small businesses are not looking to penalise. Instead, what they seek is an opportunity to run their own business in a fair and competitive environment.

Importantly, state jurisdictions now have the capacity to draw down the unconscionable conduct provisions. New South Wales, Queensland and recently Victoria have already done this. By doing this, small businesses will have easier access to justice, often in a less expensive and quicker environment such as a tribunal.

Collective bargaining

Another area of assistance for small business in their dealings with big business can be found in the Commission's willingness to authorise certain collective bargaining arrangements.

In the Act it is recognised that in certain circumstances anti-competitive conduct that otherwise would be unlawful may have certain public benefits and should be allowed or authorised. The Commission has, in recent times, been prepared to authorise collective bargaining by small businesses with a larger firm.

It is important to note that collective bargaining is not necessarily relevant to all industries. It is a tool that can be used when appropriate.

The benefits of collective bargaining could include better opportunities to negotiate on prices and conditions. However, it should be noted that by allowing collective bargaining there must be a broader public benefit that outweighs any detriment associated with the anti-competitive behaviour.

From my position, because collective bargaining may in certain circumstances contribute to more efficient markets, it is welcome. And I acknowledge AIG's support for collective bargaining in your submission to the Dawson review, where you correctly identified the need for small business to be able to engage in collective bargaining in certain instances.

I should make it clear, however, that an exemption from the competition provisions of the Act represents the granting of a significant concession. It should be applied on a case-by-case basis, and only after careful and detailed scrutiny. Furthermore, the criterion on which such a concession is provided must serve not the interests of a particular group or sector, but the broader and more important public interest.

Conclusion

I have discussed several key issues here, and given you an indication of how I view the application of competition policy and the future role of the ACCC in industry in bringing about compliance with the policy.

Importantly, by working with industry to develop appropriate codes of conduct I anticipate a more efficient and more effective regulatory regime.

I want the Commission to promote lawful, vigorous, honest and fair competition between all businesses, small and big. If we can be successful in achieving this objective, we will have contributed to ensuring the continued growth, stability, and international competitiveness of the Australian economy, with attendant benefits to all sectors of business, consumers and the Australian community as a whole.

Competition and consumer law and Australia's insurance industry

The following is an edited speech by Commission Chairman Graeme Samuel, to the Insurance Council of Australia in Canberra on 14 August 2003.

I've nominated for my topic the prosaic subject of competition and consumer law and Australia's insurance industry.

It's a title that belies the importance of both the law and the industry to the well-being of Australian men and women.

Competition law is a device whereby the economic goal of competitive markets is realised for national benefit. Legislators determined that competition law was essential if the risk associated with anti-competitive practices were to be managed.

To this audience I do not have to explain the economic benefits generated for the nation by the efficient management of risk and the proper and competent operation of Australia's insurance industry.

It's fair to say, however, that the industry has been bruised by events of the recent past: HIH and the Royal Commission brought no credit; and a run of natural disasters and terror attacks overseas have all posed difficulties.

I want to frame my comments in this way.

I will canvass insurance matters directly. In particular, I want to discuss the insurance monitoring report, which was prepared by the Commission and released earlier this month. I will also talk about our other roles in insurance as well as some of the current law reform issues.

The Commission and the insurance industry

The Trade Practices Act is the primary legislation administered by the Commission. It is a key instrument in competition policy and applies to all businesses in Australia.

Up until recently the Commission's involvement with the insurance industry has been slight. We have had need to consider merger proposals—for example, the Commission did not oppose IAG's acquisition of CGU Insurance last year. We decided the proposal was unlikely to lead to a substantial lessening of competition.

Underpinning the Act is the notion that a competitive outcome is most likely to deliver lower prices and higher quality goods and services. However, it is also recognised that in certain limited circumstances the public interest may be best served by granting parties immunity from some restrictive trade practices provisions of the Act.

In particular, if the Commission determines that countervailing public benefits outweigh the potential anti-competitive detriment of proposed conduct, corporations may be authorised to engage in what may otherwise be anti-competitive conduct.

For example, the Commission has issued a draft decision proposing to conditionally authorise a co-insurance pooling arrangement, known as 'Community Care Underwriting Agency', which would provide public liability insurance to eligible not-for-profit organisations. The arrangement involves Allianz Australia, QBE Insurance and NRMA Insurance. The Commission expects to make a final decision on the authorisation application later this year.

The Commission has received a number of third line forcing notifications from authorised medical indemnity insurers. Third line forcing is a form of exclusive dealing and arises when the supply of goods or services is conditional on the purchaser acquiring other goods or services from a third party. These notifications have arisen from the government's medical indemnity reforms which I will talk a bit more about later.

Traditionally, medical indemnity arrangements have not been captured by the Insurance Act and APRA's prudential regulation. One aspect of the reforms is the requirement that medical indemnity insurance can now only be offered by an authorised insurer under the Insurance Act. As a result, medical defence organisations (MDOs) have converted their captive insurer into a licensed 'authorised insurer' that can offer insurance contracts directly to medical professionals. However, each of these new authorised insurers proposes only to offer medical indemnity insurance to health professionals who are also members of their associated MDO—hence the third line forcing issue.

The Commission considers that the notified conduct is likely to result in a public benefit that outweighs any associated detriment to the public. So, each of the notifications has been allowed to stand; which means that the notified conduct is immune from action under the Trade Practices Act.

These examples demonstrate the general scope of the Commission's traditional work as it touches the insurance industry.

But the major role of the Commission recently regarding the insurance industry was in areas outside our compliance and adjudication roles.

We have provided two reports on the general insurance industry in March and September 2002 at the request of the government and have an ongoing role in monitoring public liability and professional indemnity insurance. This particular role was given to the Commission by the government which was responding to legitimate concerns about the affordability and availability of insurance for some groups in the community.

The Commission also monitors medical indemnity premiums at the request of the Australian Government. The monitoring role was one measure in a package designed to address rising medical indemnity insurance premiums and to ensure a viable and ongoing medical indemnity sector.

Law reform

To address pricing and availability problems, reforms to tort laws have been placed high on the agenda by governments.

Some jurisdictions have already enacted reforms. Others are introducing reforms. These changes include a number of elements, but the principle ones are the capping of compensation pay-outs and minimum claim thresholds.

Last year's 'National Review of the Law of Negligence' (the Ipp review) recommended a number of changes to the Trade Practices Act.

There was clearly a concern by the review panel that the Act should not be used to circumvent state reforms to tort laws that addressed damages for injury or death. The view of the panel was that amendments should be made to the Act.

The review recommended that suppliers of recreational services should be able to exclude their implied contractual liability for death or personal injury where the services were supplied without due care and skill. This has been implemented through the Trade Practices Amendment (Liability for Recreational Services) Act, which came into effect in December last year.

Secondly, the review also recommended amendments to the Act so that:

- individuals could not bring actions for damages for personal injury and death under the 'unfair practices' provisions of the Act (Part V, div. I)
- the power of the Commission to bring representative actions for damages for personal injury and death resulting from a breach of the consumer protection provisions be removed.

The legislation giving effect to these recommendations is currently before the Senate. It has been referred to the Senate Economic Legislation Committee—due to report soon.

Thirdly, the review recommended that the 'unconscionable conduct', liability of manufacturers and importers for defective goods, and liability of manufacturers and importers for unsuitable goods provisions of the Act, which otherwise would apply to claims of negligently caused personal injury or death, be restricted by general proposals relating to limitations of actions, quantum of damages and other limitations on liability.

Price monitoring

I would like to turn now to the Commission's various price monitoring roles.

Public liability and professional indemnity insurance

Following the Commission's reviews of general insurance in 2002 we were given an ongoing monitoring role in the public liability and professional indemnity classes of insurance.

In May 2002, at the second ministerial summit on public liability insurance, ministers indicated that they expected the insurance industry would deliver affordable public liability products to the community on the basis of the reforms agreed to by the Commonwealth and the states and territories. A role for the Commission in monitoring the impact of the reforms was foreshadowed.

The Australian Government then requested that the Commission monitor costs and premiums in the public liability and professional indemnity sectors of the insurance market on a six-monthly basis for two years. In this time the Commission is required to assess the impact on costs and premiums of measures taken by governments to reduce and contain legal and claim costs and to improve the quality of data available to insurers to evaluate and price risk.

The Commonwealth indicated that it would review the Commission's involvement, including more formal processes, if it became clear that cost savings were being realised but not passed on to consumers by the insurance industry.

The Commission's price monitoring report to government

Consistent with this request the Commission has just forwarded its first report to the Australian Government. The government released this report publicly on 4 August.

I want to take some time to go through the key findings of this report.

Our report is based on data obtained from some of the main providers of public liability and professional indemnity insurance and also to a lesser degree on data from the Australian Prudential Regulation Authority. The Commission developed its information request with the assistance of PricewaterhouseCoopers.

The Commission looked at actual costs and premiums up to December 2002. Updates will be made as information comes to hand.

We also considered how insurers expected premiums and costs to move over 2003—given the various reforms implemented by governments to the end of 2002.

By early 2004 data may be available allowing the Commission to determine whether or not expectations were realised. Again, this will be a central feature of future reports once that data becomes available and a key issue for governments as they consider the appropriateness of reforms.

The report contains information about costs and premiums over the last five years. However, the two areas of particular interest are:

- the financial performance of public liability and professional indemnity classes
- the expected impact of government reforms on premiums and costs.

Our work confirms that costs in both classes of insurance have risen over the past five years, but that prices have only tended to rise during the last couple of years, albeit quite significantly. In the professional indemnity class, premiums (adjusted for inflation) actually fell between 1997 and 1999. One result is that profitability has been squeezed in both classes.

Insurers told the Commission that one of the main reasons for recent rises in premiums, apart from rising costs, is a generally stricter risk assessment of policy holders and previously poor underwriting returns. Many insurers are attempting to price premiums on the basis of costs and risk rather than market share or demand factors.

Given this focus on cost and risk, comments to us indicate that many insurers no longer consider unpredictable shocks, such as the liquidation of HIH and terrorist attacks in the US, to be a major cause of recent premium increases.

In fact, the impact of these events may already have been absorbed by the industry.

It appears that the recent premium increases have been large enough to improve the underwriting performance in both public liability and professional indemnity in 2002. Analysis by the Commission indicates that both classes expect to generate an underwriting profit, which represents a clear turnaround from recent years.[1]

Of course, the overall profitability of the insurer will also depend upon investment returns, the actual amount of claims paid and the insurer's capital position. The Commission did not examine these aspects of financial performance in this report.

[1] The Commission estimated that the net combined ratio—that is, ratio of (the sum of all) costs to premiums—for public liability insurance decreased from 121 per cent in 2001 to an expected 96 per cent in 2002, indicating an underwriting profit in this class. For professional indemnity, the Commission estimated that the net combined ratio decreased from 114 per cent in 2001 to an expected 85 per cent in 2002. This also indicates an underwriting profit.

I would now like to turn my attention to insurers' expectations of the impact of government reforms on premiums in 2003.

Public liability insurance

Insurers indicated to the Commission that public liability insurance premiums would increase in 2003, irrespective of the implementation of tort law and other reforms in 2002. In the absence of reforms, individual insurers' premiums would be expected to rise from anywhere between 6 and 50 per cent on 2002 levels—9 per cent being indicative of the overall expected increase. These rises are expected to be driven by increases in underwriting, claims handling, reinsurance and claims costs.

However, as a result of reforms implemented up to the end of 2002, some insurers anticipate that premiums will increase at more moderate rates. Anticipated claims cost savings are estimated to be, on average, around 5 per cent. It is expected that premiums will be around 3 per cent lower than they would have been in the absence of reforms.

Of course, the effect of reforms in 2003 will not be uniform across insurers. Some indicated that they did not factor any cost savings from reforms into premiums for 2003. This was because they considered it too early to quantify the effect of reforms.

Looking beyond 2003 insurers expressed considerable uncertainty about the effect of government reforms. Such comments were based on the lack of observable long-term trends in claims experience, including how the courts will interpret and apply legislative changes. Some also suggested that other costs may offset expected reductions in claims costs over time and that premiums will tend to increase.

Professional indemnity

Professional indemnity is a simple story—relatively.

Most insurers expect premiums to rise by between 11 and 20 per cent.

Not a single insurer surveyed expected tort law reforms enacted in 2002 to make any difference to the level of premiums in 2003. In some instances this was because insurers felt that it was too early to tell what impact the reforms would have on their business. However, other insurers stated that there will be no impact because personal injury claims, which were the target of tort law reforms in 2002, make up only a small portion of professional

indemnity claims.[2] For those insurers, tort law reforms that target personal injury claims are not expected to have a material impact on premiums in the longer term either. I will talk more about proposed legislative measures designed to reduce escalating costs to professional indemnity insurers shortly.

Where do we go from here?

I want to reiterate that for this report the Commission was able to report on the **expected** impact of reforms only. It is too early to determine to what extent reforms have actually lowered insurers' costs and if cost savings are being reflected in lower premiums. This will certainly be the focus of future monitoring reports.

Governments clearly expect reforms to reduce claims costs and for these savings to be passed on. The Commission will ask for explanations if its monitoring detects cost savings by insurers that are not passed on.

The Commission will also look closely at increases in other costs. The cost savings from tort and other reforms should not be frittered away by unnecessary rises in other costs.

As for underwriting performance, the Commission does not necessarily conclude that rises in profitability are a bad thing. Indeed some rises are arguably necessary given the poor performance of some insurance categories in recent years.

I want to stress that the Commission will have no hesitation in recommending to the Australian Government that more formal procedures should be put in place if our monitoring detects that savings are being made but not passed on.

Professional standards legislation

Some have used our findings on professional indemnity to argue that more needs to be done to address pricing and availability problems in that particular insurance class. Senator Coonan has suggested that '... this [the ACCC's] analysis brings in to sharp focus the need for all states and territories to do more for Australia's professionals'.[3]

A large part of the ministerial meeting of 6 August 2003 was spent considering how best to deal with the problems still confronting professionals in purchasing professional indemnity insurance. An outcome of the meeting was that all jurisdictions confirmed their commitment to implementing professional standards legislation on a nationally consistent basis.[4]

It is likely that a uniform national professional standards scheme would focus on improving professional standards, require professionals to adopt risk management strategies and hold adequate insurance cover, provide for ongoing professional education, and appropriate complaints and disciplinary mechanisms. In return, the liability of professionals would be limited, or capped to a specified amount.

The Australian Government reiterated its intention to amend the Trade Practices Act and other relevant legislation to support a national professional standards regime.[5]

I would like to talk briefly about the Commission's views on professional standards legislation. This will necessarily be quite general as the proposed amendments to the Trade Practices Act have not yet been introduced.

Generally speaking, the Commission sees merit in professional standards legislation. Clearly such schemes can offer benefits to consumers if they are constructed appropriately. In particular, they can help to reduce the impact of so-called 'information asymmetries' between buyers and sellers of professional services. These asymmetries occur because consumers tend to buy professional services infrequently and, when they do, it is hard for them to judge the quality of the service before it is bought. Properly constructed, professional standards can raise consumers' knowledge of, and confidence in, the quality of professional services that they buy.

Medical indemnity

As well as the Commission's on-going role in public liability and professional indemnity insurance we have also been given a more specific and new responsibility for medical indemnity insurance.

Since January 2003 the Commission has had the role of monitoring medical indemnity premiums to determine if they were actuarially and commercially

[2] Medical indemnity was excluded from the Commission's analysis because it is the subject of a separate monitoring exercise. That exercise will consider, among other things, the impact of tort law reforms on medical indemnity insurance premiums, costs and profits.

[3] Senator Helen Coonan, Assistant Treasurer, *ACCC public liability and professional indemnity insurance monitoring report*, C076/03, 4 August 2003.

[4] Joint Communique Ministerial Meeting on Insurance Issues, Adelaide, 6 August 2003.

[5] ibid.

justified. We have been asked to report annually to the Treasurer for three years. The first report is to be provided by the end of December 2003.

The government expects the reduced risk exposure resulting from the package of reforms, and the state and territory tort and legal systems reforms to be factored into premiums.

That is, the government expects the savings of reforms to be passed through to practitioners, their patients and the public. In this the Commission's job is to attempt to assess if this is actually happening.

The Commission's role in medical indemnity insurance is substantially different from its existing role in public liability and professional indemnity insurance. The existing role in public liability and professional indemnity deals with monitoring the effect of a particular set of reforms on changes in premiums. Essentially we are assessing the appropriateness of the rate of increase or decrease in premiums in these areas.

The new role in medical indemnity insurance is different. It involves assessing the level of premiums charged from both an actuarial and commercial perspective and assessing the effect of reform on premiums.

Conclusion

In conclusion, a realistic assessment is that much has been done to overcome problems and challenges confronting the insurance industry. That said, it is unrealistic to expect that insurance premiums will actually fall in the near future.

Premiums are likely to increase further, but that increase will, and should be moderated by recent initiatives by governments.

The Commission's responsibilities in this area are challenging and, given the stated intentions of government, are taken very seriously.

To a great extent the Commission relies on the cooperation of the industry to achieve the tasks that the government has asked it to perform. I am happy to say that to date the Commission has had a high level of cooperation from insurers in all of its insurance monitoring roles. I look forward to continuing this strong and harmonious effort.

New investment in the national energy market

Following is an edited version of a speech by Commissioner Ed Willett at the 14th National Power and Gas Conference on 18 August 2003.

Introduction

Understandably new investment attracts considerable interest. Adequate investment is a test of the success of Australia's energy market reforms. Without investment we will not be able to support the needs of industry and consumers.

New investment was a focus of the final report of the Council of Australian Governments' (COAG) energy market review in December last year and then again recently with the release of the National Electricity Market Management Company's (NEMMCO) 2003 statement of opportunities (the SOO), so it is not surprising this topic has again attracted much attention.

The focus of my speech is on the regulated electricity transmission networks and the gas transmission pipelines as the Commission regulates these areas of the energy market.

Investment in these services is also particularly important to the operation of energy markets. It is needed to cater for growth in energy demand and improved reliability. It also plays a central role in the development of competitive energy markets. New pipelines can create inter-basin competition, while electricity interconnection between states promotes competition between generators in different states.

In carrying out its regulatory functions the Commission strives to achieve the right investment outcomes by providing the appropriate incentives for investment while at the same time protecting the interests of the users of the regulated business.

Competitive energy prices are part of the investment equation. There is little point in promoting investment in transmission if we deter downstream investment in areas like manufacturing.