In the last two years, much has been written and spoken of the so-called insurance crisis. The genesis of the problem has been attributed to the collapse of HIH Insurance, the events of September 11, 2001 and the general economic downturn in the world economy (with resultant investment losses by insurance companies), as well as to a perceived skyrocketing of liability claims.

Whatever the origins of the crisis, pressure has been building on governments Australia-wide (indeed worldwide) to solve the problem of the availability and affordability of basic liability insurance cover. Notably, the NSW Government was quick off the mark in introducing far-ranging reforms to tort law. These reforms are aimed at reducing the number of smaller claims said to be clogging up the court system and generally providing a financial headache to most insurance companies.

The Victorian Government has been criticised in some quarters for being comparatively tardy in taking appropriate steps to deal with the crisis. However, in recent weeks, it has more than made up for lost time by introducing a number of sweeping reforms to tort law. Queensland has also introduced a range of reforms.

The Ipp Report

In 2002, the Insurance Issues Working Group of Heads of Treasuries commissioned a report, chaired by the Honourable David Ipp, into tort law reform. This report, titled *Review of the Law of Negligence*, was published (in two parts) in September and October 2002 and contained over 60 recommendations for tort reform. In particular, the report noted that recommended proposals for limiting personal injury claims worth less than $50,000 was a priority in making affordable public liability insurance more readily available.

The state-by-state approach: the first stage

In 2002, each of the principal state governments enacted legislation affecting civil claims for damages for harm arising from tortuous acts.

New South Wales led the charge with the *Civil Liability Act* which applied to all proceedings issued from the courts after 20 March 2002. The other Australian states followed soon after.

The principal features of the first stage of the reform packages were to cap payable damages and to further regulate the conduct of proceedings to encourage early settlement. The legislation in New South Wales, Queensland and the ACT restricts the amount of costs lawyers can charge on ‘small quantum’ matters to discourage them being pursued. These changes did not represent tort reform as such, rather procedural changes, but more was to come.

Certainly, anecdotally, the observation is that in NSW, the most seriously litigious of all Australian states, these early reforms have had a significant early impact on smaller more mischievous claims, which have dropped off in the last six to nine months.

The state-by-state approach: the second stage

The second stage of the reforms that have either been enacted or contemplated by the...
principal states seeks to go further than modifying procedure, costs implications and the quantum of claims by reforming the law of negligence itself.

For example, the Queensland Civil Liability Act 2003 modifies negligence and causation principles. The Queensland Act defines the principles for determining the content of a duty of care and whether the duty of care has been breached.

The Queensland Act specifically provides that:

- the fact that the risk of harm could have been avoided by doing something in a different way does not of itself prove negligence
- subsequent action taken to prevent a similar occurrence happening in the future is not of itself evidence of negligence, or an admission of negligence.

The Act, subject to some exceptions, provides that there is no duty to warn of an ‘obvious risk’ and that there is no liability for injury suffered from the materialisation of an inherent risk, or of the materialisation of an obvious risk arising out of a ‘dangerous recreational activity’.

Nevertheless, it remains to be seen how broadly or narrowly the courts will choose to interpret such concepts as ‘obviousness’ and ‘an inherent risk of harm’.

In announcing the second tranche of the NSW tort reform, the Premier, Bob Carr, stated that the legislation’s intention was to, among other things:

- address the concept of reasonable foreseeability in the law of negligence
- provide that a risk warning can operate as a good defence for risky entertainment or sporting activities where there is no breach of safety regulations
- change the professional negligence test to peer acceptance so that conduct widely accepted in Australia by peer professional

The second stage of the reforms that have either been enacted or contemplated by the principal states seeks to go further than modifying procedure, costs implications and the quantum of claims by reforming the law of negligence itself.

The subsequent Civil Liability Amendment (Personal Responsibility) Act 2002 dealt with all these issues and others, consequently, it is considered that the difficult and complex areas encompassed by the legislation will lead to an increase in litigation as the boundaries of the NSW legislation are tested.

The financial implications of tort law reform

Following the publication of the Ipp Report, chartered accounting firm PricewaterhouseCoopers (PwC) was commissioned to report on the financial implications of the Ipp Report’s recommendations. The likely outcomes were that:

- public liability claims costs would be reduced by 14.7 per cent
- there would be an overall reduction in personal injury claims costs of 19.6 per cent
- these reductions in claims costs could translate into reduced premiums of about 13.5 per cent.

PwC was at pains to point out the figures were ‘very uncertain’ and that it depended on the extent to which the Ipp recommendations were actually implemented and the ultimate impact of those reforms. However, the PwC report did predict that, if most of the reforms were implemented Australia-wide, 80 per cent of claims worth less than $50,000 would be eliminated, this being the equivalent of 65 per cent of all claims.

It is clear that state governments are serious about pursuing the tort reform agenda, hoping that the reforms will lead to insurers (and reinsurers) returning to the public liability and professional indemnity markets, leading in turn to increased availability of affordable insurance cover for Australian businesses. Whether tort reform will lead to long-term significant reductions in the cost of insurance remains to be seen.

National consistency

Throughout the flurry of legislative implementations, there have been various attempts by, in particular, Senator Helen Coonan to bring the states into line on the issues. Indeed, the Ipp Report recommended that all actions for personal injury be subject to a single legal regime. This clearly has not been particularly successful; however, there is continuing discussion in the area of proportionate liability, which applies to property damage only. This concept ensures that liability is apportioned to the party actually liable and disbands the concept of joint tortfeasors. Traditional insurers have suffered if one defendant is impecunious or uninsured as the courts have tended to turn their attention to the defendant, backed by the insurer and thus supplied with a deep pocket. There are ongoing discussions amongst all states to implement consistent laws on this principle and the ‘reforming’ states have held off passing these provisions while these discussions continue.