

# Clyde & Co Response:

## Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance

June 2021

# About Clyde & Co

Clyde & Co is one of the premier insurance law firms in Australia – and in fact globally. We have offices in Sydney, Melbourne, Brisbane and Perth.

We act across the entire insurance life cycle – from policy support and drafting to claims management / dispute and resolution. We act for the full range of industry participants – from insurers, to brokers, to reinsurers and everyone in between – including insureds.

Critically, we have a strong foothold in the SME and mid-market space – frequently acting for some of the most respected insurers in the local and international markets and also directly for the insured entity.

Our work spans every sector – from agriculture to transport, from professional services to manufacturing and retail – we have it covered. In the SME space, we have assisted clients on all commercial lines of insurance including PI, PL, BI and property related matters.

Our experience, client base and breadth of offering gives us perhaps an unrivalled understanding of the issues pertaining to the affordability and availability of insurance – and the challenges and opportunities that both insurers, brokers, the regulators and insureds face.

# Introduction

As the Head of the Insurance group at Clyde & Co Australia, it gives me great pleasure to submit Clyde & Co's response to this important consultation.

The SME market is an important area of focus for many of our insurer clients. As such, it is a market that we are very familiar with and support right across our dedicated insurance offering – from cyber risk to professional indemnity, property, construction, EPL, general and public liability, casualty and beyond.

Insurance plays a vital role in the Australian economy – especially as we seek to recover from or stabilise the economic and commercial uncertainties that have underpinned the economic climate since the advent of COVID-19 (or perhaps even before).

As a key participant in the insurance sector, we can appreciate the issues that have triggered this review.

We look forward to working with the Insurance Council of Australia as it seeks to develop a plan to resolve the perceived tensions in the market. We thank the Insurance Council of Australia for the excellent work that it has done in this space.



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# Overview

As acknowledged in the 'Role of the Private Insurance Market – Independent Strategic Review: Commercial Insurance ICA Consultation Paper' (the ICA Consultation Paper), the issue regarding the affordability of insurance is multifaceted.

Some contributing factors are unlikely to be resolved by intervention or industry reforms, such as the market cycle, the appetite and capability of private enterprise and international issues that may impact at a local level (i.e. COVID-19 and other events that create economic uncertainty or issues at a reinsurance level).

But we do consider some of the measures identified in the ICA Consultation Paper could have an impact on the affordability issue, or could at least improve the perception of the utility and affordability of insurance. Of those measures, we consider further consideration should be given to the measures which encourage cooperation of industry (i.e. insurers, insureds and other industry participants) and, to a lesser extent, government.

The comments in the Clyde & Co response have been contained to those questions where we, as a law firm, feel we can add meaningful contribution.

# Question 2

## **Q2.1. HOW WIDELY AVAILABLE ARE PREMIUM INSTALMENT OPTIONS FOR SME BUSINESSES?**

We understand that premium instalment options (either through premium funding or direct through insurers) are available for intermediated and direct SME business insurance.

If payment terms are being cited as one of the barriers to SME businesses obtaining adequate insurance, further consideration may need to be given to the extent to which SME businesses are being made aware of the existence of these options and the associated advantages and disadvantages.

## **Q2.2. IN WHAT CIRCUMSTANCES AND TO WHAT EXTENT ARE THE ABSENCE OF PREMIUM INSTALMENT OPTIONS A BARRIER TO SME CUSTOMERS IN PURCHASING INSURANCE OR PURCHASING ADEQUATE INSURANCE?**

As the cashflow of SME businesses are often readily impacted during times of economic uncertainty and where there are unforeseen expenses (i.e. increases in insurance premiums), we can see how the absence of premium instalment options (either through premium funding or direct through insurers) could be a barrier to SME businesses purchasing adequate insurance.

However, as noted in our response to question 2.1, we understand that premium instalment options are available. To that extent, if payment terms are one of the barriers to SME businesses obtaining adequate insurance, then it may be that SME businesses are not being provided with information regarding the premium payment options that may be available to them.

## **Q2.3. WHAT ARE THE PROS AND CONS OF PREMIUM FUNDING FACILITIES THAT ARE CONTRACTS NOT ASSOCIATED WITH AN INSURER?**

According to the [2015 White Paper on Premium Funding by Premium Funding Pty Ltd](#), at that time, an estimated one-third of commercial insurance premiums in Australia passed through premium finance companies.

This suggests that one of the advantages of premium funding facilities is that it appears to assist insureds in obtaining cover that they may otherwise not have been able to, or may have chosen not to, purchase. Of course, one of the disadvantages is that it increases the overall costs of the insurance cover.

# Question 3

## **Q3.1. DO YOU ACCEPT THAT, IN GENERAL, INSURANCE THAT IS AVAILABLE BUT UNAFFORDABLE IS FAIRLY PRICED? IF YES, DO YOU HAVE ANY COUNTEREXAMPLES (I.E. NOT FAIRLY PRICED)? IF NO, PLEASE ELABORATE**

Yes, we accept that insurance that is available but unaffordable is fairly priced.

This is because generally the cost of the insurance reflects:

1. The insured's risk profile (i.e. business profile, claim history and level of cover sought) and the benefit of the insurance (i.e. the protection from financial losses which may otherwise be detrimental to the business) outweighs the cost; or
2. The market cycle as represented on page 36 of the ICA's Consultation Paper (i.e. insurers' realisation of losses on investments and claims resulting in price increases) rather than the insured's particular risk profile. (This is the position that is currently being faced by businesses in certain industries, such as the construction and finance industries.)

However, we accept that in the scenario at (2) insureds may reasonably perceive the insurance as being unfairly priced. In that case, it may be that insureds do not have access to advice or information which explains the reason for any significant premium increases (i.e. the factors identified at (a) to (c) on page 23 of the ICA's Consultation Paper).

## Question 3 (cont)

**Q3.2 / 3.3: IS THIS SET OF SUGGESTED CRITERIA FOR GOVERNMENT INTERVENTION A SOUND REFERENCE POINT FOR DIALOGUE BETWEEN THE INSURANCE INDUSTRY ON THE ONE HAND AND, ON THE OTHER HAND, INSURANCE BUYERS AND GOVERNMENTS OR GOVERNMENT AGENCIES? IF YOUR ANSWER IS NO, HOW OR IN WHAT CIRCUMSTANCES MIGHT THE FRAMEWORK BE MODIFIED AND FOR WHAT PURPOSE(S)?**

As a whole, we consider the set of criteria is appropriate.

In addition, we consider that the criteria should include a requirement for a framework or proposed strategy for government intervention (i.e. some practical guidance on the nature of the intervention that may be considered by government and any applicable limitations). Without this, it may be difficult for insurers and insurance buyers to have any meaningful engagement with governments or government agencies on the issue.

We also consider that there may be some merit in considering whether there should be a criteria for government intervention before there has been a clear failure of the private market. The intention behind this would be to investigate whether government intervention (particularly from a regulatory perspective) may avoid significant adverse consequences.

For example, there may have been scope for early regulatory intervention in relation to the issues being experienced in the D&O and PL market. The criteria could include (for example) a requirement for there to be: (a) some evidence of the private market failing (b) that failure is, or is likely to, impact on the broader public interest and (c) there is support from the insurance market for the government's framework or proposed strategy to provide assistance.

# Question 5

## **Q5.1. TO WHAT EXTENT WOULD THE INTRODUCTION OF STANDARD DEFINITIONS AND STANDARDISED WORDINGS, ALONG THE LINES OF OPTIONS (A) AND (B)–**

### **i. Improve underwriting efficiency?**

Standardised wording improves underwriting efficiency by providing certainty on policy responsiveness to claims. This will provide underwriters a more fulsome understanding of the risk they are covering to factor this into pricing. Certainty will also arise from clearer legal precedent on the understanding and operation of terms and definitions, leading to a reduced volume of disputed claims.

However, standardised wordings would not assist in predicting market and claims trends which is one of the significant drivers of the availability and affordability issue.

### **ii. Enhance competition or stifle competition (and how)?**

### **iii. Stifle (or enhance) innovation?**

Addressing (ii) and (iii) together. Standardised wording has the potential to stifle competition and innovation as it reduces the ability for insurers to innovate and develop new products, terms and definitions to better cater for the needs of buyers of insurance and changes in the market or legal precedents. Any standardised wordings would need to be considered carefully in consultation with insurers. Without careful consideration, standardised wording may operate to limit the choices of SMEs who may have different insurance needs from other SMEs in the same area of business or profession.

There is merit in the idea of standard exclusions. The terms may differ depending on the level of cover sought i.e. a gold star policy may have differently worded exclusions to the bronze star policy but ultimately all insurers offering bronze level of cover could have standardised wording for (some) exclusions.

### **iv. Make a material difference to the understanding and ability of insurance buyers to make their insurance decisions**

Standardised wording can make a material difference to insurance buyers as it:

- Allows for insurance buyers to more easily analyse and assess benefits, and features of insurance products being offered by different providers;
- Improves the ability of insurance buyers to understand the cover that is being provided; and
- Avoids the risk of creating ‘worthless insurance’ for consumers, those being policies where the insured pays for insurance that will never provide appropriate cover in their circumstances.



# Question 5 (cont)

## Q5.2. HOW FAR SHOULD THE INSURANCE INDUSTRY PROCEED IN THE DIRECTION OF OPTIONS (A), (B) AND (C) AND WHY?

### Option A

We do consider specific standardised terms can achieve a reasonable balance between the advantages of standardised terms and the impact they may have on innovation. Certainty is particularly needed in the areas of:

- Public liability;
- Professional indemnity
- Property insurance for natural disasters; and
- Business interruption loss.

Of these areas, it seems that standard definitions for natural disaster related policies, developed in close consultation with insurers and stakeholders, would be of real benefit to buyers and insurers.

In addition, standardised terms should also be reflected in applicable legislation. We refer to the definition of 'small business' which differs between:

**Unfair Contracts Terms Regime:** less than 20 employees

**Insurance Contracts Act** (via the Regulations): under \$1m in turnover and 5 or less full time equivalent workers;

**AFCA:** less than 100 employees

**General Insurance Code of Practice:** less than 100 employees for a manufacturing business or less than 20 employees for a non-manufacturing business

**Australian Tax Office:** under \$10m in annual turnover.

## Question 5 (cont)

AFCA's remit is to provide dispute resolution for small businesses in relation to consumer or small business insurance products. However, AFCA's definition of small business excludes contractors all risks, fidelity guarantee, legal liability (including public liability and products liability), professional indemnity and industrial special risks significantly restricting its ability to assist small businesses with dispute resolution. Consistency of definitions across legislation will provide greater certainty to policyholders and to underwriters of relevant classes of business.

It is our view that any expansion of AFCA's remit should be scrutinised extremely carefully, and wider industry and public consultation sought – including perhaps a reference to international position for comparison. The fundamental challenge for some lines of commercial insurance business is that there will often or inevitably be a third party involved – in fact, in the more complex cases, we see many third parties involved. This factor will naturally influence the way that the claim is made, formulated and in turn, will drive the coverage response. The position on personal lines policies is quite different. In those cases, AFCA is dealing with first party losses and only the insured and insurer are parties effected by the complaint.

If there is market agreement in relation to standardised wordings, we consider the idea of clearly listing inclusions, exclusions, limitations and exclusions in a type of insurance Fact Statement, with explanations as to common reasons why claims have been denied, to be of merit and warranting further detailed consideration. This type of Statement would make it easier for buyers to compare policies (including cost because they can see what benefits are included when comparing policies) and weigh up the positives and negatives of different policies. It is very difficult for the average SME to do this currently without the advice and input of a knowledgeable independent broker. This type of Fact Statement could be of benefit to Property Insurance for disaster relief, PI, PL and BI insurance.

# Question 5 (cont)

## **Q5.2. HOW FAR SHOULD THE INSURANCE INDUSTRY PROCEED IN THE DIRECTION OF OPTIONS (A), (B) AND (C) AND WHY?**

### **Option B**

Whilst we express the view above that standardised terms, definitions and/or exclusions will have benefits to buyers, we question whether that is what is required in the PI and PL insurance space. In those markets it is less clear that standardised exclusions and terms would address the affordability and coverage issues affecting these types of policies.

The Australian market for PI policies for construction professionals has hardened over recent years with certain building professionals (such as building surveyors) because of the declining profitability of this area<sup>FN</sup>. Some reform is required to address the crisis facing the construction PI industry.

Similarly in the PL market, some reform is required to address the difficulties facing SMEs. Personal injury litigation is costly. Court processes are often slow, which leads to long tail claims for insurers and increased costs. The ASBFEO recommends at recommendation 5, that following the approach taken in New Zealand, liability for personal injury should be subject to statutory caps. We support this recommendation and believe that the implementation of statutory caps would assist in stabilising the PL market. The appropriate caps would need to be subject to careful research and consideration.

<sup>FN</sup> PwC interim report 'Strengthening the professional indemnity insurance environment for building professionals in Queensland' 2019, at 20

# Option 5 (cont)

## Q5.3. WHICH ELEMENTS OF OPTIONS (A) AND (B) ARE THE MOST IMPORTANT AND WHY?

We consider the most important elements of (A) and (B) are:

1. In respect of property insurance for natural disasters we consider the following element of (B) is most important:

*“... the requirement for the insurance industry and each interested industry or profession to collaborate to redesign or rework the insurance coverage so as to build standard wordings with standard definitions, standardised exclusions and standardised optional extras, all properly designed for the industry or profession concerned to be ‘fit for purpose’...”*

This is because:

- it is achievable – we can conceptually understand how this would be implemented; and
- it is impactful – if there are standard definitions, there will be far more certainty into what types of claims will be covered.

2. In respect of PI insurance, we consider the following element of (a) is very important.

*“Describe risk management principles and risk mitigation initiatives open to the buyer that are specific to the buyer’s industry or profession...”*

This is because professionals need regular training and to stay abreast of developments in their area of expertise. This is one way of mitigating the risk of claims. A focus on this during insurance applications and renewals (as proposed is Q5.4 below) may have a positive impact on the number of claims against professionals.

# Question 5 (cont)

## **Q5.3. WHICH ELEMENTS OF OPTIONS (A) AND (B) ARE THE MOST IMPORTANT AND WHY?**

3. In respect of PL and PI Insurance (in addition to (2) above) we consider the following elements of (A) and (B) are very important:
  - *List clearly all inclusions, exclusions, limitations and conditions together with standard policy checklists ie same principle as Key Fact Statements now required for home and motor policies but more explanatory yet also abbreviated relate to PDSs*
  - *Summarise the most common reasons historically as to why claims have been denied under this kind of policy.*

This is because buyers of PL and PI insurance need to clearly be able to compare policies, understand what is excluded and why claims are denied. This in turn enables them to better understand what they are buying and prompt them to turn their minds to addressing their own risk profile.

# Question 5 (cont)

## **Q5.4. ARE THERE OTHER WORTHWHILE UNDERWRITING INITIATIVES, DIFFERENT FROM THE IDEAS AT OPTION (C) AND IN THE ABSENCE OF NEW REGULATION, THAT WOULD BE EFFECTIVE AND WHY?**

We consider that underwriting initiatives that address, or assist SME insureds in addressing, their business risks may be effective because this may mitigate the frequency and quantum of claims where the frequency and quantum of claims are a key factors in premium increases.

Options that fall within this category include:

- Assessing compliance by directors/partners/professional staff of insureds with certain minimum training and education (i.e. professional skills, ethics, mitigation of professional risks and best practice in supervisory/management skills requirements) as part of the underwriting process; and
- Insurers partnering with third-party risk management companies and (where appropriate) offering discounts on premium for insureds that engage the services of those third-party risk management companies.

In addition it is noteworthy that some insurers already adopt standardised wording across all professions. The schedule to the policy is where the nuance to the underwriting occurs and where endorsements/special conditions are inserted to accommodate the different professions, turnover and risk. This type of approach provides certainty to SMEs who are likely to have a better understanding of the cover that is being offered.

# Question 5 (cont)

## **Q5.5. HOW USEFUL OR HOW VALUABLE TO EACH OF CUSTOMERS, BROKERS AND INSURERS WOULD BE ICA STANDARDS AND GUIDANCE NOTES, AS SUGGESTED AT OPTION (4), ASSUMING THEY ARE WELL CONSTRUCTED AND DO NOT CONTRAVENE COMPETITION LAWS?**

We consider that a system of mandatory standards and non-binding guidance notes may be useful and valuable to each of customers, brokers and insurers.

For insurers, mandatory standards allow them to self-regulate what is necessary to comply with, and exceed, what is required by the law. Standards often also involve dispute resolution mechanisms avoiding the need for costly court procedures for aggrieved customers. Standards create transparent codes of practice which would promote better consumer confidence in the industry and (hopefully) more business for those insurers achieving the standards. In addition, guidelines can assist insurers in complex underwriting, and we refer, for example, to the Financial Services Council's (FSC) Guidance Note 32 regarding HIV/AIDS Underwriting.

For brokers and customers, mandatory standards allow for better results than if they were required to turn to the law. For the reasons stated above, mandatory standards including standard definitions allow for insurance buyers to analyse and compare the different products available. For example, the FSC provide Guidance Note 5 regarding Industry Terms and Definitions. The FSC considers that standardised definitions, minimal technical language and a single update mechanism for definitions used consistently across the industry will increase consumer understanding and satisfaction.

However, for standards to have any substantive value for brokers and consumers, they must be enforceable. The status of promises in existing standards and codes of conduct are not always legally clear, which mean they are not always enforced by individuals or the [regulators](#). To be valuable, ICA standards must identify which provisions govern the terms of the contract between the insurer and the consumer. As noted by the Commissioner of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,

*If industry codes are to be more than public relations puffs, the promises made must be made seriously. ... This must entail that the promises can be enforced by those to whom the promises are made: the customer who acquires the product or service, and the guarantors of loans to individuals and small businesses.*<sup>FN</sup>

<sup>FN</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, February 2019, p 12

# On the question of affordability and availability

The goal of this paper is to obtain views via consultation on the question: what is the potential for each option to improve affordability and availability? Therefore, for each of the options described in this section, this question can be considered for each of pl, pi property insurance, and bi for each segment of the sme market that is struggling to find affordable insurance available on suitable terms and conditions. More specifically, and noting that none of these options are mutually exclusive, for each option and for each market segment (industry or profession) in which you have an interest–

**Q.5.6. WHAT ARE THE POTENTIAL BENEFITS AND HOW EFFECTIVE MIGHT THE OPTION BE?**

**Q.5.7. WHAT ARE THE POTENTIAL COSTS AND THE WEAKNESSES OR LIMITATIONS OF THE OPTION?**

**Q.5.8. WHICH COMBINATIONS OF OPTIONS DO YOU BELIEVE ARE WORTH PURSUING TO DELIVER A MATERIAL CHANGE IN THE AFFORDABILITY AND AVAILABILITY PROFILE OF THE RISKS IN WHICH YOU HAVE AN INTEREST – IN 2021? – AT A LATER TIME?**

**Q.5.9. FOR EACH OF THE OPTIONS YOU WISH TO SEE PURSUED, WHAT PROCESS AND WHAT RESOURCES DO YOU SUGGEST BE APPLIED TO SEE IT IMPLEMENTED?**

We consider that (broadly speaking) across all market segments the options that are likely to be the most effective at improving the affordability and availability issue are those that provide mutual benefits to insurers and insureds and that are driven by both insurers and insureds.

Practically, we consider *Option 2: Advice and education on risk mitigation*, *Option 5: Risk management and risk mitigation* and *Option 9: Industry association accreditation and standards* fall within these categories.



# On the question of affordability and availability

These options are mutually beneficial to insurers and insureds because:

- For both insureds and insurers, they may assist in reducing the risk of a claim and the financial losses associated with a claim including the liabilities and defence costs (for insurers) and the business costs, the payment of any deductible and uninsured losses (for insureds);
- For insureds, they may assist in reducing premiums and giving them access to relevant education and practical advice on risk mitigation and management;
- For insurers, they may assist in obtaining relevant data and information that may improve underwriting efficiency.

These options also require buy-in from all industry participants and we can see how insureds and insurers (and other industry participants) could jointly work together to implement these options. For example, insurers may be able to be more transparent with insureds (or peak industry bodies) in relation to the issues that may impact on the underwriting process so that advice, education and industry accreditations and standards can properly address those issues. Alternatively, as we suggested above, insurers may be able to partner with third party risk advisory companies who can provide insureds with risk mitigation and management advice. The funding of this type of arrangement would need to be the subject of consultation but may either be at the cost of the insured (perhaps in exchange for some discount on premiums) or insurers (perhaps in exchange for some concessions from government on taxes).

As acknowledged in the ICA Consultation Paper, it may be that the benefits of these options would not assist with the affordability issue in the short term or that insurers and insureds would require some evidence of the effectiveness of taking up these options to commit to their implementation. If that is the case, and short-term outcomes are a necessity, then it may be that these options could be pursued along with some form of short-term (or long-term) government assistance identified in *Option 14: Government taxes and charges* and / or *Option 15: Collaboration with government to reduce regulatory barriers*.

The effectiveness and limitations of these options would depend on a number of factors including the general risk level of the industry and the business in issue, the quality of the risk mitigation and management advice and reduction, the willingness of the insured to participate (as opposed to the exercise being a 'tick the box' process) and the extent to which external factors (i.e. market forces, global issues and reinsurance) are strong contributors in the affordability issue.

# International perspectives

Clyde & Co is the leading international insurance law firm.

We have reached out to our international colleagues to determine whether there are any market or regulatory insights pertaining to the affordability of commercial insurance for SMEs that would be helpful to the ICA in its analysis of the issues raised in this paper.

The observations of our UK colleagues on the question of affordability and availability of insurance for SMEs in the UK include:

- The SME market makes up a very significant percentage of UK business and is an extremely important sector from a tax generation and employment perspective.
- The SME sector is under-served by traditional insurance which has led to the development of the MGA and DA sector in the UK which apparently caters better for SME needs.
- The SME sector generally distrusts insurers and considers many of the standard products are not fit for purpose.
- There is a move to more digital access to products for SMEs, as well as flexible products/insure tech and sharing products to better support the sector going forward.
- Speed of payment of claims is essential for what are generally cash poor businesses.

Like Australia, many SMEs do not have designated staff to manage insurance. UK research of SMEs suggests operating models of insurers should be adapted to create more user-centric, simplistic and transparent experiences for SMEs (McKinsey article '*Insurers must rethink the SME segment: Lessons from the United Kingdom*' 5 Nov 2020).

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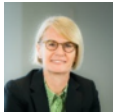
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# 440

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Lawyers

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# 4,000

Total staff

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