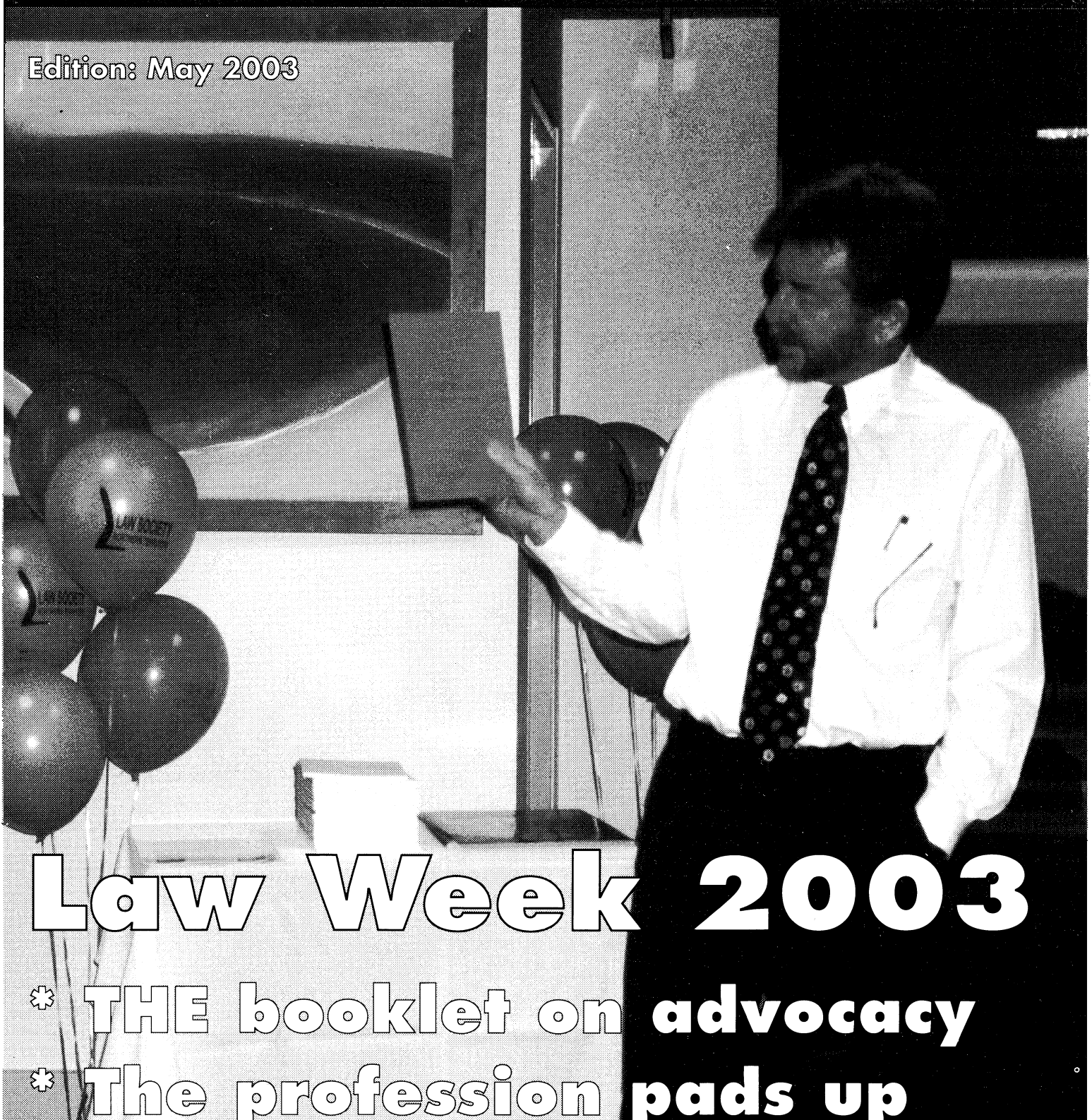
BALANCE

LAW SOCIETY NORTHERN TERRITORY

Edition: May 2003

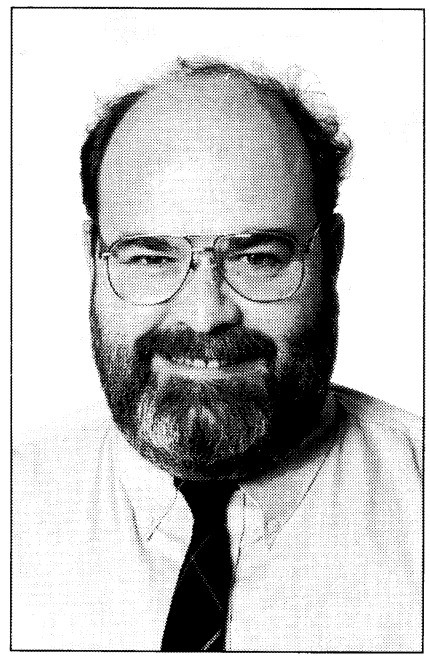


Law Week 2003

* THE booklet on advocacy
* The profession pads up

president's column

PIIr²= Next year's premiums



Ian Morris, president

At the Opening of the Legal Year lunch I said that our brokers, Marsh, would be able to circulate a discussion paper by the end of April and we would circulate the paper in the profession and seek comments and suggestions. Events have taken all of that over (I will explain this below) and this article is intended to raise the issues that would have formed the discussion paper. Comments and suggestions will still be appreciated, and perhaps we might have a special page in *Balance* in the next edition to publish those of some interest.

Since OLY we have been able to speak at length with Cheryl Richardson from Marsh and Adrian Gamble from QBE. Marsh have commissioned an actuarial report based on our claims experience that I have struggled to comprehend.

The only bright spot is I have learnt a new word: stochastic, which I understand to mean "educated guess". (It comes after "stoat" in my dictionary. This reminds me of the difference between a weasel and a stoat: one is weaselly distinguished and the other is stoatally different: this is about as funny as this article gets!)

We have also received some information on national developments and were able to use time in Melbourne when attending the Commonwealth Law Conference to speak to the Legal Practitioners Liability Committee (Vic) and Legal Practitioners Board (Vic) concerning their scheme.

The alternatives that have been discussed to date and my comments in respect of them are:

- Establish a mutual scheme.
  This means a scheme that partly relies on the contributions of members and partly on re-insurance. In effect the mutual represents an "excess" in which the profession meets a proportion of its own claims from its own funds and when an agreed amount per claim is exceeded, the re-insurance kicks in and meets the balance of the loss.

  Some of these schemes also have a further insurance that amounts to protection in case there are large numbers of claims that exhaust the funds of the mutual. This arrangement is called *Stop Loss Insurance*.

  The resort to this method is largely driven by the success of the LPLC scheme in handling the insurance crisis, but we should remember that this scheme has been in place for some years and has cost practitioners in Victoria a higher premium than we have had to pay over that time. In addition its survival has depended on aggressive and effective claims management, and they have a significantly higher number of practitioners from which contributions can be obtained.

  I understand the reduction in premium by virtue of this seed/ excess may not be as much as the cost of the seed in the first year, and whether it ever did would depend on the amount of the claims that were made.

  As each year needs to be self funding, the professions' annual contribution to the seed would need to continue for some years, but with improved claims results a surplus of these funds may be allocated for future years resulting in reduced or waiving of contributions. A further cost for this scheme would be the cost of handling claims, and that would depend on the amount of claims.

  All in all, this will be an expensive procedure and success would depend largely on the number of claims made against it. I believe that the cost of premiums under this scheme will increase until the mutual shows itself capable of surviving without significant seed funding from the profession. There are also hidden costs in this procedure, not the least of which is the cost of bring the professions' claim rate down.

  That will be the job of the Law Society and that means increases in the cost of practicing certificates. Having said that, I think this "hidden cost" will have to be borne anyway, and I deal with that aspect later. In order to establish such a scheme we would have to rely on their being "seed" money of some sort: either from a grant, possibly from moneys in the Fidelity Fund or from a levy on the profession.

  This would probably require legislative amendment. The sort of "seed" that we would need to make sure that we could pay all losses would probably be in the vicinity of $1.5m. If the "seed" had to be supplied from the profession there would have to be a levy of $1.5m ÷ 250 (the number of practitioners) = $6000. That is the fund that would meet claims at first instance, and when the agreed excess ($50,000) was achieved, the re-insurance (say $50,000 each claim) was exhausted, the insurance would cut in.

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That means on top of the seed we would have to get insurance to allow for losses above the $50,000 excess on each claim. The best estimate that we have for the cost of the re-insurance would be around $6000.

We would also have to get claim and Stop Loss Insurance for the fund so that it did not become exhausted by claims. Again, based on the actuarial report, and making some assumptions, the best estimate that we have for the cost of this insurance is around $2000, leaving a total of about $14,000 at present is around $6000 per practitioner.

This leaves a total of $10,000 for the mutual and insurance plus, we think, an allowance of around $2000 for the administration of the mutual fund and cost of claims administration. In addition there would be stamp duty and GST which would add a further 20 percent to the total. The grand total per practitioner could be, and again I emphasise that this is an estimation only, $19,000 per practitioner per annum.

I am unable to estimate how long a period practitioners would be required to contribute such a large amount to the "seed" fund and that would depend upon the amount of claims made and their effect upon the "seed" fund, but eventually one would hope that there would be a growing residual in the "seed" fund that would either act to reduce the level of contribution or obviate the necessity of contributions for some years and could be applied to the reduction in premiums. It is that expectation which has been experienced in fact in the insurance fund in Victoria.

Finally, I understand that to date APRA has not chosen to regulate mutual funds. However those who watch the demise of the Medical Defence Union (UMP) (which was a mutual fund) and the criticisms that have arisen in the investigation of that demise would have noted that many commentators consider that APRA ought to have been in control. Anecdotal evidence has suggested that mutual funds are in the sights of APRA and sooner or later will be regulated by it.

What that means is that minimum levels of capital will be required and that the capital that is retained by the mutual fund will have to be proportionate to the potential losses. That means that the surplus collections would not be so available for the reduction of premiums, and it is that reduction which makes mutual funds more attractive.

APRA may also be reluctant to see a new (as opposed to an existing) "unregulated" Mutual Fund set up.

- Statutory Fund.
This is a slight variation on the Mutual Fund. The difference is that this scheme is entirely regulated by statute, as the name suggests, but the problems in funding the scheme are much the same. Such a scheme will require the same sort of seed but in this version it would be the Government that would provide and guarantee the "seed".

This would require legislation, and it would also be unlikely that Government would fund such a scheme. However if that was to occur, it would have an impact on premiums and one would expect premiums to decrease.

For instance, using figures that I have discussed above, the potential is that premiums would be about the same as they are this year. I would also expect that the grantor of the seed would expect to see improvements in the claims rate, and there may well be a requirement for the profession to contribute to the initial cost of the seed, but I would suppose that cost would be amortised over a period of time.

Inherent in any mutual fund suggestion, of course, is a requirement that the residue of the unused "seed" fund is to be used to reduce premiums and part of that fund is the interest that would be earned on it whilst it is unused. If the funds are given to us then there might be some reticence in the grantor also giving the interest that they earned from funds whilst they are committed to be "seed" fund.

Private arrangements. What this means is that the profession would be able to arrange its own insurance with whichever company it could find. There would be a minimum level of compulsory terms set out in either the LPA or the Regulations, and proof of the achievement of those terms would be required with the application for a practicing certificate.

We already have some anecdotal evidence of Individual practitioners being unable to obtain insurance, some having tried to avoid the current high premiums.

The short answer to "no policy" will be "no practicing certificate". That is a frightening thought for those who have no bargaining power in the insurance market, particularly the smaller firms.

Join another scheme. This is an attractive option, and one that we have tried to achieve. Such a move would obviate the need to go through the difficulties in the first option of establishing our own mutual fund. Other schemes, of course, are provided for by legislation in their state of origin.

This will necessitate reciprocal legislation to be passed with the scheme we "join" and that will take some time to achieve. It means that we will be able to preserve the pool that is needed to trade in the insurance market now, but it may not mean that there will be a reduction in premiums in the initial periods.

Where those schemes rely on mutuals of one sort or another there will be a buying in period of some sort, and probably differential premiums until there is a similarity in claims records. However the effectiveness of this step has been affected by the matters that I discuss below.

- Maintain Current Arrangements.
  Whilst the premiums have certainly increased substantially this year, we must not forget that we have had the cheapest premiums in Australia for many years, and that it is the current market, and our own claims experience that has driven the premium upward. In our meeting with Marsh and the insurer, we accept that the only way to reduce premiums, no matter what option we take, is to reduce claims.

  With the support of the insurer, we are currently working with Marsh on development of an in house practice management programme whereby a firm's procedures and practices are reviewed and evaluated and recommendations provided as to improvements that may result in attacking the underlying sources of many claims.

  It is expected that with the implementation of these measures that claims will start to reduce and the premium savings can flow back. Whilst direct insurance does leave us open to the market forces and increases we are seeing now, we are not isolated in this and most other states are experiencing similar increases even though they may already have mutual structures in place.

  We need to be careful that we don't over react to a few years poor premiums and set ourselves up at great cost in a scheme that may not provide the longer term benefit we desire.

What has happened since OLY?

As I have pointed out above we have had the opportunity of meeting with our brokers, our current insurers and with the LPLC. In addition we have been provided with some further information from SCAG.

The Attorneys General have been considering the introduction of a national scheme of insurance.

It looks as if what will happen will be the introduction of a standard set of minimum terms for professional indemnity insurance and legislation enforcing that standard will be copied in each of the States and Territories, in a manner similar to the old uniform Companies Acts. We are told that one of the minimum requirements will be one that permits the automatic exemption of a practitioner from a local scheme if that practitioner can provide evidence of insurance with one of the other state schemes.

This means that the integrity of the pool in the Northern Territory cannot be protected. Firms in the Northern Territory that have offices in other States will be able to insure in those other States and will be able to therefore "premium" shop.

Those firms in the smaller States that are unable to shop around in that fashion will be left with whatever premium is available in their home state. By way of example, we were told it has been suggested that regardless of the number of practitioners who would be capable of joining a local scheme, the minimum premium pool is likely to be $1 million and that cost would have to be shared by whatever number of practitioners remained in the local pool.

For this year is easy to see that if a third of the practitioners in our pool that represent firms with offices in other states were to leave the pool then premiums would be a third more expensive than they are already.

We understand that the manner in which this problem can be dealt with is to have Governments and insurers for the States and Territories to agree to a programme of re-insurance that would have the insurer in the State or Territory in which the firm chose to insure re-insuring the risk back to the state of residence of the practitioners and, in effect, collecting the same premium that those practitioners would have paid had they remained in their local scheme. Such a procedure would protect local schemes in smaller states and territories from the ravages I have discussed in the previous paragraph.

However this sort of re-insurance also means the joining of our scheme with the scheme of another State will become less practical. There are a number of difficulties with reciprocal legislation and differential premiums that I have averted to above that would make this option hard to achieve even without the prospect of the re-insurance scheme.

Conclusions

Although I have called this section "conclusions" I only intended that to mean the conclusions that I have come to rather than any concluded view of the Law Society.

The purpose of this article is to circulate the various options available and comment upon them as a precursor to receiving comments from the profession so that the Law Society is able to come to a final view based upon all the information and views that it can gather together. I suppose I could have called the section "summary" but I think I would have had to announce the same caveat as I have earlier in this article.

1.1 The establishment of a mutual fund that is contributed to in full by local practitioners will be more expensive by about 40 percent of current premium for a period of some years.

1.2 The establishment of a mutual fund that is contributed to by sources other than local practitioners may reduce premiums depending upon the ability of the fund to use the residue of the fund from year to year and interest collected on the fund from year-to-year, but any such reduction would take some years to have effect.

1.3 The establishment of a statutory fund contributed to by sources other than local practitioners will have similar effect to 1.2 above, provided the residue of the statutory fund and interest earned upon the statutory fund can be applied to the benefit of practitioners in reducing premiums.

1.4 Although the prospect of joining another scheme is attractive, such a joiner will require policy agreement by Governments and substantial legislative change in both our own jurisdiction and the jurisdiction joined.

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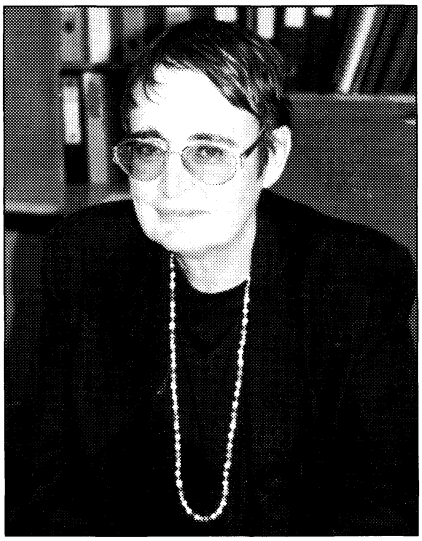
for the record

From cricket to THE booklet



Barbara Bradshaw, Chief Executive Officer, LSNT

Law Week 2003 had a number of highlights.

The first was the cricket match on Sunday 11 May.

It is clear to see why some people are legal practitioners (or maybe Ministers) rather than professional cricketers. Michael Grove also tried too hard to bowl a bouncer and ended up on crutches.

Congratulations to the Chief Justices' XI captained by his Honour Justice Dean Mildren and in particular the Most Valued Player Dick Wallace SM.

A very pleasant social afternoon was enjoyed but the Chief Justice's team needs to watch out - the LSNT President's team is seeking revenge.

It has been suggested a cricket match be held in Alice Springs later in the year.

Law Week was launched in conjunction with his Honour Justice Riley's *Little Red Book Of Advocacy*. I would commend this book to members.

I only wish it had been available when I commenced my (mercifully short) court career.

The Society has started a marketing campaign that should ensure its distribution Australia-wide. This is an important publication for the Society - our first foray into serious book publishing - and I believe it will be a popular, in much demand booklet. Included with this edition of *Balance* is a copy of the order form for the booklet.

Crime Tours were held at the Fannie Bay Gaol and around the Darwin area. As in the past, these proved to be a very popular event with the public and we thank Dr Bill Wilson for his time and effort in pulling the tours together and ably hosting them.

Law Week lunches were held in Darwin and Alice Springs. Both were very successful and members greatly enjoyed the performances by Territory-based comedian Fiona O'Loughlin which were about her experiences in the Yorke Peninsula and as a mother of five in Alice Springs.

And congratulations to Jenny Devlin and Jonathan Kneebone on their community awards. The Law Society NT's Award for Community Service to lawyers or law firms recognises volunteer legal work for community groups. Both Jenny and Jonathan put a power of work into helping East Timorese families to stay in the Territory. They were nominated by the Portuguese and Timorese Social Club.

The final chapter was the Supreme Court Open Day on Saturday 17 May. The mock trial went well though with some members of the public enjoying proceedings so much that it was felt they might fall over the edge of the public gallery. Perhaps the witnesses could join Fiona on the comedy circuit if they ever got sick of life at the bar.

We have already started analysing the events of Law Week with a view to providing an improved version for next year. Any comments or thoughts on new events would be appreciated.

Our thanks go to the NT Bar Association for the Mock Trial at the Supreme Court Open Day and to the NT Young Lawyers Committee who provided the Small Claims workshop on the Day as well.

I would also like to thank Nanette Hunter, Sam Wilcox, Wendy Morton, Ian Tranthem, Supreme Court staff, Parliament House staff and all Law Society staff who put in such an effort to make Law Week a success.

See our "cover story" section for some of the more interesting pictures from the week.

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The prospect of changes nationally can make this option difficult to achieve.

1.5 Because of jurisdiction requirements in each of the schemes currently operating in the States and Territories is unlikely that a local practitioner will be able to obtain insurance in another State or Territory without having established an office in that State or Territory.

1.6 As a result of the matters discussed in 1.5 (above) if insurance in the Northern Territory becomes unaffordable because of the size of the pool the only recourse of local practitioners will be to go to the insurance market at large and in those circumstances it is doubtful that some of the practitioners will be able to obtain insurance at all.

I hope that those that have managed to struggle through this rather doleful article will think about the problems and potential solutions to the insurance crisis and will send their suggestions in to assist the Council of the Law Society in their deliberations. Comments should be sent to the Secretariat.