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Civil liability on the political agenda in 2002

At the end of 2001 and early in 2002, headline after headline alerted Australians of a crisis in the public liability insurance market. With reports of festivals being cancelled and the closure of some community programs, the pressure mounted on governments to act.

The Honourable Senator Helen Coonan, the Minister for Revenue and Assistant Treasurer was charged by the Commonwealth Government with developing a cross-portfolio response to the issues affecting public liability, medical indemnity and professional indemnity markets.

On 1 March 2002, Senator Coonan announced that a national ministerial meeting would be held to assess the affordability and availability of public liability insurance. State and territory ministers with the responsibility for insurance would gather together and explore the options for a national response to the crisis.

To assist the ministers, the Commonwealth commissioned the assistance of actuaries, Trowbridge Consulting.

Each minister was to be given the opportunity to outline initiatives underway in their own jurisdiction. The focus of that initial meeting was on assisting community, sporting and cultural organisations, tourism operators and small businesses accessing affordable insurance.

The public was invited to make submissions. Many detailed submissions were made to the ministers to assist them in their resolution of the insurance crisis, including submissions from the Law Council of Australia and APLA.

Senator Coonan also announced that the federal government was already actioning the problem by looking to facilitate structured settlements. In fact, they had already overhauled capital adequacy requirements and risk management practices in the insurance industry with the General Insurance Reform Act 2001 and they had increased disclosure and licensing requirements in the Financial Services Reform Act 2001.

The federal government had also commissioned a report from the Australian Competition and Consumer Commission (ACCC) on insurance market pricing. The government released the ACCC's Insurance Industry Market Pricing Review on 26 March 2002, the day before the first ministerial meeting. The report explored the cost drivers for public liability insurance and did not include an explosion in claims or verdicts in its list of factors influencing premium price rises.

A Joint Communiqué released after the ministerial meeting the following day said that ministers had agreed to examine:

- targeted claims cost reduction by protecting volunteers, community and sporting groups
- broadly based tort reform
- legal system costs and practices.

However, they agreed to do so, subject to evidence that changes would increase affordability and availability of cover.[1]

They also agreed at that meeting, among other things, to ask the insurance industry to collect more detailed information on claims experience through a co-operative industry arrangement, improve data collection and to consider better risk management procedures. Ministers also called on the insurance industry to be more innovative and responsive in product development and communication with consumers.[2]

The ministers also heard from Trowbridge Consulting. The report followed the insurer agenda, blaming claims for the rise in premium costs. However, they declined to discuss the law in any great detail, saying instead, '[t]he outcome of more than a century of common law development is a highly technical and complex body of legal reasoning. Fleming's "Law of Torts", described to us as the definitive text, is in its ninth edition and runs to 789 pages.'

However, it soon became clear that the rider to the exploration of the tort reform option was forgotten. New South Wales forged ahead introducing caps and thresholds and other mechanisms to limit injured persons' access to fair compensation.[3] Then in April, the Attorneys-General were cut out of the public liability loop. It was thought they might be too easily influenced by the lawyers and consequently, reform was left to the treasurers.

Meanwhile, APLA was able to analyse the first and second Trowbridge Consulting reports[4] to the ministers and provide the ministers involved with a reasoned critique.

The second ministerial meeting was held on 30 May 2002. At that meeting an announcement was made that:

- people would be allowed to contract out for inherently risky activities
- an expert panel of three eminent persons would be appointed to examine

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the law of negligence and interaction with the Trade Practices Act
- the Productivity Commission would conduct a benchmarking study into claims management practices against world standards
- the ACCC was to continue its pricing review
- insurers would be compelled to provide comprehensive claims data
- structured settlements would be facilitated.[5]

Meanwhile, individual states were forging ahead with their own agendas, the Commonwealth applauding in particular the efforts of New South Wales in this regard.

The *Trade Practices (Liability for Recreational Services) Bill* 2002 was introduced into the federal parliament on 27 June. However, the Commonwealth continued to focus the attention on the need for the states to implement reform. The federal government's bill was later adjourned to Committee for an Inquiry.

On 2 July, Senator Coonan announced the panel to review the law of negligence (the panel).[6] The panel was no longer a panel of three eminent legal minds, but was rather four people, two with legal expertise, the others an understanding of issues affecting the community.[7] The panel consisted of:
- Chair, Justice David Ipp, an acting Judge of Appeal to the NSW Supreme Court
- Professor Peter Cane, Professor of Law at the Australian National University
- Dr Don Sheldon, Chairman of the Council of Practising Specialists
- Councillor Ian MacIntosh, Mayor of Bathurst.

The terms of reference announced by Senator Coonan started with the following statement:

'The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. 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 from personal injury and death.'[8]

The terms were flawed as they proscribed a result before the review had even begun. Nowhere in the terms of reference were the panel required to relate their examinations to the impact their recommendations would have on insurance premiums. Their time frame for reporting on substantial and fundamental principles of long established law was too restrictive to allow a comprehensive and principled review. The government, in designing the terms for the review, had accepted, without evidence, that claims for compensation were the cause of rising premium prices.

And somehow, somewhere, the issue of insurer conduct and accountability were swept aside and tort reform became the only agenda. It was forgotten that at the first ministerial meeting, the ministers had agreed to explore tort reform in principle, subject to evidence of its impact on the affordability and availability of insurance. No such evidence had yet been produced.

In August 2002, Senator Coonan welcomed reforms announced by the South Australian Government and singled out Victoria and the Australian Capital Territory as the only jurisdictions yet to implement tort reform.[9] The federal government continued to deflect the issue onto the states and territories and avoid responsibility for the insurance industry's mismanagement.

Soon after, Suncorp GIO announced that it would expand the availability of affordable public liability insurance following the announced legislative reforms. Senator Coonan welcomed the announcement, claiming victory for the two ministerial meetings and the federal and state tort reform introduced at that time.[10]

On 2 September 2002, the first panel report was released. They recommended, among other things:
- that a national response take the form of a single statute
- doctors be protected from negligence actions if they can point to a widely held view of a significant number of respected practitioners in the field

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- allowing individuals to take responsibility for their own actions in recreational activities
- misleading and deceptive conduct provision not to be available for personal injury claims
- limitation periods to be reduced to three years with a twelve-year longstop applying to children.

The recommendations were then discussed at the next ministerial meeting.

Support from Senator Coonan for Allianz Australia Insurance Ltd, NRMA Insurance and QBE Insurance (Australia) Ltd establishing a co-insurance panel soon followed.[11] The New South Wales Premier, Bob Carr also supported the alliance.[12] The insurers claimed that the scheme was possible in New South Wales due to the tort reform implemented.

The ACCC's second pricing review was released on 20 September 2002. Again, it did not cite litigation as the cost driver in increasing premiums. The report, however, did not influence the momentum of the tort reform process. The Insurance Council of Australia, in fact, commissioned Trowbridge Consulting to criticise the ACCC report.

In September it was revealed that the South Australian, Australian Capital Territory and Victorian governments were unwilling to contribute to the cost of the panel citing concerns with the independence and expertise of some of the panel members as well as the contents of the final terms of reference as their reasons.[13]

At the third ministerial meeting on 2 October 2002, the final panel report was released. Justice Ipp briefed ministers at the meeting in relation to the recommendations.

The ministers resolved to appoint actuaries for advice on the economic impacts of the proposed national reforms of the panel. They also agreed, in principle, to consider all of the panel's recommendations with a view to introducing nationally consistent reforms.

The recommendations, if implemented, will discourage small claims. They include a threshold of 15% of the most extreme case[14] as well as costs limitations for small claims.[15] These two recommendations, if both implemented, will result in deserving claimants receiving no damages for the negligent injury caused by a wrongdoer.

Public authorities are provided with a policy defence. Even a decision based on political or social factors cannot be questioned to attach liability to a public authority.[16]

The positive recommendations in the report include that:

- not-for-profit organisations should not be exempted from liability[17]
- proportionate liability should not be introduced for personal injury and death claims[18]
- the discount rate for future economic loss should be 3%.[19]

Senator Coonan said at the Australian Insurance Law Association Conference on 18 October, 'There are now major incentives for the states and territories to adopt a national law of negligence. Any jurisdiction that fails to do so will be faced with serious consequences. Insurers are saying that their ability to continue to provide insurance at a reasonable cost is dependent on states reforming the law. Doctors and other professionals are saying that they will not continue to practice in states that do not reform the law.'[20]

The fourth ministerial meeting on 15 November agreed to implement the thrust of the reforms recommended by the panel. It was not specified which recommendations the package would comprise. The actuarial analysis by PricewaterhouseCoopers stated that the panel's recommendations, if implemented, could reduce premiums by 13.5%. The report failed to state how these savings would be made, or how insurers could be compelled to pass the savings onto consumers.

Of greater concern however, is that the ministers have ignored all the evidence and chosen to follow the path of least resistance – tort reform. 'Since we began meeting in March, we have identified the problem, developed a concrete solution and there is clear evidence that the approach will work.'

The process continues and it looks like this matter will drag on for some time to come.[21]

There is still no evidence that tort reform will have any impact on the price of premiums or the availability of cover. PL

Footnotes:

1. Joint Communiqué, Ministerial Meeting on Public Liability, 27 March 2002.
2. ibid.
3. *Civil Liability Act* 2002 (NSW).
4. 26 March and 30 May 2002.
5. Senator Helen Coonan, Press Release, 'Liability meeting makes significant progress', 30 May 2002.
6. Senator Helen Coonan, Press Release, 'Minister announces review panel', 2 July 2002.
7. ibid.
8. Terms of Reference, Principles based review of the law of negligence, http://revofneg.treasury.gov.au.
9. Senator Helen Coonan, Press Release, 'Minister welcomes South Australian tort law reform', 13 August 2002.
10. Senator Helen Coonan, Press Release, 'Minister welcomes public liability turnaround', 22 August 2002.
11. Senator Helen Coonan, Press Release, 'Minister welcomes Insurance Council initiative for not for profit organisations', 5 September 2002.
12. 'Community insurance pool to help solve crisis of confidence', NRMA Media Release, 5 September 2002; 'Community insurance to fill liability void for not-for-profits', ICA Media Release, 5 September 2002.
13. *Australian Financial Review*, 'Sidelined states refuse to fund Ipp', 20 September 2002.
14. Recommendation 47.
15. Recommendation 45.
16. Recommendation 39.
17. Recommendations 10 and 16.
18. Recommendation 44.
19. Recommendation 53.
20. Senator Helen Coonan, Speech to the Australian Insurance Law Association, 'Liability Reform: It's not a waiting game', 18 October 2002.
21. Senator Helen Coonan, Press Release, "Meeting gives tick to national negligence package", 15 November 2002.