



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for revocation of authorisations A30217 and A30218 and substitution of a replacement authorisation

lodged by

Allianz Australia Insurance Limited
QBE Insurance (Australia) Limited
Insurance Australia Limited (trading as NRMA Insurance)

in relation to:

*An unincorporated joint venture operating through an agent and trading as
Community Care Underwriting Agency (CCUA)*

Date: 4 May 2006

Authorisation nos.
A90997 and A90998

Public register no.
C2006/51

Commissioners

Samuel
Sylvan
King
Martin
McNeill
Smith

Executive Summary

The Applications

On 22 December 2005, Allianz Australia Insurance Limited (Allianz), QBE Insurance (Australia) Limited (QBE) and NRMA Insurance Limited (NRMA) – together the ‘Applicants’ – lodged application for the revocation of authorisation A30217 and A30218 and substitution of replacement authorisations under section 91C of the TPA.

The Applicants are seeking re-authorisation of an unincorporated joint venture agreement – operating through an agent (QBE) and trading as Community Care Underwriting Agency (CCUA) – for the collective supply of public liability insurance to eligible ‘not for profit organisations’ (NFPOs) through a ‘co-insurance pool’.

The co-insurance pool arrangements were originally authorised in March 2004, and interim authorisation was first granted in November 2002. At the time authorisation was last considered, it was generally accepted that the market within which public liability insurance was supplied had undergone, or was undergoing, a ‘crisis’. The poor performance of Australian insurance companies from 1998 was exacerbated by the collapse of the HIH Group of companies and the terrorist attacks in the United States. These events led to a ‘hardening’ (i.e. reduction in available capital leading to higher premiums and, in some cases, market exit) of the public liability insurance market which had a particularly detrimental effect on NFPOs due to their financial limitations.

One of the key elements of the original joint venture agreement was the each of the parties to the arrangements were *required* to refer NFPO business to the co-insurance pool. However, the Applicant’s application for re-authorisation contains an important amendment to the joint venture agreement. That is that each of the Applicants are now *not* obliged to refer new NFPO business to the ‘co-insurance pool’ but may elect to do so on a case-by-case basis. In effect, this means that each of the parties to the joint venture agreement are now not constrained from competing individually against the co-insurance pool.

Assessment of detriment and benefit

The ACCC considers that the ‘softening’ conditions in the market within which public liability insurance is supplied and changes to the joint venture agreement itself have reduced both the anti-competitive detriments and the public benefits associated with the arrangements.

The ACCC is of the view that the anti-competitive detriment flowing from the proposed arrangements is likely to now be limited due to the increased level of competition in the market, improved conditions for market entry and the increased countervailing power of brokers. In addition, the ACCC considers that the amendment to the joint venture agreement may operate to reduce the level of anti-competitive detriment in that the Applicants are now not prevented from competing against each other for NFPO business, and in some cases may have a commercial incentive to do so.

However, the extent to which the Applicants will compete against each other for NFPO's business under the arrangements as amended is unclear given that it will remain the case that they will continue to set the terms of supply for some NFPOs collectively which may affect the terms on which they offer such insurance individually.

Further, to the extent that the agreement by the Applicants not to pay broker commissions in respect of business written by the co-insurance pool reduces the role of brokers in the market, this may also generate some public detriment.

On the other hand, the ACCC notes that the 'softening' market conditions (i.e. increased capital availability leading to market entry and lower premiums) since authorisation was last considered suggests that the public benefits associated with the co-insurance pool have also reduced given evidence of increased availability and affordability of public liability insurance for NFPOs.

The ACCC considers that it is possible that the co-insurance pool arrangements could continue to result in a limited public benefit to the extent that they improve the availability and affordability of public liability insurance for certain NFPOs. However, the ACCC considers that the Applicants have not provided specific evidence which establishes that the co-insurance pool would significantly impact on the availability or affordability of such insurance for NFPOs in the current market environment.

The ACCC does accept that the continuation of the co-insurance pool will allow its NFPO clients to avoid the one-off transition costs of moving to new insurance providers.

Balance of public detriment and public benefit

On balance, the ACCC is not satisfied, on the basis of the information currently before it, that ongoing authorisation of the co-insurance pool arrangements is likely to result in a public benefit that will outweigh any public detriment.

However, the ACCC would welcome any specific information which the Applicant, or other parties, are able to provide, which would substantiate a claim that the co-insurance pool does significantly improve affordability or availability of public liability insurance to NFPOs. While such information was not available at the time the arrangements were first considered, as they were only just being entered into at that time, given that the arrangements have now been in place for almost four years, it would be expected that if the arrangements are resulting in increased affordability or availability, specific evidence of this would now be available. If such information was forthcoming the ACCC may be more convinced in relation to benefits of substance in support of the application.

In this respect, the ACCC will now seek further submissions from the Applicant and interested parties. In addition, the applicant or any interested party may request that the ACCC hold a pre decision conference to discuss the draft determination, pursuant to section 90A of the Act.

While not satisfied at this time, based on information before it, that ongoing authorisation of the co-insurance pool arrangements will be likely to result in a public benefit that will outweigh any public detriment, the ACCC notes that many NFPOs are currently supplied public liability insurance by the co-insurance pool. While satisfied that absent arrangements, these NFPOs would be able to find alternative insurance coverage, the ACCC notes that for many NFPOs sourcing alternative public liability insurance may take some time potentially leaving some NFPOs without cover in the short term.

Draft decision

While not proposing to grant ongoing authorisation the ACCC does consider that there is a net public benefit in authorising the arrangements for a short period to NFPOs currently sourcing public liability insurance from the co-insurance pool to put in place alternative arrangements.

On this basis, the ACCC proposes to revoke authorisations A30217 and A30218 and grant substitute authorisations to the Applicants in respect of the joint venture arrangements which govern the operation of the CCUA co-insurance pool to:

- continue to write or renew policies up until 31 December 2006; and
- give effect to any policies until 31 December 2007.

In effect, this will allow annual policies to continue to be written by the co-insurance pool up until 31 December 2006, and for these policies to be given effect to for their duration. Existing annual policies expiring after 31 December 2006 will also be able to be given effect to for their duration, although they will not be able to be renewed by the co-insurance pool. However, in these cases, NFPOs will have sufficient notice of this to put in place alternative arrangements.

Interim authorisation

At the time of lodging the application, the Applicants also requested that the ACCC grant interim authorisation under section 91 (2) of the Act to the arrangements pending the outcome of the full authorisation application. While the existing authorisation does not expire until 31 December 2006, the effect of this time limit is that the existing authorisation does not extend to the continued giving effect to annual policies written after 31 December 2005, after 31 December 2006.¹ The Applicants argued that this significantly impacts on their ability to write new annual business, or accept annual renewals, after 31 December 2005.

Therefore, the Applicants sought interim authorisation so as to allow it to continue to write annual policies while the application is being considered.

On 1 February 2006, the ACCC granted interim authorisation to the arrangements for the period 1 January 2007 until 12 months after the ACCC issues a final determination in respect of the substantive applications.

¹ The Applicants have advised that the 'vast majority' of policies are written on an annual basis.

List of abbreviations

ACCC	Australian Competition and Consumer Commission
Allianz	Allianz Australia Insurance Limited
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
CCUA	Community Care Underwriting Agency
FSRA	Financial Services Reform Act 2001
HIH Group	Included: CIC Insurance, World Marine and General Insurance, FAI General Insurance, HIH Casualty and General Insurance, HIH Underwriting and Insurance (Australia) FAI Traders Insurance and FAI Reinsurance
Insurance Act	Insurance Contracts Act 1984
IAG	Insurance Australia Group
ICA	Insurance Council of Australia
IEC	Insurance Enquiries and Complaints Ltd
IMA	Insurance Manufacturers of Australia Pty Limited
The Ipp Review	Review of the law of negligence – October 2002
ISA	Insurance Statistics Australia Pty Ltd
MAV	Municipal Association of Victoria
NIBA	National Insurance Brokers Association
NFPO	Not For Profit Organisation
NRMA	NRMA Insurance Limited
Our Community	Our Community Pty Ltd
QBE	QBE Insurance (Australia) Limited
The Senate Review Committee	Senate Economics Reference Committee – A Review of Public Liability and Professional Indemnity Insurance – October 2002
SIA	Sports Industry Australia

SME

Small Medium Enterprise

Act

Trade Practices Act 1974

Trowbridge

Trowbridge Consulting Limited

Table of Contents

1	Introduction.....	1
	Authorisations	1
	The current applications.....	1
	Interim authorisation.....	2
2	The Applicants	4
	The Applicants.....	4
3	The existing authorisations	6
4	Industry background.....	11
5	The current applications and interested party submissions	24
	CCUA’s applications for revocation and substitution	24
	Interested party submissions.....	29
6	Statutory provisions.....	32
	The statutory tests	32
	Application of the tests	33
	Definition of public benefit and public detriment.....	33
	Future with-and-without test.....	34
	Term of authorisation.....	34
7	ACCC evaluation	35
	The relevant markets.....	35
	Public detriment.....	37
	Public benefit	43
	Balance of public detriment and benefit	51
8	The draft determination.....	54
	The applications.....	54
	Statutory test	54
	Further submissions	55

1 Introduction

Authorisations

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Revocation and substitution of authorisations

- 1.5 Section 91C of the Act allows a party to apply to the ACCC to have their existing authorisation revoked and to have a substitute authorisation granted in its place. Before the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation, it must assess the proposed substitute authorisation in the same manner that it would consider a new authorisation application.
- 1.6 In this instance, the ACCC must consider the proposed conduct against the relevant tests set out in sections 90(6), 90(7) and 90(8) of the Act.
- 1.7 In making its decision, the ACCC conducts the same public consultation process as it would for a new application for authorisation, including informing interested parties about the application, inviting submissions and issuing a draft determination. The ACCC then invites further submissions prior to issuing a final determination.

The current applications

- 1.8 On 22 December 2005, Allianz Australia Insurance Limited (Allianz), QBE Insurance (Australia) Limited (QBE) and NRMA Insurance Limited (NRMA) – together the ‘Applicants’ – lodged application for the revocation of authorisation A30217 and A30218 and substitution of replacement authorisations under section 91C of the Act.
- 1.9 The Applicants are seeking re-authorisation of an unincorporated joint venture agreement – operating through an agent and trading as Community Care

Underwriting Agency (CCUA) – for the collective supply of public liability insurance to eligible ‘not for profit organisations’ (NFPOs) through a ‘co-insurance pool’. The Applicants are seeking re-authorisation for a period of five years.

- 1.10 The ACCC originally authorised the joint venture arrangement on 24 March 2004. This authorisation is due to expire on 31 December 2006.²
- 1.11 The substantive difference, however, between the previous authorisation and the current application is an amendment to the joint venture agreement. Broadly, this amendment means that the joint venture participants are now not obliged to refer new NFPO business enquiries received by any of them individually to the ‘co-insurance pool’. Rather, they may elect to do so on a case-by-case basis.
- 1.12 In lodging this application, the Applicants have sought authorisation to:
- make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act;
 - give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the Act;
 - make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - give effect to a provision of the contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

Interim authorisation

- 1.13 At the time of lodging the application, the applicants also requested that the ACCC grant interim authorisation under section 91 (2) of the Act to the arrangements pending the outcome of the full authorisation application. While the existing authorisation does not expire until 31 December 2006, the effect of this time limit is that the existing authorisation does not extend to the continued giving effect to annual policies written after 31 December 2005, after 31 December 2006.³ The Applicants argued that this significantly impacts on their ability to write new annual business, or accept annual renewals, after 31 December 2005.
- 1.14 Therefore, the Applicants sought interim authorisation so as to allow it to continue to write annual policies while the application is being considered.

² Interim authorisation was initially granted to the arrangements on 28 November 2002.

³ The Applicants have advised that the ‘vast majority’ of policies are written on an annual basis.

- 1.15 On 1 February 2006, the ACCC granted interim authorisation to the arrangements for the period 1 January 2007 until 12 months after the ACCC issues a final determination in respect of the substantive applications.

2 The Applicants

The Applicants

Allianz Australia Insurance Limited

2.1 Allianz is Australia's fifth largest general insurance provider with over 2 million policy holders and a combined premium income of \$2.25 billion.⁴ Through its subsidiaries, Allianz offers a wide range of insurance and risk management products and services, including:

- workers compensation (it is one of the leading private workers compensation insurers in Australia, providing cover for approximately one in five Australian employees);
- personal lines (home & contents, motor, boat and travel insurance);
- industrial and commercial insurance;
- corporate insurance;
- public and product liability insurance;
- loss control and risk management strategies; and
- injury Management and Occupational Health and Safety Strategies.

QBE Insurance (Australia) Limited

2.2 QBE is part of the QBE Insurance Group Limited, which is one of Australia's largest general insurance and reinsurance groups. QBE Insurance Group Limited had a gross written premium of \$5.1 billion for the half year ended 30 June 2005, \$1.3 billion of which was written for QBE's Australian operations.⁵

2.3 QBE's (Australia) portfolio mix for the year ended 31 December 2005 was as follows (as a percentage of gross earned premium):

- professional indemnity (5.2 per cent);
- credit and surety (4.7 per cent)
- accident and health (7.3 per cent);
- property (16.6 per cent);
- motor vehicle (9.3 per cent);
- travel (1.8 per cent);
- householders (10.6 per cent);

⁴ It is a wholly owned subsidiary of the worldwide Allianz group (Allianz AG) – one of the world's largest insurance and financial service providers.

⁵ QBE has reported that its Australian operations generated a gross written premium of \$2.4 billion for the full year 2005. See QBE Insurance Group, *Annual Report December 2005*, p 1.

- compulsory third party (7.4 per cent)
- general liability (18.7 per cent);
- workers compensation (8.2 per cent);
- marine and aviation (4.6 per cent); and
- other (5.6 per cent).⁶

2.4 The 18.7 per cent figure attributed to 'general liability' insurance compares to 18.2 per cent from the previous year (i.e. year ended 31 December 2004).

NRMA Insurance Limited

2.5 NRMA is part of the Insurance Australia Group (IAG). IAG is the leading general insurance group in Australia and New Zealand, serving over 3.8 million customers in Australia and with a gross written premium value of approximately \$3.3 billion for the half-year ended 30 June 2005.⁷

2.6 IAG's core lines of insurance offerings include:

- home;
- motor vehicle;
- health;
- commercial;
- consumer credit;
- extended warranty;
- compulsory third party; and
- workers compensation.

⁶ QBE Insurance Group, *Annual Report December 2005*, p. 24.

⁷ IAG indicates that its total gross written premium for the year ended 30 June 2005 was around \$6.7 billion.

3 The existing authorisations

The original application for authorisation

3.1 On 22 October 2002, Allianz, QBE and NRMA – together the ‘Applicants’ – sought authorisation for a joint venture for the collective supply of public liability insurance to eligible NFPOs through a ‘co-insurance pool’. The applications were made under subsection 88(1) of the Act and sought authorisation to:

- make and give effect to a contract, arrangement, or understanding; a provision of which would be or might be an exclusionary provision within the meaning of section 45 of the Act (A30217); and
- make and give effect to a contract, arrangement, or understanding; a provision of which would have the purpose or would have or might have the effect of substantially lessening competition in a market within the meaning of section 45 of the Act (A30218).

3.2 In summary, the terms of the original joint venture agreement:

- outline each participants share in the agreement;
- outline the eligibility criteria for an NFPO;
- stipulate that all new applications for public liability insurance by NFPOs *must be* referred to the co-insurance pool;
- provide that commissions *would not* be paid to insurance brokers who place NFPOs seeking public liability insurance with the co-insurance pool;
- outline the collective determination of terms and conditions, policy wording and underwriting;
- determine the model to be applied in setting premiums; and
- determine the jurisdictional operation of the co-insurance pool.

Other than the changes to the terms of the joint venture agreement (referred to in paragraph 1.11) such that new applications need not be referred to the co-insurance pool, the current application is for re-authorisation on the same terms as the original authorisation. Each of these terms is discussed in more detail below.

Shares in the joint venture

3.3 Clause 3.2 of the joint venture agreement states that the shares in the joint venture of each participant are:

- Allianz – 25 per cent;
- QBE – 37.5 per cent; and
- NRMA Insurance – 37.5 per cent.

Eligibility

- 3.4 As noted, the joint venture agreement provides for the collective supply of public liability insurance through a co-insurance pool to eligible NFPOs. For an NFPO to be eligible it needs to:
- provide services to the broader community;
 - have a NFPO tax status or turnover/funding of less than \$5 million per annum;
 - not distribute profits to its members; and
 - comprise mainly of volunteer members.
- 3.5 The Applicants note that NFPOs which are most likely to meet these criteria are those involved in the areas of:
- personal services;
 - cultural and recreational services – small sporting groups;
 - services to the arts – local music and drama groups;
 - creative arts – artists operating under government grants;
 - health and community services – welfare and community groups;
 - interest groups – pensioner groups, ratepayers associations and the like; and
 - community radio and television operators.
- 3.6 The Applicants submit that the arrangements do not provide coverage for larger organisations with the financial capability to purchase public liability insurance such as:
- religious organisations;
 - semi-government bodies; and
 - national and state sporting bodies.
- 3.7 The arrangements include an internal dispute resolution process to consider appeals against whether or not an organisation qualifies as an NFPO and to consider complaints in respect of claims.

Referring of new business to the pool

- 3.8 The joint venture agreement provided that each of the Applicants could continue to supply public liability insurance to those NFPOs which whom it had an existing public liability insurance arrangement prior to the establishment of the CCUA co-insurance pool.
- 3.9 However, originally clause 3.11 of the joint venture agreement stipulated that the Applicants must refer all new applications for public liability insurance by NFPOs to the co-insurance pool. Furthermore, the Applicants were prevented from

individually offering public liability insurance to a NFPO unless the co-insurance pool had advised that it was not prepared to offer a NFPO public liability insurance. As noted in paragraph 1.11, this clause has been amended in the current application such that each of the Applicants are now not obliged to refer new NFPO business to the co-insurance pool, but may elect to do so on a case-by-case basis.

Restriction on broker commission

- 3.10 The joint venture agreement provides that the Applicants will not pay commission to insurance brokers who place NFPOs seeking liability insurance with the co-insurance pool.
- 3.11 Specifically, clause 5.2 of Schedule 4 to the joint venture agreement provides that the agent, appointed by the Applicants to act for each co-insurance pool member in connection with arranging business through the pool, must not pay, or agree to pay, money or any other form of benefit to any broker or other person in relation to a contract of insurance provided by the co-insurance pool.

Collective determination of terms and conditions, policy wording and underwriting

- 3.12 Schedule 1 to the joint venture agreement establishes the terms and conditions upon which public liability insurance will be offered by the co-insurance pool. It provides that the contract of insurance will be based on a standard liability policy wording agreed by the applicants with the following modifications:
- the definition of ‘employee’ will include volunteers⁸ so that they are not considered to be third parties;
 - there will be a ‘participant-to-participant’ exclusion;
 - there will be a child molestation/sexual abuse exclusion;
 - the territorial limits will be to be restricted to Australia only, although the policy could be extended to cover overseas trips on a case-by-case basis;
 - the care, custody and control sub-limit shall be removed;
 - it will remove vicarious professional liability and cover first aid only;
 - the limits of liability are inclusive of defence costs;
 - the maximum limit of liability is \$10 million per policy per claim subject to higher limits being available if approved by the CCUA Management Committee;
 - a minimum deductible of \$1,000 per occurrence will apply with higher levels of deductible being imposed on particular exposures; and

⁸ A ‘volunteer’ means a person who carries out community work on a ‘voluntary basis’. In this context, ‘voluntary basis’ means that the person receives no remuneration for the work; or is only remunerated for the reasonable expenses incurred while performing that work.

- an exclusion for various provisions of the Act and ancillary legislation.

Model used to set premiums

- 3.13 Schedule 2 to the original joint venture agreement establishes underwriting guidelines to be applied by the CCUA agent (QBE) of the co-insurance pool in determining the premium applicable to an individual NFPO contract of insurance.
- 3.14 Premiums are initially determined based on the following criteria:
- type of activity;
 - size of organisation;
 - claims history; and
 - risk analysis.
- 3.15 These criteria determine whether a NFPO presents a low, medium or high hazard. Examples of low, medium and high hazards include:
- *low hazard* – book clubs, rostrum clubs and community arts;
 - *medium hazard* – historical associations, street markets and eisteddfods; and
 - *high hazard* – crisis centres, fetes and pony clubs.
- 3.16 Once an NFPOs hazard level premium has been determined, the underwriting guidelines provide for the application of a ‘multiplier factor’. The multiplier factor is determined based upon consideration of ‘exposure measures’. Examples of exposure measures include the:
- number of attendees;
 - turnover;
 - total funding – government and non-government;
 - number of stallholders;
 - number of full/part-time staff and volunteers;
 - number of beds;
 - frequency and nature of events; and
 - full range of activities undertaken.
- 3.17 The multiplier factor is then applied to the initial premium value to determine the final premium payable.
- 3.18 The underwriting guidelines also provide that an eligible NFPO may be excluded from cover if they have a poor loss history, are an unduly high risk and/or have an overseas exposure. They also state that parties seeking cover of this type may be

provided cover on different conditions with the approval of the CCUA Management Committee.

ACCC decision in 2004

- 3.19 The ACCC first granted interim authorisation to applications for authorisations A30217 and A30218 on 28 November 2002.
- 3.20 On 24 March 2004, the ACCC issued a determination granting *conditional* authorisation to the arrangements until 31 December 2006.
- 3.21 At the time, the ACCC considered that the co-insurance pool was likely to have a detrimental effect on competition. In particular, the ACCC expressed its view that the proposed arrangements would further concentrate the relevant market (determined to be the national market for public and product liability insurance) and may have the effect of increasing barriers to entry. The ACCC also expressed a concern that the co-insurance pool was unlikely to be significantly constrained by competitive forces of the countervailing power exercise by brokers.
- 3.22 That said, the ACCC also considered that there were likely to be public benefits flowing from the authorisation of the co-insurance pool. In particular, the ACCC considered that the co-insurance pool was likely to result in improved availability of public liability insurance to eligible NFPOs and, to the extent that the agreement not to pay broker commissions was passed on through lower premiums, improved affordability.
- 3.23 Overall, the ACCC considered that there was some uncertainty about whether the public benefits of the arrangements outweighed the public detriments. However, it considered that the imposition of certain conditions would reduce this uncertainty such that it could be satisfied that the public benefits of the arrangements would outweigh the public detriment.
- 3.24 Therefore, the ACCC granted authorisation to the co-insurance pool subject to conditions that:
- the Applicants collect and publish relevant data so as to establish the effects of the arrangements;
 - the co-insurance pool implement a complaints handling procedure; and
 - complaints received and the outcome of complaints be reported to the ACCC on a quarterly basis.
- 3.25 The ACCC notes that no substantive complaints against the co-insurance pool have been made through the complaints handling process since the authorisation was granted.

4 Industry background⁹

General insurance

- 4.1 Insurance is the commercial relationship by which an insurance company agrees to pay the insured a sum of money as compensation on the occurrence of a specified event causing loss to the interests of the insured. The insured party pays an amount, known as a 'premium', in consideration.¹⁰
- 4.2 In Australia, the Australian Prudential Regulation Authority (APRA) has responsibility for the licensing and prudential regulation of general insurance companies.¹¹ The products provided by general insurance companies can be divided into nine main classes:
- domestic motor;
 - home;
 - commercial third party (CTP);
 - accident and travel;
 - fire and industrial special risk;
 - commercial motor;
 - public and product liability;
 - marine; and
 - other.
- 4.3 The major sales avenue for insurance is through companies' own outlets, or through intermediaries – namely, agents or brokers. Brokers carry on the business of arranging contracts of insurance on behalf of policyholders and also sell insurance on behalf of one or more insurers.
- 4.4 Entry into the general insurance industry requires entities to:
- gain knowledge of their targeted market segments;
 - enter at a level sufficient to claim the necessary economies of scale;
 - attract necessary capital;
 - establish distribution channels; and

⁹ The information contained in this section is sourced from the ACCC's Fifth Monitoring Report (August 2005) on Public Liability and Professional Indemnity Insurance, JP Morgan and Deloitte 2005 *General Insurance Industry Survey* – 8 November 2005, www.asic.gov.au, www.apra.gov.au, www.apf.gov.au, www.qbe.com.au, www.allianz.com.au, www.iag.com.au, the Applicants submission on 22 December 2005, their original submission on 22 October 2002 and submissions made by interested parties in relation to this (and the previous) application for authorisation.

¹⁰ Business Law, 11th Edition, Peter Gillies, 2003 at page 716.

¹¹ APRA is also responsible for the prudential regulation of banks, superannuation funds, credit unions, building societies and friendly societies.

- obtain staff with the skills to write for the business.

Previous ‘crisis’ in public liability insurance

- 4.5 Anecdotal evidence suggests that the markets within which general insurance was supplied (including the market within which public liability insurance is supplied), were highly competitive in the mid-to-late 1990s. By about 1998, however, many insurers were realising losses from public liability insurance and either increasing premiums, cutting back the amount/type of business they were willing to write, or pulling out of the public liability insurance market altogether.
- 4.6 Subsequently, the poor performance of Australian insurance companies was exacerbated by two large and unusual events in 2001.
- 4.7 The first of these occurred in March 2001 when the HIH Group of companies was placed in liquidation. The HIH Group of companies represented around one-eighth of the domestic insurance market (as measured by premium revenue) as was widely regarded as being a ‘price leader’, particularly in the mid to late 1990’s. Based on information available during the ACCC’s previous assessment of the co-insurance pool arrangements, had the HIH Group been included in the 2001 APRA statistics, the general insurance losses in 2001 reported by APRA would have been in excess of \$4 billion.¹²
- 4.8 The second event was the terrorist attacks in the United States on 11 September 2001. This event has been estimated to have resulted in insured losses in the range of US\$20 to US\$40 billion.
- 4.9 These events lead to a major reduction in available capital and increase in the cost of reinsurance, and a corresponding increase in insurance premiums. This ‘hardening’ of the public liability insurance market had a particularly detrimental effect on NFPOs and resulted in the cancellation of some community events due to the inability of NFPOs to obtain appropriate public liability insurance.¹³
- 4.10 To address this concern several public liability insurance related initiatives were introduced by a range of industry stakeholders, including governments, insurers and NFPO umbrella organisations. The co-insurance pool application with respect to public liability insurance for NFPOs, was one such initiative.

Reforms, monitoring programs and industry initiatives

- 4.11 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 certain classes

¹² ACCC, *Second insurance industry pricing review*, September 2002, p. 18.

¹³ The previous determination on the CCUA arrangements (28 March 2004) noted that anecdotal evidence provided to the Commonwealth Department of Treasury suggested that many NFPOs experienced significant increases in the price of public liability insurance premiums over the course of 2002, and that some NFPOs were unable to obtain cover, despite not having made a claim under their insurance policy in the many years they had held it.

of insurance – notably, public liability and professional indemnity insurance. These reforms included:

- changes to the application of tort law;
- legal system reforms;
- prudential reforms;
- the implementation of data collection and publication exercises; and
- initiatives by governments and industry stakeholders.

Each of these is discussed in turn below.

Tort reforms

- 4.12 The major types of tort reforms implemented by 31 December 2004 included the capping of damages for economic loss (i.e. loss of past and/or future income) and non-economic loss (i.e. pain and suffering) as well as the capping of legal costs. Other reforms included the introduction of minimum thresholds of minimum impairment for access to damages for non-economic loss, limitation periods for personal injury claims and waivers for risky activities.

Legal system reforms

- 4.13 In July 2002 a Negligence Review Panel, chaired by Justice Andrew Ipp (the Ipp Review) was jointly established by Commonwealth, State and Territory Governments. The Terms of Reference stated that *'it is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising for personal injury and death'*. The Ipp Review Final Report was released on 15 October 2002
- 4.14 In relation to NFPOs, the Final Report recommended that there should be no provision exempting NFPOs from damages claims for death and personal injury caused by negligence or limiting their liability for such damages. However, the Ipp Review made recommendations, the effect of which are to limit liability for the materialisation of obvious risks of recreational services (Recommendation 11) and to exclude liability for failure to warn of obvious risks in any circumstances (Recommendation 14).¹⁴ The Ipp Review considered that these recommendations will make significant contribution towards furthering the objectives relating to NFPOs.¹⁵
- 4.15 By November 2002, all governments agreed to implement the recommendations of the Ipp Review.¹⁶ The Insurance Council of Australia (ICA) notes that the States and Territories have effectively completed their public liability law reforms and

¹⁴ Final Report of the Review of the Law of Negligence page 59 paragraph 4.3

¹⁵ Further information regarding tort reforms implemented by state and territory governments can be found in the ACCC's *Public liability and professional indemnity insurance* monitoring reports (July 2003, January 2004).

¹⁶ Insurance Council of Australia, *Industry Response to the Liability Challenge in Australia*, July 2005, p.9.

that most have also introduced Professional Standards and proportional liability reforms. Further, the ICA notes that in February 2006 the final major piece of legislation – the *Trade Practices Amendment (Personal Injuries and Death) Bill* was passed by the Federal Parliament.¹⁷

Prudential reforms

- 4.16 A new framework for the prudential regulation of Australian general insurers became effective on 1 July 2002. This new framework strengthened and modernised the prudential requirements applying to general insurers in Australia.¹⁸ For example, APRA now imposes stronger requirements in relation to both financial soundness (liability valuation and capital adequacy¹⁹) and risk management (particularly in relation to governance and reinsurance). These reforms, coupled with new legislative provisions, strengthen APRA's capacity to intervene in the affairs of an ailing insurer.²⁰

Data collection: APRA's role

- 4.17 APRA's prudential reporting framework for general insurers changed significantly with the introduction of the *Financial Sector (Collection of Data) Act 2001* and prudential and reporting standards that took effect on 1 July 2002. APRA now releases a *Quarterly General Insurance Statistics* publication, and also a quarterly *Insight* that provides editorial on the wide range of APRA's interests as prudential regulator.²¹
- 4.18 In January 2005, at the request of the Federal Government, APRA launched a National Claims and Policies Database (NCPD) for 'public and product liability' and 'professional indemnity' insurance. All APRA-regulated insurers that provide these types of insurance policies are required to contribute claims and policies data to the NCPD. Other organisations, such as state and territory insurers also submit data to the NCPD. The first data collection occurred in early 2005 and included claims and policies data for the period from 1 January 2003 to 31 December 2004.

¹⁷ Insurance Council of Australia, *Briefing Note: Tort Laws Reformed – Outcomes Being Achieved*, March 2006.

¹⁸ One interested party (which requested that its submission be kept confidential), however, submitted that the new prudential regime was introduced quickly and with little consultation meaning that insurance capacity was quickly and substantially decreased due to more capital being required to underwrite long tail classes of insurance (such as public liability) and, also, the requirement that insurers' reserves for such classes be increased.

¹⁹ From 1 July 2002, under APRA's new prudential regime, capital requirements for general insurers became a risk-based measure where higher requirements are placed on insurers with higher risks. In addition, the absolute minimum capital requirement (MCR) for an authorised general insurance company was increased from \$2 million to \$5 million.

²⁰ In its quarterly bulletin (*Insight*) for the 3rd quarter of 2005, APRA indicated that further work is required to strengthen the prudential supervision framework for general insurance.

²¹ In late 2005, APRA released its proposal for a new bi-annual statistical publication on the insurance industry. It released a consultation document on 30 September 2005 and invited submissions by 16 November 2005. APRA has not yet indicated when this publication will be released.

- 4.19 The NCPD is designed to provide insurers, the community and the government with a better understanding of these types of insurance, and enable them to identify trends and implement changes to reduce the number of claims or lower the cost of claims. The NCPD is also designed to make these products more affordable and available by providing insurers with detailed information to help them assess risks and determine appropriate premiums for these insurance products; and through also helping insurers to develop or enhance the products available to policyholders in the future.

Data collection: ACCC's role

- 4.20 At a 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.²² Since July 2003, the ACCC has published bi-annual monitoring reports on public liability and professional indemnity insurance specifically. The last report (fifth in the series) was published by the ACCC on 11 August 2005 and included a specific section on NFPOs. The next report is due for release in the first half of 2006.

Government and industry initiatives

- 4.21 Aside from the co-insurance pool which is the subject of this determination, a number of other initiatives have been implemented by Government and industry (often in combination) to address the issue of ensuring affordable public liability insurance for NFPOs.
- 4.22 For example, in August 2002, the Queensland Government announced that it would develop a group purchasing insurance scheme for NFPOs that had difficulty in obtaining public liability insurance. Following a competitive tender process, Suncorp-Metway was appointed as underwriter to the scheme with AON Risk Services appointed to provide liaison services between NFPOs and Suncorp-Metway.
- 4.23 Currently, there are a number of NFPOs participating in this scheme. The Queensland Government has also published a 'Public Liability Information' brochure which includes information on tort law reform, risk management, duty exemptions on premiums and insurance price monitoring, as well as relevant frequently asked questions.
- 4.24 In May 2002, Civic Mutual Plus, operated by the Municipal Association of Victoria (MAV), commenced a public liability insurance scheme for NFPOs. The scheme defined 'eligible' NFPOs as those that:
- provide public benefit or serve a charitable purpose;

²² 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. The monitoring period has subsequently been extended, though reports are now provided by the ACCC on an annual basis.

- support the social fabric of the community;
- are not controlled or appointed by the business or government sectors; and
- do not return profits to the owners or managers.

According to the Civic Mutual Plus website, for 2005, the scheme had around 130 members.

4.25 In its latest monitoring report (released July 2005), the ACCC noted that there are several organisations that either provide, or help provide, insurance to the ‘not-for-profit’ sector. These included:

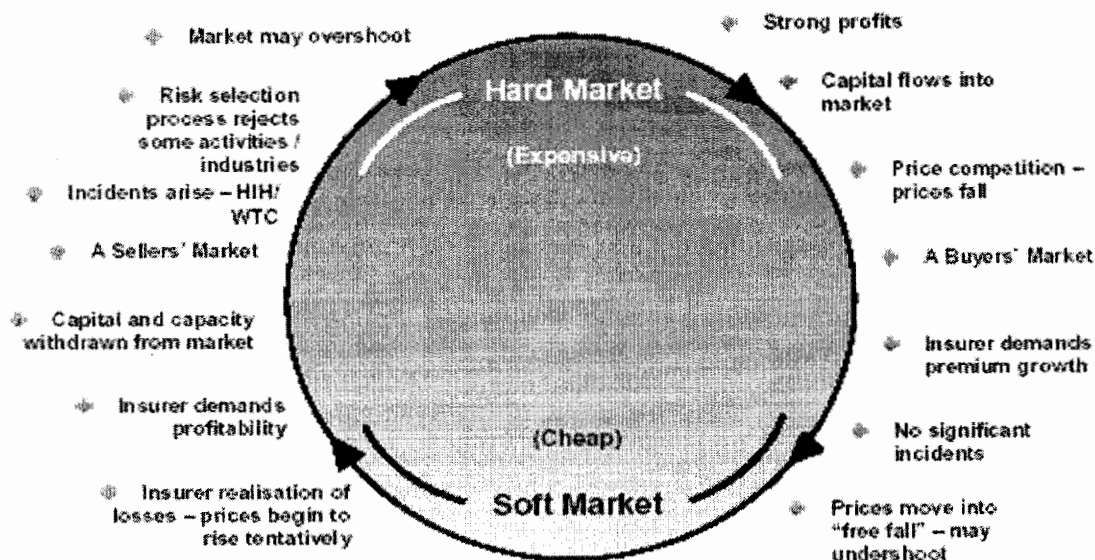
- the Community related Insurance and Superannuation Program (CRISP) which is a program of the NSW Meals on Wheels Association and is available to any NFPO within Australia;
- Brokers AON Risk Services and the Council of Social Service of NSW (NCOSS) have created NCOSS Community Cover which is a bulk buying program that helps a range of NFPOs obtain public liability insurance policies through licensed insurance companies;
- Catholic Church Insurances Limited (CCI) offer a full range of insurance products, including liability personal accident insurance, to parishes, schools (and other education facilities), hospitals, nursing homes, welfare organisations and other religious institutions in Australia;
- The Ecclesiastical Insurance Group (EIG) acquired the Australian, New Zealand and UK subsidiaries of Ansvar Insurance to form EIG-Ansvar. EIG-Ansvar provides insurance primarily for church groups, but also provides insurance for care homes, retirement villages and independent schools in Australia.

Current state of the insurance sector in Australia

General insurance

4.26 According to a March 2002 report by Trowbridge Consulting (the ‘Trowbridge Report’) the insurance industry is notorious for its cyclical behaviour. An overview of a typical insurance cycle, as described in the Trowbridge Report, is shown in Figure 1 below.

Figure 1: Insurance Market Cycle



- 4.27 As noted above, at the time the Applicants made their original application for authorisation, the general consensus appeared to be that the insurance market was in a 'hard' phase. According to the Trowbridge Report, the Australian general insurance market began to enter a 'hard' phase in June 2000. This situation was then exacerbated by the previously described 'external shocks' in 2001.²³ Anecdotal evidence presented to the ACCC, as well as the Senate Review Committee,²⁴ suggested that these market conditions had a particularly adverse effect on NFPOs.
- 4.28 It appears, however, that the state of the general insurance industry in Australia has changed considerably since authorisation was substantively granted in March 2004 and even more so since interim authorisation was first granted in November 2002. This appears to have been, at least in part, influenced by the reforms and initiatives that have been implemented since 2002.
- 4.29 In a broad sense, APRA's monitoring reports of this sector indicate that there has been an ongoing trend of industry consolidation since 1998. This trend appears to have continued from 2002 to the latest monitoring period. As at 30 March 2005, there were 89 active direct insurers in Australia, compared to 97 at 30 June 2002.²⁵ Also, there were 15 active reinsurers and 32 inactive institutions (being those institutions whose quarterly revenues are below \$200,000 and quarterly unearned

²³ According to one confidential interested party submission, the situation in 2002 was also exacerbated by APRA's hastily implemented prudential reforms which mandated that relatively more capital was required to underwrite long tail classes of insurance (such as public liability).

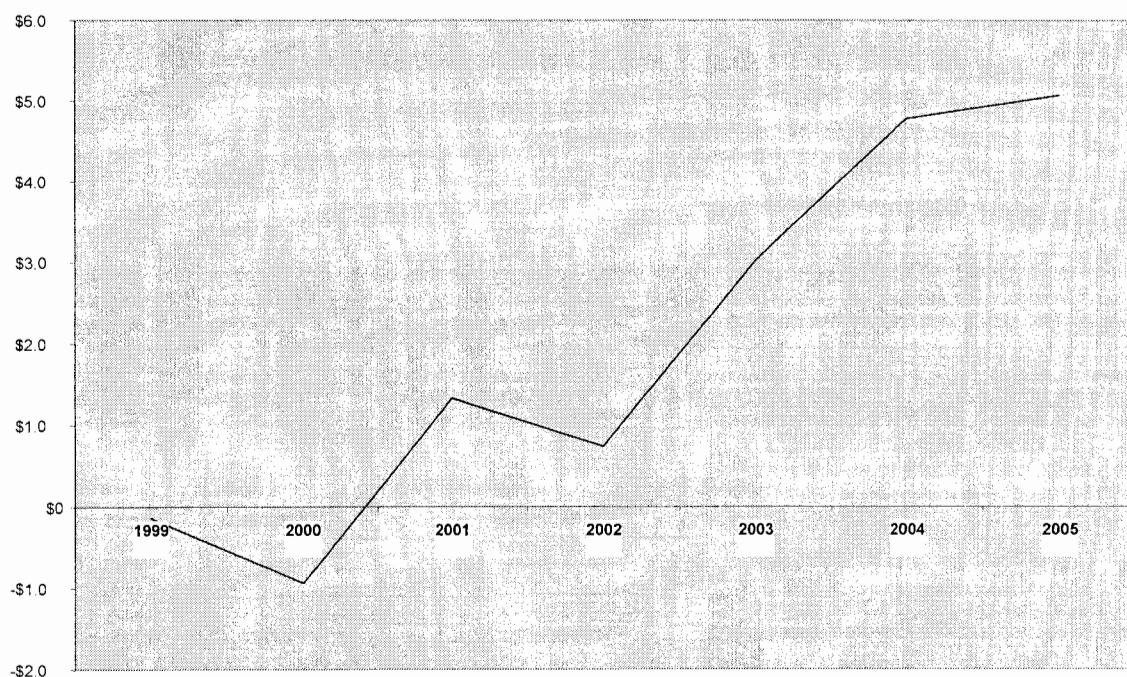
²⁴ Senate Economics Reference Committee – A Review of Public Liability and Professional Indemnity Insurance – October 2002

²⁵ There comprised 30 diversified insurers (being direct insurers who are active in six or more lines of business) and 59 other insurers (being direct insurers who are active in less than six lines of business).

premiums are below \$500,000), compared with 20 and 26 respectively as at 30 June 2002.

- 4.30 As in 2002, the current market is comprised of Australian-based insurers as well as a number of overseas insurers. This includes the operation in the Australian market of a number of affiliates of leading overseas insurance companies.
- 4.31 One interested party has suggested that industry consolidation has had a negative effect on competition. However, there is evidence to suggest that this longer term trend of industry consolidation has been beneficial for industry stability. In its recent quarterly bulletin, APRA notes that the gradual decline in the number of general insurers since the peak in 1998 means that major insurers now have the size and diversity to handle major loss events with little impact on the balance sheet.²⁶
- 4.32 At the present time, the profitability of the insurance industry in Australia appears to be healthy. According to APRA, total industry 'net profit after tax' for the year ended 30 September 2005 was \$5.5 billion. Figure 2 below illustrates the trend of net profit (or loss) registered by the insurance industry in Australia over the last six years.

Figure 2: Australian Insurance Industry – Net profit/loss over last 6 years (\$ billion)



- 4.33 As the above figure shows, the net profitability of the industry as at 30 June 2005 (approximately \$5.0 billion) is substantially higher than the net profitability of the industry around the time of the CCUA's original application for authorisation

²⁶ APRA, *Insight*, 3rd Quarter 2004, p. 4.

(approximately \$0.74 billion). Moreover, the current industry net profitability levels are in stark contrast to the negative net profit levels reported by APRA for 1999 and 2000.

- 4.34 Further evidence of the health of the insurance industry can also be seen by considering the latest return on equity (ROE) result.²⁷ At 30 September 2005, the ROE of the insurance industry was 22.9 per cent, marginally down from 23.2 per cent from September 2004, but nonetheless, substantially above the average ROE of 8.9 per cent over the period 1993 to 2004. In addition, total assets for the insurance industry were \$81.8 billion as at 30 September 2005, and increase of \$1.1 billion (or 1.4 per cent) from the previous year.
- 4.35 Of itself, overall industry profitability levels do not necessarily indicate that competition has increased in the insurance sector. However, as Figure 1 suggests, strong profitability is typically considered a precursor to a 'softening' of market conditions in the insurance sector. This is because as capital flows back into the market, insurance companies re-enter to supply certain classes of insurance and price competition begins to place downward pressure on premium rates.
- 4.36 The information examined by the ACCC in the context of the current application suggests that this 'softening' has taken place in certain elements of the Australian insurance industry. For example, the *2005 General Insurance Industry Survey* released by JP Morgan/Deloitte indicates that premium rates for a number of types of commercial insurance fell in 2004 and 2005²⁸, while premium rates for domestic classes of insurance (i.e. domestic motor and household insurance) increased – though by less than in previous years.²⁹
- 4.37 Moreover, this survey reveals that the insurance industry itself anticipates that premium rates for commercial insurance will fall even further in 2006.³⁰ This evidence has led JP Morgan/Deloitte to conclude that competition in the industry has 'intensified considerably'.³¹

²⁷ Strictly, ROE = Net Income/Shareholders Equity. Essentially, the ROE measures how much money profit a company (or in this case, an industry) generates with the money shareholders have invested in it.

²⁸ For example, the survey indicates the following premium movements in 2004 and 2005 respectively: Fire & ISR (-7 per cent, -14 per cent), Commercial Motor (-8 per cent, -6 per cent), Liability (+3 per cent, -11 per cent), Professional Indemnity (+6 per cent and -12 per cent), Workers Compensation (-9 per cent, 0 per cent).

²⁹ The increase in domestic motor insurance premiums over 2004 and 2005 respectively was +2 per cent and +2 per cent while the 'average increase' over the 1994-2005 period was approximately 6 per cent. The increase in household insurance premiums over 2004 and 2005 respectively was +5 per cent and +3 per cent, while the 'average increase' over the 1994-95 period was approximately 5 per cent. The movement in CTP (NSW) premiums over 2004 and 2005 was 2 per cent and -4 per cent respectively, while the 'average increase' over the 1994-95 period was approximately 10 per cent.

³⁰ For example, the 2005 General Insurance Industry Survey published by JP Morgan/Deloitte indicates that premiums for the following classes of insurance will fall in 2006; Fire & ISR (-4 per cent), Commercial Motor (-1 per cent), Liability (-6 per cent), Professional Indemnity (-8 per cent) and Directors & Officers (-4 per cent).

³¹ JP Morgan and Deloitte, *2005 General Insurance Industry Survey*, p. 5.

Public liability insurance

- 4.38 The co-insurance pool arrangements that are the subject of this determination provide for the supply of public liability insurance to NFPOs.
- 4.39 Public liability insurance protects individuals, businesses and organisations against the financial risk of being found liable to a third party for death or injury, loss or damage of property or ‘pure economic’ loss resulting from negligence by the insured. Public liability policies are typically written on a claims occurring basis in which premiums cover all incidents that occur in the policy year regardless of when they are notified.
- 4.40 In the past, public liability insurance has been described as ‘fat’ and ‘long’ tailed. It is ‘fat’ tailed in the sense that, although claims are generally not frequent, such claims have previously tended to involve high payouts. This risk appears to have been mitigated somewhat by the ‘capping’ of damages and the review of the ‘law of negligence’. It is ‘long’ tailed because many years may elapse between the date the incident occurred and the final settlement of the claim.
- 4.41 Participants in the public liability insurance market include:³²
- **Buyers** - Most members of the community who own, control or occupy property are exposed to the risk of a negligence action by a third party for injury or damage. To protect themselves from damages payouts should such an action be successful, it is customary and prudent to purchase “third party” public liability insurance. This cover is automatically provided in home insurance products to protect the owner or tenant. Business owners need separate cover to protect themselves from actions arising from incidents in the course of undertaking their business.
 - **Brokers** – Traditionally, most public liability of a commercial nature is acquired through insurance brokers, specialist intermediaries whose role is to advise on insurance needs and obtain the best deal (including price) for their clients.
 - **Agents** – In some cases the intermediary may be an agent, who acts only for one or a few insurers. For example, in the case of the CCUA co-insurance pool, QBE acts as the ‘agent’ on behalf of the Applicants.
 - **Insurers** - Most general insurers provide public liability cover. Each policy is assessed by the insurer before a premium and terms of cover are offered.
 - **Underwriting agents** - Some public liability insurance, especially in specialist classes, is placed with underwriting agents who perform most of the functions of the insurer but do not carry the risk, which is passed to one or more insurers on a bulk basis.
 - **Reinsurers** - Insurers buy reinsurance protection against individual large losses that they may incur. For example, with liability cover of \$10 million an

³² Public Liability Insurance, Analysis for Meeting of Ministers 27 March 2002, Trowbridge Consulting.

insurer's own risk retention may be \$2 million with any claim above this amount covered by reinsurance. Reinsurers charge insurers a premium for that cover.³³

- 4.42 Most Australian licensed insurers sell public liability insurance. Typically, this has been a consequence of it being a component of home and contents insurance policies. In addition, in most industries (and especially for smaller businesses), public liability and products liability are sold as a combined product with a single premium amount. Usually, therefore, statistics are only available for public and products liability combined.
- 4.43 The market information collected by APRA suggests that the public liability sector represents a very small proportion of total Australian insurance activities, and therefore, a relatively small proportion of the insurance book of the major Australian insurers.
- 4.44 For example, as at 30 March 2005, public liability and product liability insurance represented 7.4 per cent of total gross premium revenue earned by general insurers in Australia. This compared to 5 per cent as at 30 June 2002. Notably though, the latest APRA quarterly bulletin reveals that only three classes of insurance (i.e. inward reinsurance at 13.7 per cent, domestic motor at 11.4 per cent, household at 9.2 per cent) generated a greater proportion of premium revenue in the latest period.³⁴
- 4.45 As noted above, during the insurance 'crisis' early this decade, many insurance companies operating in the Australian market became more selective about the risks they were prepared to underwrite. In this regard, one of the poorer prospects was 'long tail' liability classes (i.e. such as public liability) since they required significant capital reserves. In particular, there is anecdotal evidence to suggest that insurers became reluctant to provide cover to NFPOs for public liability because of the poor prospects of a profitable return on capital and also because of a perceived high risk of claims against them.
- 4.46 This was consistent with anecdotal evidence provided to the Commonwealth Department of Treasury around the time of the last authorisation which suggested that many NFPOs had experienced significant increases in the price of public liability insurance premiums over the course of 2002, with some being unable to obtain cover. Many of these organisations stated that this was despite not ever having made a claim under their public liability insurance policy.³⁵

³³ In this sense, reinsurance could be considered an 'input cost' for general insurance companies. Therefore, the price of reinsurance will typically have an indirect impact on premium rates for general insurance.

³⁴ The largest source of revenue (23.4 per cent) for this period was derived from investment revenue.

³⁵ ACCC, *Determination: Application for Authorisation Lodged by Allianz Australia Insurance Limited, QBE Insurance Limited and NRMA Insurance Limited*, 24 March 2004, p. 15.

- 4.47 In line with the insurance industry more broadly, it appears that the market within which public liability insurance is supplied has altered substantially since 2002. In short, there appears to have been a significant ‘softening’ of market conditions. This is based on a number of key factors.
- 4.48 In the first instance, there now appears to be more companies supplying public liability insurance to NFPOs. Information provided by the Applicants in support of their application suggests that at the date of the original application for authorisation there were approximately 11 companies/facilities that provided public liability insurance to NFPOs.³⁶ The Applicants submit that there are now around 20 companies/facilities providing public liability insurance to NFPOs (this includes the co-insurance pool participants offering NFPOs public liability insurance individually outside the joint venture agreement). Further detail on the new entrants in the relevant market since the ACCC previously considered these arrangements is provided at paragraph 5.13.
- 4.49 In addition, the available evidence suggests that there continues to be a low level of concentration in the public and product liability insurance market. Data collected by the ACCC for its last monitoring report with respect to the public liability insurance sector (year ending 31 December 2004) indicates that there has been consolidation in the market since 2002.³⁷ However, this data also indicates that the four insurers with the largest market share earned 48 per cent of total gross premium revenue in 2004. Further, confidential information provided by the Applicants suggests that their combined share of the market is substantial.
- 4.50 However, perhaps the strongest indication of a ‘softening’ of market conditions is evidence of premium rate reductions for public liability insurance in recent periods. In its latest quarterly bulletin (for the 3rd quarter of 2005), APRA cites anecdotal evidence that the pricing of large public liability risks appears to be becoming ‘very competitive’. APRA notes that its own on-site visits and reviews of board documentation show that, in general, such aggressive pricing is part of a considered strategy with recognition of the risk-return trade-off.³⁸
- 4.51 The 2005 General Insurance Industry Survey reveals that premium rates for public liability insurance declined by 11 per cent in 2005. Notably, premium rates paid by ‘small medium enterprises’ (SMEs) specifically (which encompasses NFPOs) declined by 9 per cent. Looking forward, the survey forecasts that premium rates

³⁶ These were the CCUA co-insurance pool participants (Allianz, QBE and NRMA), QBE Mercantile Mutual, ANSVAR, Suncorp Metway, Concord Underwriting Agency (using local and overseas insurers), Global Underwriting Agency (using local and overseas insurers), Triton Underwriting Agency (Transpacific Insurance Company based on the Cayman Islands), Marsh Insurance Services (using local insurers), AON Client Placement Facility (using local insurers), Jardine Lloyd Thompson Commercial and Domestic Facility (using local insurers) and Catholic Church Insurances.

³⁷ The report shows that the number of direct insurers active in the public liability class declined from 47 in December 2002 to 42 in December 2004.

³⁸ APRA, *Insight – Quarter 3 2005*, 5 January 2006, p. 4.

for liability insurance generally are expected to decline by 6 per cent in 2006 and 1 per cent in 2007.³⁹

- 4.52 This information appears to be broadly consistent with the pricing data collected by the ACCC for the last monitoring report it published in July 2005 (i.e. for the period ending 31 December 2004). These data reveal that the 'average premium' for public liability insurance in real terms decreased by 4 per cent, from \$1416 to \$1363, in 2004. Previously, the average premium was stable in real terms between 1997 and 1999 at approximately \$640 before increasing substantially to peak in 2003.

³⁹ Based on forecasts by survey respondents.

5 The current applications and interested party submissions

CCUA's applications for revocation and substitution

- 5.1 As discussed above, the ACCC granted the Applicants request for authorisations A30217 and A30218 on 24 March 2004. Interim authorisation had operated since 28 November 2002.
- 5.2 On 22 December 2005, the Applicants lodged two applications pursuant to section 91C of the Act for the revocation of authorisations A30217 and A30218 and substitute of replacement authorisations. The proposed substitute authorisations seek to continue to allow the Applicants to operate a co-insurance pool with respect to public liability insurance for eligible NFPOs. The Applicants request that authorisation be granted for a period of five years.
- 5.3 The Applicants also sought interim authorisation pending the outcome of the full authorisation application. While the existing authorisation does not expire until 31 December 2006, the effect of this time limit is that the existing authorisation does not extend to the continued giving effect to annual policies written after 31 December 2005, after 31 December 2006.⁴⁰ The Applicants argued that this significantly impacts on their ability to write new annual business, or accept annual renewals, after 31 December 2005.
- 5.4 On 1 February 2006, interim authorisation was granted by the ACCC until 30 June 2007 (unless circumstances warrant revocation or amendment of the interim authorisation at an earlier stage).
- 5.5 As noted in paragraph 3.2, the conditions in the joint venture arrangement proposed for re-authorisation are essentially the same as the joint venture arrangement that is covered by the current authorisation. That said, the substantive difference is an amendment which means that the co-insurance pool participants are no longer obliged to refer new business enquiries received by any of them individually to the 'co-insurance pool', but rather, may individually choose to do so on a case-by-case basis.⁴¹
- 5.6 In lodging this application, the Applicants have sought authorisation to:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act;

⁴⁰ The Applicants have advised that the 'vast majority' of policies are written on an annual basis.

⁴¹ The amendment also results in Clause 3.11 of the original joint venture agreement being deleted in its entirety.

- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the Act;
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
- to give effect to a provision of the contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

5.7 A copy of the Applicants' submission in support of its application for re-authorisation is available on the ACCC's website www.accc.gov.au. A summary of the main issues raised in the Applicants submission is below.

Public detriment

- 5.8 The Applicants note that in its final determination authorising their arrangements on 24 March 2004, the ACCC concluded that the relevant market in which to assess the potential effect on competition of the CCUA co-insurance pool arrangement was the 'national market for the supply of public and product liability insurance'. The Applicants have adopted the same market definition for the purpose of their submission regarding the potential public detriments generated by their arrangements.
- 5.9 The Applicants submit that without the arrangements, each Applicant would individually choose whether or not it wanted to supply public liability insurance to NFPOs (and may unilaterally decide not to in certain circumstances). With the arrangements, the Applicants submit that the continuing existence of the co-insurance pool will not preclude each applicant from supplying public liability insurance individually to NFPOs. Rather, the Applicants contend that the existence of the CCUA co-insurance pool acts as an additional player in the market which is specifically focused on providing insurance to NFPOs (and has set up its own systems to assist with this) and that this creates greater competition overall within the market.⁴²
- 5.10 In this regard, the Applicants note that the parties to the co-insurance pool currently supply certain NFPOs with public liability insurance outside the arrangements. As a result, the Applicants submit that the CCUA co-insurance pool arrangement does not, of itself, have the effect of increasing market concentration or barriers to entry. Rather, in their view, it has created an additional competitor in the market.

⁴² For example, the Applicants submit that, by its nature, CCUA may quote on some risks that each party may individually choose not to do, because the pool arrangement allows the Applicants to distribute between them the risk of claims being made which makes it more economically viable for them to provide cover in some circumstances.

- 5.11 The Applicants also submit that the continuation of the CCUA co-insurance pool arrangement will not significantly inhibit other competitors from operating in, or entering, the relevant market.
- 5.12 The Applicants cite four additional issues that are relevant to their submission that the CCUA co-insurance pool arrangement will not have, or be likely to have, the effect of substantially lessening competition moving forward. These are that:
- there is increased competition in the relevant market;
 - there is evidence of new entry and scope for new entry;
 - CCUA places emphasis on risk management; and
 - there have been improvements in industry-wide data collection and publication.

Each is discussed in turn below.

- 5.13 *Increased competition* – The Applicants submit that at the date of the original application for authorisation, around 11 companies/facilities provided public liability insurance services to NFPOs.⁴³ The Applicants note that at the present time, in addition to these companies/facilities:
- CGU, IAG and QBE Commercial also write public liability insurance for NFPOs;
 - CGU and QBE Commercial participate in the bulk buying arrangement brokered by AON for NCOSS (New South Wales Council of Social Services);
 - Lloyds of London writes public liability insurance for a bulk buying arrangement brokered by Meals on Wheels for hundreds of NFPO groups, initially in NSW, but now spreading across Australia;
 - Calliden Group Limited is a new entrant to the relevant market, specialising in the Small Medium Enterprise (SME) sector including NFPOs; and
 - Employers Mutual Limited provide capacity to Renaissance Underwriting Agency (formerly Triton Underwriting Agency).
- 5.14 The Applicants therefore submit that the increased level of competition within the market, compared to the level that existed at the date of the current authorisation, acts as a constraint upon the conduct of the pool.

⁴³ These were the CCUA co-insurance pool participants (Allianz, QBE and NRMA), QBE Mercantile Mutual, ANSVAR, Suncorp Metway, Concord Underwriting Agency (using local and overseas insurers), Global Underwriting Agency (using local and overseas insurers), Triton Underwriting Agency (Transpacific Insurance Company based on the Cayman Islands), Marsh Insurance Services (using local insurers), AON Client Placement Facility (using local insurers), Jardine Lloyd Thompson Commercial and Domestic Facility (using local insurers) and Catholic Church Insurances.

- 5.15 *Market entry* – In support of their original application, the Applicants submitted that there were not significant barriers to entry to insurance companies wishing to enter the market from within or outside Australia. The Applicants now submit that the recent entry of Calliden into the market (early 2005) confirms that there are still not significant barriers to entry in this market.
- 5.16 Moreover, (and as noted above in paragraph 1.11) the Applicants note that the amended joint venture agreement allows the CCUA co-insurance pool participants to write public liability insurance for NFPOs in competition with the pool arrangements.
- 5.17 *Data collection/publication* – The Applicants note that at the time of the final determination, the ACCC commented on the lack of industry wide data. The ACCC considered that such data would assist insurers and their actuaries to set appropriate rates for individual risks and to set appropriate claims reserves.
- 5.18 The Applicants note, however, that in January 2005, APRA established the NCPD for public/product liability and professional indemnity insurance. This was discussed in paragraphs 4.18 to 4.19. The Applicants submit that the NCPD should assist insurers and their actuaries to set appropriate rates for individual risks and to set appropriate claims reserves. The Applicants also submit that when NCPD reports are published they may provide further assistance to potential new entrants in deciding whether to enter the market.

Public benefits

- 5.19 The Applicants submit that the continuation of the CCUA co-insurance pool arrangements will result in the following public benefits.
- 5.20 *Greater availability of cover for NFPOs* – The Applicants argue that although the situation has eased in recent years due to ‘softening’ market conditions, there is still continuing ‘unavailability’ and ‘unaffordability’ of public liability insurance for *certain* NFPOs – particularly those that meet CCUA’s eligibility criteria (which are designed to capture smaller NFPOs).
- 5.21 In this regard, the Applicants submit that while public liability insurance premiums for corporate and commercial clients have reduced, this is true to a lesser extent for NFPOs.⁴⁴ The Applicants also consider that the impact of tort reforms will not be seen for several more years.
- 5.22 As a result, the Applicants submit that there is a continuing need for the co-insurance pool arrangements because it allows them to distribute risk between them for certain NFPO clients. In the Applicants view, this, in turn, makes it more economically viable for them to offer public liability insurance to certain NFPOs which may otherwise not be able to access public liability insurance. The

⁴⁴ That said, the Applicants note that there was no increase in premiums for co-insurance pool clients in 2005 unless there were changes in their operations which increased their risk exposure.

Applicants submit that public liability insurance will therefore continue to be available to certain types of NFPOs which, prior to the arrangements being entered into, had been unable to obtain cover or had to cancel events because of the cost of cover. In support of this claim, the Applicants provided a list of six organisations that were unable to get public liability insurance prior to arrangements being entered into, but which have now have cover from the co-insurance pool.⁴⁵ In the Applicants' view, this in turn supports public events and community initiatives which contribute to the community spirit, particularly in outlying communities.

- 5.23 *Reduced reliance on government funding* – The Applicants submit that the CCUA co-insurance pool arrangement will continue to allow certain NFPOs to maintain their current services and reduce the need for these organisations to approach governments for increased funding.
- 5.24 *Commonwealth protection* – The Applicants submit there is a public benefit in allowing NFPOs to obtain cover from companies licensed in Australia because it affords them the protection of Commonwealth Government legislation which governs the conduct of these insurers.
- 5.25 *Education function* – In their original application, the Applicants submitted that the CCUA co-insurance pool arrangement would facilitate the education of NFPOs as insureds by providing a central information facility for risk management and also by providing information about the cost implications of certain activities. The Applicants note, however, that in its final determination (March 2004) the ACCC did not attach much weight to this claim because of the possibility that the education service might simply replace the role traditionally provided by brokers. Similarly, the Applicants note that the ACCC did not consider that adequate evidence had been provided of how aggregation would occur.
- 5.26 In support of the current application, the Applicants submit that their risk management education program is far in excess of any such education service traditionally provided by brokers. In this regard, the Applicants submit that since CCUA began issuing public liability insurance policies to NFPOs in December 2002, it has run a variety of risk management workshops in conjunction with a variety of stakeholders, including local councils,⁴⁶ a member of parliament⁴⁷ and

⁴⁵ They include *Sea Shepherd Conservation Society* (organisation dedicated to protecting marine wildlife), *Tom Price Motorcycles* (organises motorcycle community events for children), *Girls Ride Out* (group who ride Harley Davidson motorcycles for social and fundraising purposes), *Baa Baa Rella* (a petting farm and organisation which takes farm animals to community events), *United Muslim Association* (made up of several local Muslim associations) and *Warakuma Artists' Aboriginal Corporation* (a corporation of aboriginal artists which produces arts and crafts).

⁴⁶ This includes Mildura Rural City Council, Baulkham Hills Shire Council, Caloola Shire Council and Coonabarabran Shire Council and representatives of NFPOs attended each workshop.

⁴⁷ This was Joanna Gash, Federal Member for Gilmore (4 regional towns) and around 200 representatives of local NFPOs attended.

peak public bodies.⁴⁸ The Applicants also note that they have, or are in the process of developing, a variety of risk management materials which will be made available free of charge on the CCUA website within the next couple of months, including:

- sample forms and checklists to help NFPOs plan safe events;
- risk assessment templates which provide a framework for the development of a risk management plan; and
- three booklets developed by the Nonprofits' Insurance Alliance of California, which will be amalgamated into one booklet ('Keeping Community fun alive and well') for Australian purposes.⁴⁹

The Applicants submit that as a result of the current arrangements, NFPO volunteers are better able to, and informed about, dealing with NFPO insurance issues.

- 5.27 The Applicants also note that co-insurance pool currently offers a 20 per cent premium reduction to NFPOs that have an acceptable risk management plan in place.⁵⁰
- 5.28 *Collective purchasing arrangements* – The Applicants submit that they encourage discussion between their agent (QBE) and peak bodies in an attempt to develop collective or 'aggregated' purchasing arrangements that are of benefit to NFPOs in particular. In this regard, the Applicants note that the co-insurance pool currently has aggregated arrangements in place with ten organisations where a bulk public liability insurance policy covers multiple groups that operate under each organisation.⁵¹
- 5.29 The Applicants submit that these collective purchasing arrangements result in cost savings to the individual organisations since they do not need to obtain individual covers.

Interested party submissions

- 5.30 The ACCC sought submissions on the applications for revocation and substitution from a range of interested parties.

⁴⁸ This included Play Groups NSW (a presentation to zone managers who pass on information within their zones), NSW Film & Television Office and Regional Arts NSW (around 100 representatives of NFPOs attended).

⁴⁹ They are 'SAFE – Sound Advice for Functions and Events', 'Managing Volunteers: Balancing Risk and Reward' and 'Surviving a Crisis: Practical Strategies for Non profit Organisations'.

⁵⁰ Risk management plans will vary depending on the nature of the NFPO and the type of events they hold.

⁵¹ These organisations include *Riding for the Disabled* (in all states and territories aside from Victoria), *Playgroups NSW* – one policy covers 1200 playgroups throughout NSW, *Regional Arts NSW* – covers nearly 100 individual groups, *Defence Community Australia* – covers nearly 50 individual groups, *Australian Miniature Pony Society* – covers group activities in all States and Territories, *Soroptimist International of Western Australia* – one policy covers all branches in WA, *Scouts NSW Hall Hirers* – provides cover to all casual hirers of NSW Scout halls, *Girl Guide – NSW, Victoria, Tasmania and WA*, *Bluey's Day Foundation* – covers National Shave Day events in all states and territories.

- 5.31 In response the ACCC received submissions from eight interested parties. Five supported the Applicants' request for re-authorisation, two objected to it while another was equivocal on the matter.
- 5.32 Complete copies of all public submissions are available on the ACCC's website, <www.accc.gov.au>. A summary of the main issues raised by interested parties is provided below.
- 5.33 Aradley Insurance Brokers P/L (Aradley) strongly objects to the CCUA's substantive application for re-authorisation. It submits that circumstances have changed in the public liability insurance market since the late 1990s and early 2000s – including legislative reforms, increased entry/competition and a fall in premium rates. Aradley submits that, in these circumstances, the continuation of the CCUA co-insurance pool unfairly prejudices other participants in the market. For these reasons, Aradley considers that there is no justifiable public benefit in allowing the CCUA co-insurance pool arrangement to continue.
- 5.34 The ACCC received one submission for which confidentiality was granted. Broadly, this submission argues that the application should be rejected. This submission agrees that when the original authorisation was granted there was a 'crisis' brought on by a number of key events, although it notes that the general insurance industry, (and, in particular, public liability insurance for NFPOs) has changed considerably since then and that the concatenation of events that caused the 'crisis' is most unlikely to be repeated. This submission also argues that there is no distinguishable public benefit that the co-insurance pool provides that its participants, acting individually, cannot (and do not) provide. On the detriment side, this submission argues that the co-insurance pool allows three major insurance players in the Australian market to act in collusion in relation to the NFPO sector, and further, tends to act as an exclusionary force for brokerage services.
- 5.35 Volunteering Australia believes that for the co-insurance pool to continue its operations, certain public benefits should be sufficiently evident to outweigh concerns that Applicants will continue to enjoy the market share generated by the joint agreement, despite competition opening up in the market.
- 5.36 Westpool (which the ACCC understands is a pooling arrangement by seven NSW regional councils for the supply of public liability and professional indemnity insurance) supports the application for re-authorisation. It notes that the co-insurance pool has provided an affordable alternative for NFPOs that either use its council facilities or provide services to its community groups and NFPOs.
- 5.37 The Local Government Association of Queensland Inc (LGAQ) strongly supports initiatives that seek to provide affordable public liability insurance to NFPOs. It notes that CCUA provides an additional option for NFPOs seeking insurance cover, and submits that there does not appear to be evidence that CCUA's

operations have been a barrier to other insurers entering or re-entering the market. On this basis, LGAQ has no objection to the application for re-authorisation.

- 5.38 TIO Insurance and Banking (TIO) considers it clear that the co-insurance pool has filled an important community need in certain parts of Australia. TIO also submits that it would be 'unfortunate' for the community if the CCUA's efforts came to a stop, and further, that it would be unsettling and inconvenient for insured groups to have to make new arrangements so soon after entering the scheme. As a result, the TIO supports the re-authorisation of the arrangements, although for a period of three years rather than five.
- 5.39 The Department of Family and Community Services (FaCS) submits that while it does not have specific quantitative data on this issue, anecdotal evidence is that some NFPOs are still experiencing difficulties in accessing affordable insurance cover. On this basis, FaCS is supportive of the application.
- 5.40 The Australian Council for the Arts supports the application based on its belief that the public benefits arising from the co-insurance pool are significant.

6 Statutory provisions

- 6.1 Under section 91C of the Act, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party. The ACCC may also institute an application for revocation and substitution in certain circumstances.
- 6.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

The statutory tests

- 6.3 In assessing an application made under section 91C of the Act, the relevant tests that the Applicants must satisfy for the substitute authorisation to be granted are outlined in sections 90(6), 90(7) and 90(8) of the Act.
- 6.4 Under section 90(6) of the Act, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned were given effect to.
- 6.5 Under section 90(7) of the Act, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract arrangement or understanding.
- 6.6 Section 90(8) provides that the ACCC shall not make a determination granting authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all circumstances that the provision has resulted, or is likely to result in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

Application of the tests

- 6.7 There is some variation in the language particularly between the tests in sections 90(6) and 90(7) and that in section 90(8) of the Act.
- 6.8 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same.⁵² In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition but that the test under section 90(8) was not so limited.
- 6.9 However, the Tribunal has previously stated that with respect to the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁵³
- 6.10 Consequently, when applying either test, the ACCC can take all public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 6.11 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is applicable to section 90(7) also.
- 6.12 In many authorisation applications, all detriments likely to result from the conduct appear to arise from a lessening of competition. The ACCC considers this to be the case in this matter.

Definition of public benefit and public detriment

- 6.13 Public benefit is not defined by the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵⁴
- 6.14 Similarly, public detriment is not defined by the Act but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

⁵² *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

⁵³ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty. Ltd. and Amatil Ltd. for review* (1981) ATPR 40-200 at 42,763, 42766.

⁵⁴ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this in *Qantas Airways Limited* [2004] ACompT9.

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵⁵

Future with-and-without test

- 6.15 The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation is sought.
- 6.16 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is often referred to as the counterfactual.

Term of authorisation

- 6.17 Section 91(1) of the Act allows the ACCC to grant authorisation for a specific period of time.
- 6.18 The ACCC may authorise different aspects of conduct for which authorisation is sought for different periods.

⁵⁵ Ibid., 42683.

7 ACCC evaluation

The relevant markets

- 7.1 The first step in assessing the public benefits and detriments of the conduct for which authorisation is sought is to consider the relevant market or markets in which that conduct occurs. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise, regardless of the scope of the defined market.
- 7.2 In their latest application, the Applicants submit that the appropriate market through which to consider the proposed arrangements is the 'national market for public and product liability insurance'.
- 7.3 The ACCC has not reached any conclusion on the ability of an insurance company supplying one type of insurance product to diversify its product range and supply other types (supply side substitutability). However, the ACCC notes that the different types of insurance products are generally not substitutable from the point of view of an organisation/person seeking insurance for a specific event, activity or property item (demand side substitutability). The ACCC also notes that public and product liability insurance are typically sold in a package by insurance companies, and that it is the general practice of insurers to offer public and product liability insurance on a national basis (and that licensing of providers is on a national basis).
- 7.4 For these reasons, the ACCC considers that the appropriate market to consider the proposed arrangements is the 'national market for public and product liability insurance' while noting that the market may be broader than this due to supply-side substitutability.

The counterfactual

- 7.5 As outlined in section 5 of this draft determination, the ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and detriment generated by arrangements for which authorisation has been sought.
- 7.6 Under this test, the ACCC compares the public benefit and detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.
- 7.7 In its 2004 determination, the ACCC considered that the most likely counterfactual in the short to medium-term was the market without the CCUA co-insurance

arrangements in place (the 'status quo' at that time).⁵⁶ In reaching this view, the ACCC noted that a number of features of the proposed arrangements, including exclusionary provisions and agreements between competitors, may have substantially lessened competition. Therefore, in the absence of authorisation, the ACCC was of the view that the Applicants would be at risk of breaching the Act, and were therefore unlikely to engage in the proposed conduct. Further, the ACCC expressed the view that based on the submissions received from interested parties, the status quo meant that certain NFPOs would likely continue to face difficulties in obtaining public liability insurance in the short to medium term.

- 7.8 The ACCC considered that the counterfactual for the longer term was less easily identifiable. In particular, when the last application for authorisation was considered, a number of reviews were being conducted, and a range of initiatives were being introduced by both industry and Government in an attempt to alleviate the perceived 'insurance crisis'. Accordingly, the ACCC considered that if authorisation was not granted the difficulties experienced by NFPOs in obtaining public liability insurance would be unlikely to continue, at least to the same extent.
- 7.9 The ACCC also noted that it is generally accepted that the insurance business is cyclical in nature, and that following a series of unusual events, the Australian market was then in a 'hardened' phase. The ACCC observed that the normal business cycle could see the market soften at some point, though it would be difficult to predict exactly when this would occur and what the market would look like.
- 7.10 As outlined in paragraphs 4.47 to 4.52, the ACCC is of the view that the market conditions in the Australian insurance sector have 'softened' since interim authorisation was first granted in 2002, and since authorisation was granted in 2004 with increased market entry and reductions in premium rates. This suggests that, as compared to when authorisation was originally granted, it is now easier for NFPOs to source public liability insurance at reasonable rates from the market. Moreover, the ACCC notes that these 'softening' market trends are forecast to continue in the short to medium term.
- 7.11 Despite amendments to the joint venture agreement, it is the ACCC's view that the arrangements continue to raise concerns under the Act. In light of this, the ACCC considers the most likely counterfactual in the short to medium term would be the market without the operation of the CCUA co-insurance pool, given that the arrangements would otherwise risk breaching the Act. Instead, absent the arrangements and allowing for the possibility of a period of transition, each Applicant would individually choose whether or not it wanted to supply public liability insurance to NFPOs currently supplied by the co-insurance pool, and may unilaterally decide not to in certain circumstances.

⁵⁶ In this case, the 'status quo' meant the situation without interim authorisation (first granted by the ACCC on 28 November 2002).

- 7.12 Based upon the submissions from the Applicants, submissions from interested parties and other available information, it is the ACCC's view that, absent authorisation, most NFPOs that currently have public liability insurance would continue to be able to source this from the one of the Applicants individually, or another insurance company.
- 7.13 In the longer term, the ACCC considers that the counter-factual is less easily identifiable. This is because the ability of NFPOs to obtain affordable public liability insurance in the longer term will be, to some extent, influenced by unpredictable market forces. This includes the possibility that the market for public and product liability insurance could be exposed to external shocks which lead to a 'hardening' of market conditions, therefore making it relatively more difficult for NFPOs to gain affordable cover.
- 7.14 However, the ACCC is of the view that the collection of factors that conspired to cause the previous 'crisis' in the area of public liability insurance are unlikely to be repeated to the same effect. This is due to the potential longer term influence of reforms to prudential standards in the Australia insurance market which have been designed to safeguard the industry, as far as possible, from future crises. It is also potentially due to the longer term impact of Government and industry initiatives introduced with the aim of improving the availability and affordability of public liability insurance for NFPOs.

Public detriment

- 7.15 The Applicants are seeking re-authorisation for a joint venture agreement to supply public liability insurance to NFPOs through the CCUA co-insurance pool that is governed by a joint venture agreement. As part of that joint venture agreement, the Applicants will agree not to pay any commission to brokers that place NFPOs with CCUA. Notably, however, under the amended joint venture agreement, each Applicant is free to individually supply public liability insurance to NFPOs.
- 7.16 In general, it is the ACCC's view that the grouping together of competitors to act as a collective supplier is likely to be of significant concern when the actions of the collective are not constrained, or significantly influenced, by competitive forces which would otherwise act to prevent the development of monopolistic conditions.
- 7.17 In considering the effect of the proposed CCUA co-insurance pool on competition, it is relevant to consider:
- the extent of competition from existing insurance companies;
 - the scope for new entry; and
 - countervailing power exercised by insurance brokers.

Competition from existing insurance companies

- 7.18 During consideration of the original application for authorisation, the ACCC was of the view that, irrespective of the existence of the CCUA co-insurance pool, the

level of competition within the market for the supply of public liability insurance was limited. The ACCC considered that the ability of the Applicants to form a co-insurance pool to offer public liability insurance to NFPOs would further concentrate the market. As such, the ACCC was concerned that the ability of existing market participants to act as a constraint upon the conduct of the CCUA co-insurance pool was likely to be limited.

- 7.19 With respect to the current application, the ACCC notes that two interested parties have raised concerns that the arrangements will allow three 'major' insurance players in the Australian market to gain a market advantage which would inhibit competition. However, the ACCC considers that the ongoing operation of the co-insurance pool is likely to result in limited anti-competitive detriments. The ACCC has reached this view for four main reasons.
- 7.20 First, the level of competition within the market for the supply of public and product liability insurance appears to have increased since substantive authorisation was granted in 2004, and even more so since interim authorisation was first granted in 2002. This has led one interested party (which argues that re-authorisation should be denied) to claim that 'competition in this segment has never been higher'.⁵⁷ In particular, the ACCC notes evidence that there are now approximately 20 insurers writing public liability insurance for NFPOs in Australia, compared to 11 at the time when the original application for authorisation was lodged. There is also evidence of premium rates for public liability insurance decreasing in 2005, and expectations of further reductions in 2006. This evidence would tend to suggest that, as compared to when authorisation was originally granted, the ability of existing market competitors to exert a competitive constraint on the conduct of the CCUA co-insurance pool has improved.
- 7.21 Second, the information available to the ACCC suggests that the market for 'public and product liability insurance' is not highly concentrated. Company-specific information provided to the ACCC as part of its latest monitoring report (July 2005) with respect to the public liability and professional indemnity sectors indicated that the four insurers with the largest market share (based on revenue) earned 48 per cent of total public and product liability revenue in 2004. Further, confidential information provided by the Applicants suggests that their combined share of the market for public liability insurance is substantial.
- 7.22 Third, the ACCC notes that the supply of public liability insurance to NFPOs represents only a subset of the total public liability insurance business conducted by insurance companies. Anecdotal information provided by the Applicants on a confidential basis indicates that NFPO business represents a relatively modest proportion of the total liability insurance business written in Australia. This suggests that the proposed arrangements will not impact on the overwhelming majority of the market within which public liability insurance is supplied.

⁵⁷ Aradley submission, p. 2.

Moreover, the Applicants have also provided confidential information which indicates that the public liability insurance premiums written by the co-insurance pool itself was a very small percentage of total liability premiums written in the 2005 calendar year.

- 7.23 Finally, the ACCC notes that the proposed amendment to the joint venture agreement means that each party to the agreement is now free to compete against the CCUA co-insurance pool on an individual basis. The Applicants have provided anecdotal evidence that the parties to the co-insurance pool currently 'can and do' write public liability insurance, including for NFPOs, in competition with the co-insurance pool. The Applicants therefore submit that the co-insurance pool effectively provides 'an additional player in the market, which is specifically focused on providing insurance to NFPOs, and has developed its own systems to do this'.
- 7.24 The ACCC does not necessarily agree with the argument that the proposed arrangements will lead to an additional fully-fledged competitor in the market, given that they involve three large existing market participants acting collectively in some instances. However, the ACCC accepts that in certain cases each Applicant is likely to have a commercial incentive to *not* refer profitable NFPO business to the co-insurance pool. As such, the ACCC is of the view that the amendment to the joint venture agreement significantly reduces any anti-competitive effects associated with the proposed arrangements.
- 7.25 That said, notwithstanding this, the joint venture agreement does provide for three major insurers to agree on the price and other terms and conditions on which public liability insurance will be collectively provided to some NFPOs by them. Therefore, while under the arrangements, as amended, each of the Applicants is able to compete against the co-insurance pool, they will be doing so in the context where they are also collectively agreeing on the terms on which public liability insurance is provided to some NFPOs.
- 7.26 Consequently, there is some potential that the terms on which public liability insurance is offered by the insurers individually to an NFPO may be guided by the collectively agreed terms on which it is offered to that, or other like, NFPOs. To the extent that this did occur, this would limit the extent to which the amendment to the joint venture agreement serves to promote competition from each of the Applicants acting individually against the co-insurance pool.
- 7.27 Overall, the ACCC considers that the ability of the existing market participants to act as a constraint on the conduct of the co-insurance pool has improved significantly since authorisation was last considered. Further, the ACCC considers that the amendment to the joint venture agreement to allow each of the Applicants to write public liability insurance for NFPOs individually may also reduce the anti-competitive detriment generated by the arrangements for NFPOs in certain cases.

Scope for new entry

- 7.28 In lodging their original application for authorisation of the CCUA co-insurance pool arrangements, the Applicants submitted that there were no significant barriers to entry for insurance companies wishing to enter the market from within or outside Australia.
- 7.29 In its final determination, the ACCC indicated that it was concerned about the short-term capacity of insurers to enter the market and act as a competitive constraint upon the activities of the CCUA co-insurance pool. The ACCC also noted that, whilst the features of public liability insurance may create natural barriers to entry (particularly in a ‘hardened’ market), it was concerned that the increased market concentration resulting from the proposed agreement may, of itself, have the effect of increasing barriers to entry.
- 7.30 In support of their current application, the Applicants re-affirm their view that there are no significant barriers to insurance companies seeking to enter the market. The Applicants believe this has been confirmed by the fact that the Calliden Group Limited entered the market in April 2005 with a view to focusing on providing customised insurance solutions for the SME sector, which comprises NFPOs. In addition, the Applicants consider that the amendment to the joint venture agreement to allow each participant to write public liability insurance for NFPOs individually means that the co-insurance pool arrangement does not, of itself, have the effect of increasing barriers to entry, but rather has created an additional player in the market.
- 7.31 In general terms, the ACCC is of the view that entry into the market for public and product liability insurance by new competitors (including the threat of credible entry) can act as a competitive constraint on the conduct of the CCUA co-insurance pool. Such entrants may be new providers or existing domestic or international insurance market participants who have elected to broaden their portfolio.
- 7.32 As noted previously, the information available to the ACCC suggests that the market for the supply of public and product liability insurance appears to have ‘softened’ substantially since authorisation was last granted, and is predicted to continue to ‘soften’ in the short to medium term. The ACCC also notes that a number of reforms implemented since the ‘crisis’ in liability insurance, including prudential reforms, legal reforms and the establishment of the NCPD database, may have had a positive impact on the greater stability in the insurance sector since authorisation was last granted.
- 7.33 In light of, in particular, reforms providing for greater availability of market data, the ACCC considers that it possible that potential entrants to this market, and their actuaries, are better able to assess the risks associated with the provision of public liability insurance to particular clients, and to set appropriate claims reserves and premium rates. Therefore, while public and product liability insurance could still

be described as 'fat' and 'long' tailed in nature⁵⁸, the ACCC considers it possible that potential entry into this market is now more likely to now occur on its economic merits.

- 7.34 Further, the ACCC considers that it has not received sufficient evidence to conclude that the CCUA co-insurance pool itself is operating as a barrier to entry in this market.

Countervailing power exercised by insurance brokers

- 7.35 An important issue raised during the original consideration of the CCUA co-insurance pool arrangements was whether brokers exercised countervailing power over the co-insurance pool. At that time, the National Insurance Brokers Association (NIBA) submitted that over 90 per cent all public liability insurance was placed through NIBA members, and provided anecdotal evidence that a high proportion of NFPOs obtained public liability insurance with the assistance of brokers.
- 7.36 The Applicants submitted that brokers were able to exert countervailing power through the aggregation of insureds, enabling them to obtain preferential terms and conditions for their clients. In turn, the Applicants submitted that this would act to constrain the pricing decisions of the CCUA co-insurance pool, thereby reducing the potential for anti-competitive detriment.
- 7.37 However, the ACCC noted that terms of the original joint venture agreement provided that the agent of the CCUA co-insurance pool must not pay, or agree to pay, commission (or any other form of benefit) to brokers. It was also noted that the CCUA co-insurance pool arrangements would not allow the issuing of a pre-payment 'cover note', meaning that cover would not be provided until the premium was paid in full.
- 7.38 Based on this information, the ACCC concluded that, to the extent that the co-insurance pool arrangements had the effect of reducing the level of broker involvement in the market, the direct effect of the countervailing power exercised by broker would be reduced. The ACCC noted that brokers would still be able to indirectly exert a certain amount of countervailing power over the CCUA co-insurance pool if they were able to find suitable insurance for NFPO clients with other insurance providers. However, the ACCC indicated that the level of countervailing power could be limited due to the level of competition in the market at that time.
- 7.39 With respect to the current application for authorisation, the ACCC believes that the ability of brokers to exert countervailing power over the CCUA co-insurance

⁵⁸ It is 'fat tailed' in the sense that, although claims are generally not frequent, such claims tend to involve high payouts though this risk appears to have been mitigated somewhat by the 'capping' of damages and the review of the 'law of negligence'. It is 'long tailed' as many years may elapse between the date the incident occurred and the final settlement of the claim.

pool is likely to have increased since authorisation was originally granted. The ACCC has reached this view for two main reasons.

- 7.40 First, as noted previously, the level of competition in the market for public and product liability insurance has increased since authorisation was originally granted. This suggests that in searching for the best deal for their NFPO clients, brokers are now able to seek quotes from a wider array of alternative competitors to the CCUA co-insurance pool. To the extent that these alternative suppliers are prepared to pay broker commissions, this would tend to increase the level of countervailing power that can be exercised by brokers.
- 7.41 Second, the amendment to the joint venture agreement to allow the individual parties of the co-insurance pool to write public liability insurance for NFPOs individually, further contributes to the level of countervailing power that can potentially be exercised by brokers. This is because when supplying public liability insurance individually there is no constraint on each of the Applicants ability to pay broker commissions. Therefore, to the extent that brokers are able to place their NFPO clients with any of the Applicants, outside the co-insurance pool, this is likely to (all other things being equal) increase the level of broker involvement in this market.
- 7.42 However, in addition to any countervailing power they may be able to exercise in their dealing with insurers through the aggregation of insureds, brokers often play another important role in the market. Generally, a broker will be more fully informed about the market for the supply of public liability insurance than an NFPO sourcing insurance directly. Therefore, generally speaking, brokers are likely to be in a better position to identify and negotiate the best possible terms for an NFPO than would the NFPO acting independently, albeit at a cost. Essentially, brokers act as intermediaries assisting insureds to obtain insurance on the best possible terms.
- 7.43 Accordingly, to the extent that the agreement by the Applicants not to pay brokers commissions in respect of policies written by the co-insurance pool does reduce the role of brokers in the market, this would continue to generate a public detriment.

Conclusion on anti-competitive detriment

- 7.44 For the reasons discussed above, it is the ACCC's view that the CCUA co-insurance pool arrangements are likely to have limited anti-competitive effects in the market for the supply of public and product liability insurance in Australia. In particular, the ACCC considers that increased competition from other insurance companies, an improved environment for market entry and an increase in the countervailing power of brokers is likely to significantly limit any ongoing anti-competitive effects. In addition, the ACCC considers that the amendment to the joint venture agreement may also reduce the level of anti-competitive detriment in that the Applicants are now not prevented from competing against each other for NFPO business, and in some cases may have a commercial incentive to do so.

- 7.45 However, the extent to which the Applicants will compete against each other for NFPOs business is unclear given that it will remain the case that they will continue to set the terms of supply for some NFPOs collectively which may affect the terms on which they offer such insurance individually.
- 7.46 Further, to the extent to which the agreement by the Applicants not to pay brokers commissions in respect of business written by the co-insurance pool reduces the role of brokers in the market, this may also generate some public detriment.

Public benefit

- 7.47 To grant authorisation the ACCC must be satisfied that the anti-competitive detriment is outweighed by the benefits to the public arising from the proposed conduct. The Applicants submit that a number of public benefits are likely to flow from the granting authorisation to the proposed arrangements. The ACCC's consideration of these claims is set out below.
- 7.48 As a preliminary matter, however, the ACCC continues to recognise the importance of the services provided by NFPOs to the Australian community. It is the ACCC's view that there is a clear benefit to the public in ensuring that such services continue to be offered and that the availability of affordable public liability insurance is important to ensuring that this is the case.

Greater availability of cover for NFPOs

- 7.49 In considering the original application for authorisation, the ACCC accepted that, given the state of the insurance market at that time, the granting of authorisation would be likely to result in an improvement in the general availability of public liability insurance to NFPOs. The ACCC also considered that authorisation would likely improve affordability to the extent that the agreement not to pay broker commission was passed through to NFPOs in the form of lower premiums.
- 7.50 In support of the current application, the Applicants submit that while public liability premiums have reduced for commercial and corporate clients since the arrangements were originally authorised, this is true to a lesser extent for NFPOs. Therefore, they consider that while the market has 'softened' to an extent, there is a continuing need for the CCUA co-insurance pool arrangement because it allows them to distribute the risk of claims being made which, in turn, makes it more economically viable for them to offer this type of insurance. The Applicants submit that public liability insurance will therefore continue to be available to certain types of NFPOs which had previously been unable to obtain cover, or had to cancel events because of the high cost of cover.⁵⁹
- 7.51 Some interested parties have questioned the basis for this argument. In particular, one submission considers that there is now sufficient capacity in the local and overseas insurance markets to provide cover for all risks, and that all NFPOs can

⁵⁹ A list of such NFPOs was provided by the Applicants and is summarised in footnote 45 above.

now get reasonably affordable insurance. It was also argued that the ‘quantity’ of individual risks in this sector is usually not significant and the diversification benefit arises from insuring a ‘number’ of risks, not from the ‘sharing’ of risks as argued by the Applicants.

- 7.52 In considering the current application, the ACCC considers that the key question is whether the availability of public liability insurance for NFPOs would be better promoted with or without the proposed arrangements. In this context, the ACCC considers that the issue of the ‘affordability’ is integral to a consideration of availability. This is because, due to funding limitations, many NFPOs are unable to respond to rapid increases in the level of premiums, such as those that occurred in the early 2000s. Therefore, whether an NFPO can access public liability insurance often depends not only on whether they can obtain a quote, but whether this quote is reasonably within its financial limitations.
- 7.53 There appears to be a general level of consensus that the market has ‘softened’ since authorisation was last granted with increased competition and evidence of falling premium rates. That said, the Applicants have provided anecdotal evidence that public liability premium rates for NFPOs specifically have not fallen as dramatically as for other types of clients, and that some NFPOs are still experiencing difficulties in accessing affordable public liability insurance cover.
- 7.54 The ACCC considers that the current market conditions suggest that most (if not all) NFPOs would now be able to access public liability insurance in the absence of the CCUA co-insurance pool arrangements. This suggests that whether the proposed arrangements are authorised or not may not greatly impact on the general availability of this type of cover for most, if not all, NFPOs.
- 7.55 However, a key consideration in this context is whether the proposed arrangements serve any beneficial purpose in terms of improving the availability of public liability insurance for certain ‘less profitable’ NFPO risks. A related consideration is whether the proposed arrangements are likely to improve the affordability of public liability insurance for certain NFPOs.
- 7.56 The ACCC notes the Applicants claim that the proposed arrangements will enable them to distribute between them the risk of claims being made, making it more economically viable to offer public liability insurance to certain NFPOs. The ACCC also notes the Applicants claim that the exclusion of broker commissions (which at the time of the original application were claimed to average between 15 – 20 per cent of net premiums) enables them to supply public liability insurance to NFPOs at the lowest possible price.
- 7.57 In principle, the ACCC agrees with the proposition put by one interested party that the diversification benefit in the public liability sector (and the insurance sector more generally) is likely to result from insuring a *number* of risks rather than a sharing agreement *per se*. That said, given information that the number of risks in this sector is relatively low anyway, it is possible that the sharing of risks becomes

more important in the context of this market. Therefore, at the margin, it could be the case that some NFPOs are more likely to be able to obtain, or retain, public liability insurance given the ongoing existence of the co-insurance pool.

- 7.58 In particular, if the number of NFPOs subject to the co-insurance pool arrangements were to shrink significantly such that the diversification benefits flowing from insuring a 'number' of risks was reduced, then the sharing of such risks per se may become more important to the terms on which cover is provided to those NFPOs remaining within the co-insurance pool.
- 7.59 In this sense, it is therefore possible that the co-insurance pool could act as a type of 'safety net' for those NFPOs that may find it difficult to obtain public liability insurance from the market players on an individual basis. However, neither the applicant or interested parties, including customers of the co-insurance pool, provided any specific evidence in support of this claim.
- 7.60 Moreover, in certain circumstances, the co-insurance pool may be in a position to provide lower premiums to NFPOs relative to circumstances in which the co-insurance pool, or providers individually, would pay broker commission. Consequently, the proposed arrangements may improve affordability for NFPOs to the extent that the agreement not to pay broker commission is passed through to NFPOs in the form of lower premiums. Such a reduction in premiums could also be reflected in lower premiums offered by competitors of the co-insurance pool. Although, such a reduction in premiums would need to be weighed against any detriment generated by brokers having a reduced role in the market.
- 7.61 In this respect, the ACCC requested that the applicants provide evidence that public liability insurance provided by the co-insurance pool is cheaper than that which the Applicants individually, or the market more broadly, is able to provide. In response the Applicants noted:
- the 20% reduction in premiums offered to NFPO's who have acceptable risk management plans in place (as discussed in greater detail at paragraph 5.27);
 - the agreement for the co-insurance pool not to pay brokers commission; and
 - discussions with some co-insurance pool customers had indicated that premiums offered by the pool are lower than quotes offered by other underwriters.
- 7.62 However, no specific evidence was provided which suggests that public liability insurance provided by the co-insurance pool is cheaper than that which the Applicants individually, or the market more broadly, is able to. Indeed, the fact that other market participants appear to be effectively competing against the co-insurance pool suggests that it is not significantly cheaper.
- 7.63 The ACCC also asked the Applicants to provide details of NFPOs currently insured by the co-insurance pool that would not be able to source public liability insurance from any of the applicants individually. In response, the Applicants did not

provide specific examples of NFPOs they considered would be unable to otherwise obtain cover. However, they did reiterate their argument that the co-insurance pool may quote on some risks that the Applicants individually may not because the pool arrangement allows them to distribute the risk of claims being made between them.

- 7.64 As noted, the ACCC considers that it is possible the co-insurance pool arrangements may increase the affordability and/or availability of public liability insurance to NFPOs. Indeed, this argument was accepted by the ACCC in authorising the arrangements in 2004. However, as also noted, market conditions have changes considerably since authorisation was first granted. In particular, there appears to have been a significant ‘softening’ in the market for the supply of public liability insurance, such that current market conditions suggest that most (if not all) NFPOs would now be able to access public liability insurance in the absence of the CCUA co-insurance pool arrangements. This suggests that whether the proposed arrangements are authorised or not may not greatly impact on the general availability of this type of cover for most, if not all, NFPOs.
- 7.65 Therefore, in the absence of any concrete evidence to the contrary at this stage, the ACCC does not consider, based on the available evidence, that the co-insurance pool arrangements are likely to significantly impact on the affordability and/or availability of public liability insurance to NFPOs in the current market environment. Consequently, the ACCC does not place great weight on this as a public benefit likely to flow from the arrangements. However, the ACCC would welcome any specific information which the Applicant, or other parties, are able to provide, which would substantiate a claim that the co-insurance pool does improve such affordability or availability.
- 7.66 In this respect, while such information was not available at the time the arrangements were first considered, as they were only just being entered into at that time, given that the arrangements have now been in place for almost four years, it would be expected that if the arrangements are resulting in increased affordability or availability, specific evidence of this would now be available.

Reduced reliance on government funding

- 7.67 The ACCC understands that many NFPOs obtain the funding necessary to enable them to provide services to the community from two main sources, being government funding or grants and through community support (including gifts, donations, and fundraising). Public liability insurance, as well as other operational necessities, must be secured using these funds.
- 7.68 In support of their original application, the Applicants submitted that as many NFPOs rely heavily on government funding and fundraising to maintain their services, the loss of fundraising opportunities due to the unavailability of public liability insurance would lead to an increased reliance on government funding or a reduction in services provided by the NFPO. In particular, the Applicants submitted that the proposed arrangement will enable NFPOs to maintain their

current services and reduce their need to approach governments for increased funding.

- 7.69 In its previous determination, however, the ACCC concluded that it was not convinced that the proposed arrangements would prevent the need for increased government funding should such a need be identified, and that it did not have sufficient information to suggest this would occur. Accordingly, the ACCC did not accept this claim as a public benefit flowing from the proposed arrangements.
- 7.70 In support of their current application, the Applicants have reiterated their view that the proposed arrangements will continue to allow certain NFPOs to maintain their current services and reduce the need for these organisations to approach governments for increased funding. However, the Applicants did not provide any further information in support of this claim.
- 7.71 Therefore, based on the available information, the ACCC maintains its view that it is not convinced that the proposed arrangements would prevent the need for increased government funding. Accordingly, the ACCC maintains its view that this should not be considered a public benefit flowing from the proposed arrangements. In any case, the ACCC's views as to whether the proposed arrangements will improve the affordability of public liability insurance for some NFPOs is discussed above. Accepting a reduced reliance on government funding as a public benefit flowing from the co-insurance pool would in effect, be double counting the same cost saving twice.

The protection afforded to NFPOs by Commonwealth Government legislation

- 7.72 The Applicants submit that there is a public benefit in allowing NFPOs to obtain cover from companies licensed in Australia because it affords them the protection of Commonwealth Government legislation which governs the conduct on these insurers. A similar argument was put forward by the Applicants in support of their original application.
- 7.73 In assessing this claimed public benefit, the ACCC has considered issues relating to prudential regulation and consumer protection. During its consideration of the current application, the ACCC has not received submissions on the issue of NFPOs sourcing public liability insurance from overseas insurers.
- 7.74 However, submissions in relation to the original application for authorisation indicated that some NFPOs, whether due to a general lack of availability, or a lack of affordability, obtained public liability insurance from foreign insurance companies. In particular, a submission from Our Community expressed concern that some NFPOs had obtained public liability insurance from obscure foreign insurers, and that, given NFPO resource constraints, these policies may have been

entered into without first completing a due diligence assessment (including recognition of the risk that claims made under the policy may not be met).⁶⁰

- 7.75 APRA had also expressed concern that some foreign insurers had elected to use lightly regulated jurisdictions as a base from which to distribute their products into countries with higher prudential requirements.⁶¹ In particular, APRA noted that such companies may target ill-informed consumers who buy purely on price without understanding the greater risk involved. For this reason, APRA was seeking to educate prospective policyholders as to these risks and in particular was encouraging prospective policyholders to check whether a locally unauthorised foreign insurer is licensed and regulated in its home country, and has the financial capacity to pay future claims.
- 7.76 The ACCC considers that there is a benefit in the prudential regulation of insurance companies in Australia and in Australian insureds being able to have claims under their policies met. To some extent, this may have been influenced by alterations to the prudential standards in Australia (discussed in paragraph 4.16) since the previous 'crisis' in public liability insurance.
- 7.77 However, while there may still be concern about Australian NFPOs, or indeed consumers more generally, obtaining insurance from unauthorised foreign insurers, the ACCC does not consider that the proposed co-insurance pool is likely to address this issue other than by providing an alternate local source of public liability insurance. In other words, the arrangements themselves will not prevent NFPOs from obtaining public liability insurance from insurers located in lightly regulated jurisdictions should they choose to do so.

Facilitating the education of NFPOs as insureds

- 7.78 In support of their original application, the Applicants submitted that the proposed arrangements would facilitate the education of NFPOs as insureds by providing a central information facility for risk management and advice on the cost implications of certain activities.
- 7.79 In support of their current application, the Applicants have reiterated these arguments and provided further evidence to support their case that the co-insurance pool facilitates NFPO education. Specifically, the Applicants submit that its risk management education program is far in excess of any such education program traditionally supplied by brokers. In this regard, the Applicants have referred to a number of workshops that have been conducted with a variety of stakeholders and the development (and prospective development) of a number of free publications

⁶⁰ Our Community Pty Ltd, 27 November 2002, at page 6.

⁶¹ *General Insurance Industry - The Supervisor's Perspective*, Australian Financial Review Insurance Summit 2002, Friday, 29 November 2002.

aimed at improving the education of NFPOs (and their staff) in this area.⁶² These initiatives were discussed in paragraph 5.26.

- 7.80 One interested party submission disputes the Applicants assertion that the risk management education provided by CCUA exceeds that available via brokers and other insurers. For example, this submission notes that certain brokers provide NFPOs with a free risk management system when they purchase insurance with them and that certain brokers organise and liaise with relevant peak bodies to improve NFPO education.
- 7.81 The ACCC is of the view that improved risk management may reduce the potential for NFPOs to suffer detriment caused by moral hazard and adverse selection on the part of insurers. In addition, it is the ACCC's view that measures aimed at improving NFPO risk management and providing NFPOs with improved information resources to enable them to identify the cost implications of certain activities are likely to be of benefit.
- 7.82 The ACCC understands, however, that brokers generally provide some of these services and information to clients, including NFPO clients. From one perspective, to the extent that the CCUA co-insurance pool arrangements reduce the level of broker involvement, the education services described by the Applicants might have simply replaced those traditionally provided by brokers.
- 7.83 On this issue, the ACCC notes the Applicant's view that its risk management education programs are 'far in excess of' those traditionally supplied by brokers and an interested party's view to the contrary. While the ACCC does not rule out the possibility that the risk management initiatives outlined by the Applicants are more extensive than those typically supplied by brokers, on the available evidence, it is unclear whether this is the case. As such the ACCC does not attach significant weight to this public benefit claim flowing from the arrangements.
- 7.84 The ACCC does consider that the 20 per cent reduction in premiums to NFPOs which have an acceptable risk management plan in place is likely to promote acceptable risk management practices, which is likely to be of benefit. However, in this respect, all providers of public liability insurance have an incentive to ensure that insureds have acceptable risk management plans in place, and all could be expected to offer insureds such incentives which are necessary to ensure this is the case.

Encouragement of collective purchasing arrangements

- 7.85 In support of their original application, the Applicants submitted that the central information facility flowing from the proposed arrangements would also enable the possible aggregation of NFPOs (collective purchasing arrangements) as purchasers of public liability insurance, which in turn, would result in cost savings. In support

⁶² The Applicants now offer a 20 per cent reduction of premium to NFPOs which have an acceptable risk management plan in place.

of the current application, the Applicants have reiterated this argument, noting that the proposed arrangements encourage discussion between the co-insurance pool agent (QBE) and peak bodies in an attempt to develop collective purchasing arrangements. The Applicants have also provided a list of those groups/organisations that currently undertake collective or 'aggregated' purchasing arrangements. These groups/organisations were listed in footnote 51.

- 7.86 It is the ACCC's view that the aggregation of buyers can reduce the transaction costs associated with supplying insurance, in particular through the use of a single representative allowing for efficiency-enhancing negotiations with insurers that are precluded when each NFPO has to be dealt with separately. The aggregation of buyers could also result in more effective incentives under joint buying from within the purchasing body's own ranks to take adequate care, most notably by reducing moral hazard, to keep premiums down.
- 7.87 That said, despite the Applicants providing a list of those groups it currently has aggregated arrangements in place with, the ACCC considers that it is unclear whether the proposed arrangements are, themselves, necessary for this type of collective purchasing to occur. That is, it is not clear why these type of collective purchasing arrangements could not be entered into by a group/organisation dealing with an insurance broker that also fulfils a type of function as an 'information facility' for those wishing to purchase insurance. Similarly, it is not clear why these types of agreements could not be entered into by groups/organisations with the parties to the co-insurance pool individually, or other insurance providers directly.
- 7.88 Accordingly, on the available evidence, the ACCC does not place great weight on this claim as a public benefit.

Avoiding cost of transition

- 7.89 As noted above, absent the arrangements, NFPOs that currently source public liability insurance from the co-insurance pool would be required to source alternative public liability insurance from either the Applicants operating individually, or through other market participants. The transition from the present arrangements to a market without the co-insurance pool would be likely to generate 'transition' costs for certain NFPOs.
- 7.90 It is difficult to speculate as to how significant these transition costs would be for NFPOs that currently source public liability insurance from the co-insurance pool. At the very least, they would involve the 'search costs' involved for NFPOs in finding a public liability quote commensurate with their current policy through the co-insurance pool.
- 7.91 Therefore, the ACCC considers that there may be a public benefit in maintaining the present arrangements to the extent that this avoids the costs that would otherwise be incurred in NFPOs currently sourcing public liability insurance from the co-insurance pool having to do so through other providers.

- 7.92 However, costs incurred in the transition to new public liability insurance providers would be 'one-off' costs. As such, the benefit of avoiding these costs would need to be weighed over the life of the co-insurance pool arrangements.

Conclusion on public benefits

- 7.93 It is the ACCC's view that the co-insurance pool arrangements could result in a limited public benefit, by acting as a type of 'safety net' for those NFPOs that cannot source public liability insurance from insurance companies acting individually and, to the extent that the agreement not to pay broker commissions is passed through in the form of lower premiums, improve the affordability of public liability insurance for NFPOs. However, market conditions have changed considerably since authorisation was first granted to the arrangements. In particular there has been a significant 'softening' in the market for the supply of public liability insurance which suggests that the co-insurance pool may not greatly impact on the availability and affordability of such insurance to NFPOs. In this respect, the Applicants have not provided specific evidence which establishes that the co-insurance pool would significantly impact on the availability or affordability of such insurance for NFPOs in the current market environment. Consequently, on the basis of the information currently before it, the ACCC does not place great weight on this as a public benefit likely to flow from the arrangements.
- 7.94 While the ACCC does accept that the continuation of the co-insurance pool will mean that NFPOs currently sourcing insurance from it will avoid the one-off transition costs of moving to new insurance providers, it does not consider this public benefit to be significant.

Balance of public detriment and benefit

- 7.95 The ACCC may only re-authorise arrangements if it is satisfied that, in all the circumstances, the arrangements are likely to result in a public benefit that will outweigh any public detriment.
- 7.96 The ACCC considers that changes to the market and to the joint venture agreement have significantly reduced both the detriments and benefits generated by the arrangements.
- 7.97 As indicated above, the ACCC is of the view that the CCUA co-insurance pool arrangements are likely to have limited anti-competitive effects in the market for the supply of public and product liability insurance in Australia. In particular, the ACCC considers that increased competition from existing insurance companies, an improved environment for market entry and an increase in the countervailing power of brokers is likely to significantly limit any ongoing anti-competitive effects. In addition, the ACCC considers that the amendment to the joint venture agreement may also reduce the level of anti-competitive detriment in that the Applicants are now not prevented from competing against each other for NFPO business, and in some cases may have a commercial incentive to do so.

- 7.98 However, the extent to which the Applicants will compete against each other for NFPOs business is unclear given that it will remain the case that they will continue to set the terms of supply for some NFPOs collectively which may affect the terms on which they offer such insurance individually.
- 7.99 Further, to the extent to which the agreement by the Applicants not to pay brokers commissions in respect of business written by the co-insurance pool reduces the role of brokers in the market, this may also generate some public detriment.
- 7.100 The ACCC considers that the 'softening' of the market for the supply of public liability insurance since authorisation was first granted suggests that the co-insurance pool may not greatly impact on the availability and affordability of such insurance to NFPOs. In this respect, the Applicants have not provided specific evidence which establishes that the co-insurance pool would significantly impact on the availability or affordability of such insurance for NFPOs in the current market environment. Consequently, on the basis of the information currently before it, the ACCC does not place great weight on this as a public benefit likely to flow from the arrangements.
- 7.101 While the ACCC does accept that the continuation of the co-insurance pool will mean that NFPOs currently sourcing insurance from it will avoid the one-off transition costs of moving to new insurance providers, it does not consider this public benefit to be significant.
- 7.102 On balance, the ACCC is not satisfied, on the basis of the information currently before it, that ongoing authorisation of the co-insurance pool arrangements is likely to result in a public benefit that will outweigh any public detriment.
- 7.103 However, the ACCC would welcome any specific information which the Applicant, or other parties, are able to provide, which would substantiate a claim that the co-insurance pool does significantly improve affordability or availability of public liability insurance to NFPOs. While such information was not available at the time the arrangements were first considered, as they were only just being entered into at that time, given that the arrangements have now been in place for almost four years, it would be expected that if the arrangements are resulting in increased affordability or availability, specific evidence of this would now be available. If such information was forthcoming the ACCC may be more convinced in relation to benefits of substance in support of the application.
- 7.104 In this respect, the ACCC will now seek further submissions from the Applicant and interested parties. In addition, the applicant or any interested party may request that the ACCC hold a pre decision conference to discuss the draft determination, pursuant to section 90A of the Act.
- 7.105 While not satisfied at this time, based on information before it, that ongoing authorisation of the co-insurance pool arrangements will be likely to result in a public benefit that will outweigh any public detriment, the ACCC notes that many NFPOs are currently supplied public liability insurance by the co-insurance pool.

While satisfied that absent arrangements, these NFPOs would be able to find alternative insurance coverage, the ACCC notes that for many NFPOs sourcing alternative public liability insurance may take some time potentially leaving some NFPOs without cover in the short term.

- 7.106 In effect, the terms of the interim authorisation granted by the ACCC on 1 February 2006 allow the applicants to continue to write new annual business through the co-insurance pool, and accept renewals, up until the date of the ACCC's final determination, and to give effect to annual policies written up until the time of the ACCC's final determination for their duration. While not proposing to grant ongoing authorisation the ACCC does consider that there are public benefits in granting authorisation for a transition period so as to allow NFPOs currently sourcing public liability insurance from the co-insurance pool to put in place alternative arrangements.
- 7.107 However, if re-authorisation of the arrangements is denied, no new annual policies will be able to be written or renewed after the date that the ACCC's final determination comes into effect.
- 7.108 While not proposing to grant ongoing authorisation the ACCC does consider that there are public benefits in granting authorisation for a transition period so as to allow NFPOs currently sourcing public liability insurance from the co-insurance pool to put in place alternative arrangements.
- 7.109 Therefore, the ACCC proposes to revoke authorisations A30217 and A30218 and grant substitute authorisations to the Applicants in respect of the joint venture arrangements which govern the operation of the CCUA co-insurance pool to:
- continue to write or renew policies up until 31 December 2006; and
 - give effect to any policies until 31 December 2007.
- 7.110 In effect, this will allow annual policies to continue to be written by the co-insurance pool up until 31 December 2006, and for these policies to be given effect to for their duration. Existing annual policies expiring after 31 December 2006 will also be able to be given effect to for their duration, although they will not be able to be renewed by the co-insurance pool. However, in these cases, NFPOs will have sufficient notice of this to put in place alternative arrangements.

8 The draft determination

The applications

- 8.1 On 22 December 2005, Allianz Australia Insurance Limited (Allianz), QBE Insurance (Australia) Limited (QBE) and NRMA Insurance Limited (NRMA) – together the ‘Applicants’ – lodged an application for the revocation of authorisation A30217 and A30218 and substitution of a replacement authorisation under section 91C and sub-section 88(1) of the *Trade Practices Act 1974* (Act).
- 8.2 The Applicants are seeking authorisation of an unincorporated joint venture agreement – operating through an agent and trading as Community Care Underwriting Agency (CCUA) – for the collective supply of public liability insurance to eligible ‘not for profit organisations’ (NFPOs) through a ‘co-insurance pool’. The ACCC originally authorised the joint venture arrangement on 24 March 2004. This authorisation is due to expire on 31 December 2006.
- 8.3 The substantive difference with the current application is set out by the Applicants in their ‘Amended Agreement to Joint Venture Agreement’ as follows:

The Participants agree to delete Clause 3.11 of the Joint Venture Agreement in its entirety.

Clause 3.12 of the Joint Venture Agreement is amended to provide as follows:

“The Participants acknowledge that each of the Participants may provide insurance similar to a Contract of Insurance to any NFPO or any other body which is not a NFPO under this Agreement.

- 8.4 The Applicants are seeking immunity from legal action under the Act in respect of the joint venture agreement for a period of five years.
- 8.5 On 1 February 2006, the ACCC granted interim authorisation to the arrangements for the period 1 January 2007 until 12 months after the ACCC issues a final determination in respect of the substantive applications (unless circumstances warrant revocation or amendment of the interim authorisation at an earlier stage).

Statutory test

- 8.6 For the reasons outlined in this draft determination, the ACCC is not satisfied that in all the circumstances, the conduct for which authorisation is sought under subsection 88(1) of the Act in respect of provisions which would be or might be exclusionary provisions would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to (A90997).
- 8.7 For the reasons outlined in this draft determination, the ACCC is not satisfied that, in all the circumstances, the conduct for which authorisation is sought under

section 88(1) of the Act in respect of provisions which would have the purpose or would have or might have the effect of substantially lessening competition within the meaning of section 45 of the Act would be likely to result in a benefit to the public and this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding (A90998).

- 8.8 The ACCC considers, however, that it is in the public interest to grant a transitional period of authorisation to the CCUA with respect to the co-insurance pool.
- 8.9 Accordingly, the ACCC proposes to revoke authorisations A30217 and A30218 and to grant substitute authorisations A90997 and A90998 to the Applicants in respect of the joint venture arrangements which govern the operation of the CCUA co-insurance pool to:
- continue to write or renew policies up until 31 December 2006; and
 - give effect to any policies until 31 December 2007.

Further submissions

- 8.10 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.