



The Law Society
OF NEW SOUTH WALES

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26 February 2026

Dr. James Pople
Chief Executive Officer
Law Council of Australia
PO Box 5350
BRADDON, ACT 2612

By e-mail: john.farrell@lawcouncil.au

Dear Dr Pople,

INQUIRY INTO SMALL BUSINESS INSURANCE

The Law Society is grateful for the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Corporations and Financial Services in response to its *Inquiry into small business insurance (Inquiry)*. The Law Society's Injury Compensation and Business Law Committees contributed to this submission.

In our view, it will be important for the Inquiry to consider the various economic and other drivers which may be impacting the availability and affordability of products for small businesses across core insurance classes such as public liability, professional indemnity and asset insurance. In particular, we note the need for a multi-faceted approach to address concerns of small businesses who are facing multiple challenges in obtaining insurance, even in circumstances where they have invested heavily in risk management and mitigation measures. In our view, recommendations should not focus exclusively on tort law reform, but should examine a range of policy settings such as procurement and tax policy.

In addition, we consider insurers should be guided and incentivised by government to create affordable, tailored microinsurance and other options for small businesses and not-for-profit organisations. We note, for example, that the Australian Chamber of Commerce and Industry has expressed the need for further education of, and engagement with, international reinsurers operating in the Australian market in light of their 'elevated pricing and disproportionate risk mitigation requirements which are often not aligned with local risk profiles or industry norms'.¹

We expect the issue of tort reform to be raised in the context of the Inquiry; however, we have made brief comments below in respect of some of the issues raised in the context of the Insurance Council of Australia's 2025 position paper, *A Sustainable Public Liability Insurance Market in Australia: The Case for Civil Liability Reform (Insurance Council Paper)*, which preceded the initiation of the Inquiry.²

¹ Australian Chamber of Commerce and Industry, '[Addressing the small business insurance challenge](#)' (Updated October 2025), 14.

² Insurance Council of Australia, '[A Sustainable Public Liability Insurance Market in Australia: The Case for Civil Liability Reform](#)' (Report published October 2025).

Different legislative schemes for public liability across Australian jurisdictions

It is important for the Inquiry to recognise the distinct legislative schemes in respect of civil liability insurance operating across Australian jurisdictions. We note that current concerns around the availability and affordability of insurance products for small businesses and not-for-profit and community organisations are not novel. These formed that basis for different legislative responses to a perceived ‘insurance crisis’ across Australia in the early 2000s. In NSW, the result of the reform process was the introduction of the *Civil Liability Act 2002 (NSW)* (**Civil Liability Act**). As noted in a 2022 speech delivered by the Hon. Justice Richard Cavanagh of the Supreme Court of NSW:

Whilst it might be said that a purpose of the [Civil Liability] Act was to clarify and improve aspects of the law, it must also be said that its primary purpose was to reduce the quantity of claims, limit the types of claims and restrict the amounts that could be recovered by claimants, not just in personal injury but in claims for property damage and economic loss as well.³

It is broadly recognised that the Civil Liability Act, by significantly altering the liability principles of negligence found in the common law, has achieved the intended purpose described above. It is broad in scope considering that negligence provisions contained in Part 1A apply to all claims for damages for personal injury, death, property damage and economic loss, regardless of whether the claim is brought in tort, contract, statute or otherwise.⁴

We note that several of the suggestions for public liability reform, including those raised in the Insurance Council Paper, are already legislated for in NSW. Of particular note are the following provisions:

- The ‘mental harm’ provisions in Part 3 of the Civil Liability Act, which curtail common law rights in relation to ‘nervous shock’⁵ Section 30(2), for example, limits recovery for pure mental harm unless the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or the plaintiff is a close member of the family of the victim.
- Limitations on damages with respect to gratuitous attendant care under s 15(2) of the Civil Liability Act.
- The “dangerous recreational activity” provisions. Of particular note is the defence at s 15L in respect of claims for harm suffered as the result of a materialisation of an obvious risk of a dangerous recreational activity. We also draw attention to s 5M, which provides that ‘a person does not owe a duty of care to another person who engages in a recreational activity in respect of a risk of the activity if the risk was subject of a risk warning to the plaintiff’.
 - We note that there is some support among our members for a review of these provisions being expanded to include other types of recreational activities, noting existing barriers to obtaining insurance (e.g., trampolines reducing an insurer’s capacity to write coverage for the caravan and camping industry, even if the individual business seeking cover does not have these assets).
- Curtailment of the damages available at common law (e.g., maximums for non-economic loss under s 16 and economic loss/loss of earnings under ss 12 and 13).

Further, it is important that concerns raised with the legislative frameworks for public liability insurance are scrutinised in an evidence-based manner. The Insurance Council report refers to ‘expansive judicial decisions, a more litigious society, an active plaintiff lawyer environment and increasing claims costs particularly resulting from psychological injury claims’, but does not provide evidence to support its viewpoint on all of these matters. In respect of the reference to ‘expansive judicial decisions’, for example, it will always be the case that a statutory

³ The Hon. Justice Richard Cavanagh, ‘The Civil Liability Act...Has it served its purpose’, speech delivered at the Twilight Seminar Series, July 2022.

⁴ *Civil Liability Act 2002 (NSW)*, ss 5 and 5A.

⁵ *Civil Liability Act 2002 (NSW)*, Part 3 ss 27-33.

public liability scheme such as the Civil Liability Act will interact with and be informed by the common law of negligence, given its historical underpinnings.

Work injury claims

The Insurance Council Paper draws attention to an increase in so-called “worker to worker” claims and associated delays in the making of these claims. These are described as follows:

[Worker to Worker] claims occur when a person is injured during their employment through the negligence of a third party. Claims are often made against a head contractor, an occupier of a premises or a host employer.⁶

Worker to worker arrangements are frequently used in the construction, mining and manufacturing industries. We appreciate that liability insurers may face challenges in underwriting these classes, particularly in light of the fact that the liability claim may be made after a workers compensation claim has run its course. However, we suggest that any recommendations with respect to these arrangements take account of the fact that a business using internal labor hire entities is making an informed commercial decision to expose themselves to workers compensation and third-party liability claims across their subsidiaries/related entities.

We also note that there are certain statutory protections in NSW which, to a great extent, protect against dual compensation for the same injury or what is colloquially referred to as “double dipping”: See, for example, the statutory recovery provisions in 151Z of the *Workers Compensation Act 1987* (NSW). Further, the deemed worker provisions mean that workers who are not considered employees in the traditional sense, are still entitled to statutory workers compensation.⁷ This extended definition of ‘worker’ therefore provides further protection to small businesses from claims which might otherwise be made against public liability insurers.

Limitation periods and discoverability

We accept that there may be different views about the appropriateness of limitation periods for public liability claims across different jurisdictions. In NSW, the limitation is the first of the following to expire:

- The so-called “discoverability limitation period” which runs for three years after the date on which the cause of action is discoverable by the plaintiff; and
- The “long stop limitation period” which refers to 12 years after the date of the act or omission which caused the injury or death.⁸

We note that the Insurance Council Paper is critical of the concept of discoverability, noting that ‘multiple elements of discoverability’ (for example the time at which a person sustains an injury as opposed to the time at which a person knows the extent of their injuries) create greater underwriting uncertainty for insurers. While our members representing insurers have noted that the ability to obtain evidence to defend an action can be difficult, particularly years after the event itself, we suggest at the same time that it is important for there to be sufficient flexibility within a limitations system, in order to ensure fairness for plaintiffs as well as defendants.

The importance of ensuring efficient outcomes in public liability matters

We note that in some jurisdictions outside NSW there are detailed pre-litigation procedures, including mediations and negotiations, that must be adhered to before commencing personal injury proceedings: See, for example, Chapter 2, Part 1 of the *Personal Injuries Proceedings Act 2002* (Qld) and Chapter 5 of the *Civil Law (Wrongs) Act 2002* (ACT). While such measures may encourage early settlement in certain circumstances, our members acting in these jurisdictions have noted that there are some matters where these procedures exacerbate delays

⁶ Insurance Council Paper, above n 2.

⁷ *Workplace Injury Management and Workers Compensation Act 1998* (NSW), Schedule 1.

⁸ *Limitation Act 1969* (NSW), s50C.

and increase costs. We therefore would suggest caution in relation to the impact of mandatory pre-procedures in all public liability matters.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, A/ Head of Commercial and Advisory Law Reform, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ronan MacSweeney', with a small flourish at the end.

Ronan MacSweeney
President