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HIH, UMP, ADR and W2N

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Editorial

HIH, UMP, ADR and W2N

Laurence Boulle

Few Australians have not been affected in some way by the current difficulties in the public liability and medical indemnity insurance industries. Public events have been cancelled, surgery has been postponed and increased premiums have affected many households, voluntary organisations and small businesses.

There has been no lack of 'crisis comment' in the media and industry publications. Much of this deals with broad policy issues and only some of it relates to dispute resolution matters. However the dispute resolution side will be an important ingredient of any solution to the difficulties.

At the Commonwealth level, Senator Coonan, in a recent speech to the Insurance Council of Australia, made reference to the potential use of mediation and other forms of ADR to deal with personal injury claims, but there was no real specificity or clear policy framework for ADR in her presentation. There are inevitable limits on Canberra's ability to respond to these problems, though there is likely to be continued focus on co-ordinating policy developments. Perhaps this would also be the occasion to advance the Model Laws concept.

At the State level, where much of the activity is likely to occur, there are different responses to the situation by different governments. In this issue of the Bulletin, Rob Davis, president of the Australian Plaintiff Lawyers' Association, discusses and compares the State government responses in NSW and Queensland.

As regards the professionals involved — doctors, lawyers, marketers, insurers and others — they are all subject to the standards and ethics of their respective professions. However, insofar as a self-regulation response might be appropriate, there is scope for relevant professional bodies to consider the development of specific codes of conduct to deal with personal injury and other cases where indemnity insurance is commonly encountered.

As regards the prospective plaintiffs, some suggestions include a screening system before they can initiate proceedings. A prominent eye surgeon advises that, in relation to health matters such as the quality of their vision, patients often have difficulty making a comparison of the quality of their eyesight between before and after an operation. With these health issues an independent medical tribunal could screen cases to determine those in respect of which proceedings might be instituted.

And so the question arises for many interested parties in this topical social issue, where to now — W2N?

If one looks at this in dispute system design terms then the initial task would be to consider the multiple and sometimes complex causes of the problems in the two areas under discussion. Clearly this would not be an easy task, but it should be borne in mind that the reasons for the different responses to date, apart from political considerations, revolve around the way the situation is diagnosed and how different actors understand the causes of the problem.

Any such diagnosis will inevitably present a multi-factored phenomenon and not all the potential responses to it will be of a dispute resolution nature. Some parties might argue that the remedies are to be found in improved management in the ranks of insurers, others in the self-correcting mechanisms of the market, and yet others in the ebb and flow of international financial competition.

Where the focus is on dispute resolution matters the recommendations are likely to include those that have already been mooted: the abolition of jury trials; the use of ADR before the issuing of proceedings; mandatory offers

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of settlement; capping of damages for future economic loss; restrictions on the use of expert witnesses; or periodic compensation payments. However there are also likely to be other recommendations ranging from preventive mechanisms through to low cost determinations such as 'arbitration on the papers'.

An important dimension of the responses will depend on the extent to which they adopt a regulation, quasi-regulation or self-regulation philosophy, or rely on the no-regulation vagaries of the 'market'. The Queensland proposal to abolish 'no win no fee' advertising is a regulatory response, while the dedicated professional codes of conduct referred to above would involve self-regulation.

Of course it is unrealistic to expect that these deliberations will be undertaken with dispassionate independence and objectivity. There are always vested interests in the status quo and changes introduce new winners and losers. Medical negligence and public liability insurance reforms will provide a field for these types of struggles.

Readers are invited to comment on the contribution of Rob Davis to the debate and to provide other perspectives on this important 'work in progress'. ●

Laurence Boulle, General Editor.

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