort reforms. One insurer noted that its business strategy was to minimise exposure to the risk of personal injury claims, which it considers to be the main target of reforms.

All eight insurers indicated that they had considered their public liability pricing strategies for 2005. Five insurers anticipated rates remaining stable in 2005, whereas two anticipated reductions in premiums (of up to 10 per cent). Reasons given by insurers for these pricing strategies included increased competition, the effect of tort reforms on costs and falling claims frequency. One insurer expected premiums to increase by up to 5 per cent.

Most insurers expected reforms to have an impact on claims costs and premiums in the future, although they consider it still too early to tell the extent to which reforms may act to reduce claims costs. Some insurers were concerned that the degree to which reforms are successful will depend on the attitudes of the courts in regard to awarding damages and the degree to which plaintiff lawyers find ways to circumvent reforms. One insurer stated that if the current trend for falling claims numbers continues, this may have an effect in the medium term. Insurers also noted that increasing capacity in the market is likely to affect premiums in the future.

Among those insurers that did not expect any future savings resulting from tort law reform, it was noted that savings will be minimal while excess levels remain high. Others commented that the impact of government reforms remains uncertain and even where savings eventuate, over time they may be eroded by superimposed inflation³¹, shifting of claims costs to other heads of damage, and escalation of claims costs within heads of damages.

5.3.3 Impact of reforms on outstanding claims provisions

Insurers were asked whether they had made explicit allowance for tort reform in their outstanding claims provisions for public liability insurance.

Outstanding claims provisions are reserves set aside by an insurer to pay for all unfinalised claims that it has incurred to date. While a proportion of the claims estimated to be within the outstanding claims provisions may have been lodged with a court before the implementation of reforms, the remaining proportion (including IBNRs, claims reported but not lodged with a court and unfinalised claims lodged with a court after the implementation of reforms) are likely to be affected by the reforms if and when they are finally settled. As such, an insurer expecting reforms to have an impact may choose to reduce its outstanding claims provisions.

In its third monitoring report, the ACCC found that four insurers had revised down their outstanding claims provisions (by up to 9 per cent) as a result of reforms. No further revisions were made by these insurers between the period year ending 31 December 2003 and half year ending 30 June 2004. Of the four remaining insurers, none revised down their outstanding claims provisions. Reasons given included that the impact of reforms remains highly uncertain and that a significant portion of outstanding claims provisions relate to claims incurred before the enactment of tort law reform.

³¹ Superimposed inflation is the rate of inflation of claims costs by reason of factors other than economic/investment factors. Examples include court awards and legislative amendments.

5.4 Impact of reforms on professional indemnity insurance

This section reports on the impact of reforms on insurers' emerging claims experience, expectations for costs and premiums, and outstanding claims provisions in respect of professional indemnity insurance.

5.4.1 Emerging claims experience

Three insurers indicated that they had not observed any significant patterns emerging in their recent claims experience for professional indemnity insurance.

Two insurers noted some general trends in their claims experience, although it was not clear whether these were the result of tort reforms. The first noted that the number of 'circumstance only' claims³² had fallen in the previous three years, although the number of real claims remained relatively stable. The other insurer observed a continuing fall in the number of litigated matters, a continuing trend for judicial determinations in favour of the defendant, and the emergence and increased incidence of class actions.

5.4.2 Expected impact of reforms on costs and premiums

The ACCC asked insurers to update their expectations of the effect of reforms on professional indemnity insurance costs and premiums as at 31 December 2004, and whether they expected savings in subsequent years.

None of the five insurers expected tort reforms enacted between the period year ending 31 December 2003 and half year ending 30 June 2004 to affect costs and premiums as at 31 December 2004. Most commented that reforms have been predominantly focused on personal injury and death claims. The ACCC notes that Commonwealth legislation aimed at professional indemnity insurance has been passed since 30 June 2004.

All five insurers indicated that they had considered their pricing strategies for 2005, although it was noted that price changes were not related to government reforms. Of the four insurers that provided detail, one expected premiums to fall slightly in 2005 as a result of increasing competition. Another insurer expected premiums to increase in line with inflation, while a third expected premiums to rise in response to increasing capital costs and risk exposure. The fourth insurer expected premiums to remain stable or rise depending on the sector of professional indemnity insurance written.

The majority of insurers indicated that reforms aimed at professional indemnity are expected to have a positive impact when enacted. In particular, changes to the *Insurance Contracts Act 1984*³³ and the introduction of professional standards legislation at the Commonwealth level³⁴ are expected to impact on professional indemnity insurance, although insurers are not yet able to determine the level of savings anticipated.

³² Circumstance only claims are those where the claimant simply alerts the insurer to a potential future claim once an incident has occurred. It does not mean that they will necessarily make a claim in the future.

³³ On 10 September 2003 the Australian Government announced that it would undertake a comprehensive review of the *Insurance Contracts Act 1984*. The use of section 54 to obtain cover under 'claims made' policies—generally written for professional indemnity insurance—despite a failure of the insured to notify the claim during the policy period (as required under claims made policies) will be examined as part of the review.

³⁴ The *Treasury Legislation Amendment (Professional Standards) Act 2004* commenced on 13 July 2004.

5.4.3 Impact of reforms on outstanding claims provisions

All five insurers indicated that, as at 30 June 2004, they had not made any adjustments to their outstanding claims provisions in response to tort reform. Reasons given included that many of the reforms enacted to 30 June 2004 are focused on personal injury and death claims and thus are unlikely to have any impact on professional indemnity claims. Insurers also noted that it will not be possible to determine the impact of reform until a significant body of claims are settled under the new legislation.

5.5 Conclusion

The ACCC asked insurers to update their expectations of costs and premiums for 31 December 2004 to take account of experience and reforms up to 30 June 2004. The ACCC also asked insurers whether there is evidence of the reforms having an impact on their emerging claims experience to 30 June 2004 and, if so, to what extent they had reflected this and their expectations of the likely impact of reforms in their outstanding claims provisions.

Most insurers indicated that the frequency of claims for **public liability insurance** fell between the period year ending 31 December 2003 and half year ending 30 June 2004, largely as a result of changes in portfolio mix and higher levels of excess. One insurer noted that reforms may be acting to remove small claims.

Insurers' expectations regarding the short term impact of tort reforms on costs and premiums had not changed substantially from those reported in the ACCC's third monitoring report. Reasons given included that too few claims have been settled under the new legislation to identify any clear impact on claims costs and uncertainty about the ultimate impact of tort reforms.

Five insurers anticipated rates remaining stable in 2005. Two other insurers anticipated reductions in public liability insurance premiums (of up to 10 per cent). Reasons given for these pricing strategies included increased competition, the effect of tort reforms on costs and falling claims frequency.

Most insurers expected reforms to have an impact on claims costs and premiums in the future, although they believe it is still too early to tell to what extent reforms may act to reduce claims costs. Some insurers were concerned that the success of the reforms will depend on the courts' attitudes when awarding damages and the degree to which plaintiff lawyers find ways to circumvent reforms.

In its third monitoring report, the ACCC reported that four insurers had revised down their outstanding claims provisions (by up to 9 per cent) as a result of reforms. No further revisions were made by any insurer between the period year ending 31 December 2003 and half year ending 30 June 2004.

Insurers had not identified any significant patterns emerging in their recent claims experience for **professional indemnity insurance** as a result of tort reforms.

Furthermore, none of the five insurers expected tort reforms enacted as at 30 June 2004 to affect costs and premiums as at 31 December 2004. Most noted that reforms have been predominantly focused on personal injury and death claims.

Four insurers provided details about pricing strategies for 2005, with one insurer expecting premiums to fall slightly in 2005 as a result of increasing competition. Another insurer expected premiums to increase in line with inflation, while another expected premiums to rise in response to increasing capital costs and risk exposure. The fourth insurer expected premiums to remain stable or rise depending on the sector of professional indemnity insurance written.

However, most insurers expected reforms aimed at professional indemnity insurance to have a positive effect when enacted. In particular, changes to the *Insurance Contracts Act 1984* and the introduction of professional standards legislation at the Commonwealth level³⁵ are expected to impact on professional indemnity insurance, although insurers are not yet able to determine the level of savings anticipated.

³⁵ The *Treasury Legislation Amendment (Professional Standards) Act 2004* commenced on 13 July 2004.

6 Other sources of information

6.1 Introduction

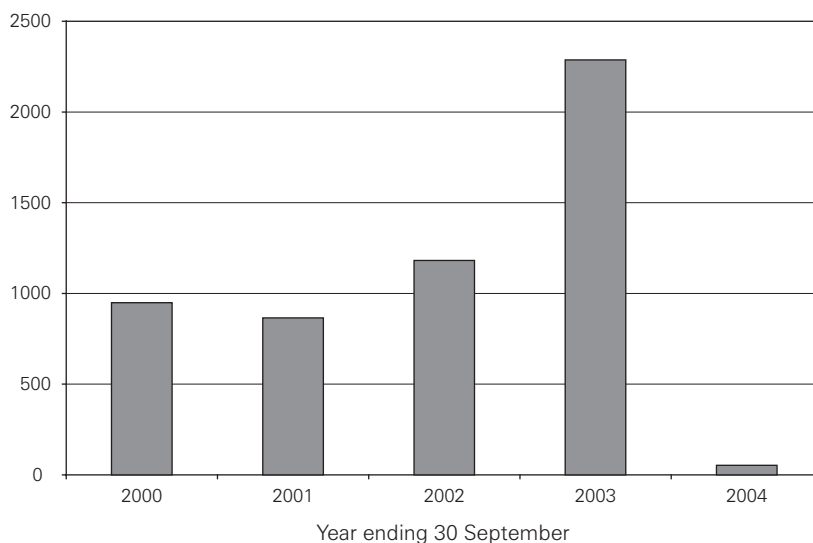
The ACCC's analysis has focused on information provided by public liability and professional indemnity insurers. For this report the ACCC also gathered information from the Law Institute of Victoria (LIV), the Law Society of New South Wales (LSNSW) and a major retailing corporation. Findings are discussed below.

6.2 Trends pre and post-reform

The LSNSW and LIV provided data, respectively, on the number of civil claims and the number of personal injury writs served in recent years.

Chart 6.1 shows the annual number of personal injury writs served in the Victorian County Court for the period 1 October 1999 to 30 September 2004 that were identified as 'public liability' or 'slipping'³⁶.

Chart 6.1 Number of personal injury writs served in the Victorian County Court—public liability and slipping



Notes: Constructed from data sourced from Victorian County Court.

In the three years between 1 October 1999 and 30 September 2002, the number of personal injury writs served in the Victorian County Court was on average approximately 1000 per year. However, in the twelve months to 30 September 2003, the number jumped to almost 2300 before falling to less than 100 in the following twelve month period.

³⁶ Although 'slipping' type incidents are often considered public liability claims, the Victorian County Court identifies them as a separate category.

The LSNSW provided the ACCC with an extract from the NSW District Court *2003 Annual Review* which shows that a similar though less pronounced trend to that in Victoria is evident in data on the number of civil claims³⁷ in New South Wales for the period 1996 to 2003. The review notes that 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.³⁸

The data suggests that claimants in both states rushed to file claims preceding the introduction of reforms, thereby significantly increasing the number of claims filed in 2002 as claims that would ordinarily have been filed later were brought forward.

Furthermore, it is possible that the significant fall in the number of filings post-reforms may be partly the result of claimants waiting to see the effect of reforms. The net effect of reforms on the number of claims filed will only become clear over the next few years.

The ACCC notes that the above data relates only to those claims (and writs) lodged with the courts, not the number of claims lodged directly with insurers.

Information supplied by a major retailing corporation was also consistent with that gathered from the LIV and LSNSW. The retailer 'self insures' most of its public liability risk, and observed a pre-reform 'spike' in the number of litigated claims in a number of states. It also noted that the number of claims lodged with lawyers post-reform had fallen in Victoria, and that caps on legal costs and fixed impairment levels have had a significant effect on claims experience in Queensland. However, the retailer was uncertain about the success of reform in New South Wales, stating that judicial rulings may erode the benefit of reform.

Although it is difficult to obtain data on the ease or difficulty with which businesses gain insurance cover, the ACCC notes a recent survey by the Victorian Employers' Chamber of Commerce and Industry (VECCI).³⁹ The survey found that just over 10 per cent of respondents reported that they had difficulty renewing their public liability insurance in 2003–04, compared to 28 per cent in 2002–03. Although similar information before 2003–04 was unavailable for professional indemnity insurance, the ACCC notes that in 2003–04 only 7 per cent of respondents had difficulty in renewing their professional indemnity insurance.

The survey also found that the rate of increase in average public liability insurance premiums stabilised significantly in 2003–04, increasing by an average of 9.3 per cent compared to 85 per cent in 2002–03. Although this information is for a single state and based on a financial year, the results are consistent with the national trend shown in chart 3.5. VECCI noted that while a number of influences are likely to have shaped this outcome, it believed that state, territory and Commonwealth legislative reforms have had a positive impact.

³⁷ Public liability and medical indemnity claims are combined.

³⁸ NSW District Court, *2003 Annual Review*, pg 14.

³⁹ Victorian Employers' Chamber of Commerce and Industry, press release, 29 October 2004.

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 Mercantile Mutual 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 64 per cent of the public (and product) liability class of insurance, as measured by APRA data for the year ending 30 June 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 30 June 2004.

The ACCC acknowledges that all insurers responded (to varying degrees) to the ACCC's information request, although there was no statutory requirement for them to comply.

B Tort reforms as at 30 June 2004

B.1 Introduction

This appendix outlines tort reforms introduced by respective Australian, state and territory governments up to 30 June 2004, and the progress of these reforms to 1 January 2005.

B.2 Government initiatives introduced as at 30 June 2004

B.2.1 The Australian Government

The Taxation Laws Amendment (Structured Settlements and Structured Orders) Bill 2002 was introduced on 6 June 2002. It received royal assent on 19 December 2002 and commenced on that day. It amended the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1936*, the *Income Tax (Transitional Provisions) Act 1997* and the *Life Insurance Act 1995*. The amendments provide an income tax exemption for annuities and certain deferred lump sums paid under structured settlements to seriously injured people.

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 Commission 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 *Treasury Legislation Amendment (Professional Standards) Act 2004*⁴⁰ 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 Commission Act 2001* to support those states and territories that implement professional standards legislation. The Act received royal assent on 13 July 2004 and commenced the same day.

⁴⁰ Previous citation: *Treasury Legislation Amendment (Professional Indemnity) Act 2004*.

The *Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004* 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.

B.2.2 New South Wales

The *Civil Liability Act 2002* was introduced on 28 May 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 five 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.

The *Civil Liability Amendment (Personal Responsibility) Act 2002* was introduced into NSW Parliament on 23 October 2002, and received assent on 28 November 2002. The Act commenced, with the exception of parts of schedules 1[1], 1[4] and 1[5], on 6 December 2002. Those parts of schedule 1[1] and 1[4] which did not commence on 6 December 2002 commenced on 10 January 2003 and those parts of schedule 1[5] which did not commence on 6 December 2003 commenced on 1 December 2004. The Act amends the *Civil Liability Act 2002*, the *Limitation Act 1969*, the *Dust Diseases Tribunal Act 1989*, the *Environmental Planning and Assessment Act 1979*, the *Fair Trading Act 1987*, the *Health Care Liability Act 2001*, the *Legal Profession Act 1987*, the *Motor Accidents Compensation Act 1999*, the *State Emergency and Rescue Management Act 1989* and the *Motor Accidents Act 1988*.

The Act provides:

- general principles for standard of care⁴¹
- 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 (not in force)
- 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 *Civil Liability Amendment Act 2003* was introduced into parliament on 13 November 2003. It was given assent on 10 December 2003. The Act commenced, with the exception of Schedule 2, on 19 December 2003. Schedule 2 commenced on 1 December 2004. The Act amends the *Civil Liability Act 2002* and the *Mental Health Act 1990*. The amendments provide:

⁴¹ Based on recommendations in the Ipp Review of the Law of Negligence.

- 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.

B.2.3 Victoria

The *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* was introduced into the Victorian Parliament on 12 September 2002, and given royal assent on 22 October 2002. It commenced, with the exception of ss. 8 and 11 and Part V, on 23 October 2002. Section 8 (structured settlement provisions) commenced on 14 February 2003. Section 11 (volunteer protection provisions) commenced on 15 March 2003. Part V (amendments to the *Goods Act 1958*) commenced on 1 May 2003. The Act amends the *Wrongs Act 1958*, the *Food Act 1984*, the *Goods Act 1958*, the *Essential Services Commission Act 2001*, the *Country Fire Authority Act 1958*, the *Coroners Act 1985* and the *Metropolitan Fire Brigades Act 1958*. The amendments provide:

- 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, and
 - six years for a person under a disability.

The *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* was introduced to the Victorian Parliament on 20 May 2003, and received assent on 16 June 2003. The Act commenced retrospectively on 21 May 2003 with the exception of ss. 3, 17 and 18, which commenced on 1 January 2004. The Act amends the *Wrongs Act 1958*, the *Limitation of Actions Act 1958*, the *Building Act 1993* and the *Accident Compensation Act 1985*. The amendments provide:

- proportionate liability for economic loss
- a 5 per cent impairment threshold for general damages, with certain exceptions⁴²
- 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).

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 care⁴³

⁴² Loss of a foetus or loss of a breast is automatically considered 'significant injuries'.

⁴³ Based on recommendations in the Ipp Review of the Law of Negligence.

- 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 9 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.

B.2.4 Queensland

The *Personal Injuries Proceedings Act 2002* was introduced into the Queensland Parliament on 18 June 2002, and given royal assent on 20 June 2002. It commenced retrospectively from 18 June 2002. The Act provides:

- 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 settlements⁴⁴
- provides that expressions of regret made before court proceedings have started are inadmissible⁴⁵
- cap on damages for economic loss of three times AWE for Qld⁴⁶
- exclusion of jury trials in personal injury claims⁴⁷
- no exemplary, punitive or aggravated damages⁴⁸
- liability does not attach to a person rendering first aid or other assistance to persons in distress in an emergency⁴⁹
- sets out that future economic loss be discounted by 5 per cent.⁵⁰

The *Personal Injuries Proceedings Amendment Act 2002* was introduced into parliament on 30 July 2002, and received royal assent on 29 August 2002. Sections 4 and 8 of the Act commenced retrospectively on 18 June 2002. The remainder of the Act commenced on the date of royal assent. The Act contains transitional provisions in relation to the *Personal Injuries Proceedings Act 2002*.

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. 53–54 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) was not yet in force as at reprint date 25 September 2004. 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 care⁵¹
- 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

⁴⁴ Subsequently replaced by provisions in the *Civil Liability Act 2003*.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Based on recommendations in the Ipp Review of the Law of Negligence.

- 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 (not yet in force)
- limitations on liability of public authorities
- protection for volunteers who undertake community work in good faith⁵²
- 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 damages⁵³
- 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 Qld⁵⁴
- facilitation of structured settlements⁵⁵
- expressions of regret do not represent admission of liability.⁵⁶

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 had not commenced at 28 November 2004.

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 *Wrongs Act 1936*.⁵⁷

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

⁵² Relocating and expanding the provisions of the *Personal Injuries Proceedings Act 2002*.

⁵³ Replacing those provisions of the *Personal Injuries Proceedings Act 2002*.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ The name of the *Wrongs Act 1936* was subsequently changed to the *Civil Liability Act 2003* by the *Law Reform (lpp Recommendations) Act 2003* discussed later.

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*.⁵⁸ 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
- 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 the 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

⁵⁸ *ibid.*

- 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 Bill 2003 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 not yet received assent. 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 members 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 *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 *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.

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.

On 30 June 2004 the government introduced the *Professional Standards Amendment Act 2004* to make that legislation consistent with the *New South Wales Professional Standards Act 1994*. It passed both houses on 22 September 2004 and received royal assent on 28 September 2004, but has not yet commenced.

B.2.7 Tasmania

The *Civil Liability Act 2002* was introduced in to 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 where a risk warning was given
- protection for volunteers who do community work.

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.

The *Civil Laws (Wrongs) Amendment Act 2003*⁵⁹ commenced 28 March 2003. It amended the *Civil Law (Wrongs) Act 2002*. The amendments provide:

- temporary exclusion of liability for terrorism-associated risks
- limitation of liability for acts of terrorism.

The *Civil Law (Wrongs) Amendment Act 2003 (No. 2)*⁶⁰ commenced on 9 September 2003 and 8 March 2004. It amended the *Civil Law (Wrongs) Act 2002*. The amendments provide:

- 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

⁵⁹ 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.

⁶⁰ 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.

- 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.

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 ss. 1 and 2 commenced on 8 September 2004 with the remainder yet to commence. The Act amends the *Civil Law (Wrongs) Act 2002* to implement proportionate liability and professional standards in the Australian Capital Territory and 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.

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 on 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 NT Legislative Assembly on 17 October 2002 and commenced on 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 NT
- 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 NT
- 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 on 29 May 2003 and amends the Legal Practitioners Act. Sections 1–6 commenced on 1 July 2003 and ss. 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.

C Monitoring methodology for examining costs, premiums and financial performance

Chapters 3 and 4 examined trends in the major cost components, that is, claims costs and expenses, as well as trends in premiums. This information was also used to assess the underwriting financial performance of insurers in each insurance class.

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

C.1 Claims costs and other expenses

The ACCC examined trends in claims costs and numbers using a range of indicators:

- *average size of claims*—this shows the average size of settled claims in real terms; that is, the total amount of settlement costs divided by the total number of claims settled in any one year, adjusted to 30 June 2004 values. It shows how the average size of claims in real terms has changed over time.
- *average size of personal injury and death claims settled and the average size of property damage claims settled in real terms*—the trend in average size of each of these claim types is examined over time.

The ACCC examined trends in major categories of expenses—brokerage, reinsurance and underwriting—by comparing them to gross written premium (i.e. shown as a proportion of gross written premium). This indicates how much each of these expenses represents as a proportion of written premium and whether this has changed over time. The expenses are compared with gross written premium because the premium written in any one year will be used to pay for all costs of acquiring, writing and servicing insurance business.

The ACCC also examined the reinsurance expense in terms of the reinsurance coverage by looking at insurers' retention of risk. This indicator shows the level of coverage that insurers are receiving for their reinsurance premium.

C.2 Premiums

To examine trends in premiums, the ACCC used one main indicator—the average premium. The average premium is the total gross written premium written in one underwriting year in real terms, divided by the number of policies for that year. This indicates the average premium that was paid across the period by policyholders.

C.3 Underwriting performance

The overall financial performance of insurance companies is determined by their underwriting and investment activities. However, the ACCC's monitoring role relates specifically to monitoring costs and premiums rather than investment activities, and therefore it focuses on the underwriting performance of insurers in each class of insurance. Also, general expenses are excluded from the ACCC's methodology as they cannot 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.

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 (i.e. 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, if the combined ratio is greater than 100 per cent, premiums are insufficient to cover costs implying an underwriting loss. If the ratio is less than 100 per cent, premiums are greater than the sum of all costs implying an underwriting profit.

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