

# Religious Institutions and Personal Injury Compensation Claims for Abuse: The Noteworthy Significance of Insurance

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*Many churches, religious schools, and care institutions have apologised for historical child sexual abuse and committed themselves to reparation and safeguarding. However, recent changes to legislation have resulted in a deluge of tort law claims, civil litigation, and work for lawyers. Religious leaders and devotees today bear the financial burdens of compensating for historical wrongs sometimes many decades old in times of meagre or no insurance coverage. This article recalls some relevant discussion at the Royal Commission into Institutional Responses to Child Sexual Abuse about the anticipated consequences for insurance. Next, there is an examination of judicial ideas about insurance in decisions relating to civil liability. Then, it provides a look at some commercial comparisons and the response of governments to the lack of insurance. The article further considers a case example of what happened to a major faith-based insurer after the legislative changes. Finally, some alternative perspectives are investigated alongside a look into the future.*

## I. INTRODUCTION

Religious organisations involved in historical institutional abuse against children have offered apologies and commitments to reparation and safeguarding.<sup>1</sup> Yet, issues of liability arise for the intentional torts committed by church ministers.<sup>2</sup> Civil litigation targets religious bodies and religious leaders.<sup>3</sup> Many religious institutions are likely to have ‘a deeper pocket’ and can be expected to have insured against vicarious liability.<sup>4</sup> Diocesan insurance has been ‘a relatively sleepy domain involving chiefly slip and fall cases, property and casualty questions,

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<sup>1</sup> Catholic Religious Australia and Australian Catholic Bishops Conference, ‘Catholic Church Stands with Prime Minister, Renews Apology’, *Catholic Australia* (Media Release, 22 October 2018) <<https://www.catholic.org.au/acbc-media/media-centre/media-releases-new/2152-catholic-church-stands-with-prime-minister-renews-apology/file>>; Anglican Church of Australia, ‘Apology for Sexual Abuse’ (12 January 2021) <<https://anglican.org.au/resolutions/apology-for-sexual-abuse/?s=Apology+for+Sexual+Abuse&button=>>>; Uniting Church in Australia, ‘National Apology’ (24 October 2018) <<https://assembly.uca.org.au/news/item/2896-national-apology>>.

<sup>2</sup> Nafees Meah and Philip Petchey, ‘Liability of Churches and Religious Organizations for Sexual Abuse of Children by Ministers of Religion’ (2005) 34(1) *Common Law World Review* 39; Kim Stevenson, Judith Rowbotham, and Jason Lowther, ‘Reparation for Betrayal of Trust in Child Sexual Abuse Cases: The Christian Duty of Care, Vicarious Liability and the Church of England’ (2015) 41(2) *Australian Feminist Law Journal* 253; Ruth Everhart, *The #MeToo Reckoning: Facing the Church’s Complicity in Sexual Abuse and Misconduct* (InterVarsity Press, 2020).

<sup>3</sup> Thomas J Paprocki, ‘As the Pendulum Swings from Charitable Immunity to Bankruptcy, Bringing it to Rest with Charitable Viability’ (2009) 48(1) *Journal of Catholic Legal Studies* 1.

<sup>4</sup> *Cox v Ministry of Justice* [2016] UKSC 10, [20]; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [77] (Lord Hughes dissenting).

and only rarely, cases where there was serious disagreement between a diocese and its insurer. That sleepy domain has now been clearly relegated to the past'.<sup>5</sup>

Significant legislative changes were recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>6</sup> Consequently, states and territories in Australia removed the statute of limitations for child abuse.<sup>7</sup> The new legislation enabled courts to set aside previously settled causes of action.<sup>8</sup> Many claims have arisen alongside plaintiff law firms who often offer conditional fee or 'no win, no fee' arrangements.<sup>9</sup> The altered socio-legal environment favours claimants whose lawyers may resort to class actions and thus seek to 'extract large settlements from litigation-weary defendants, regardless of the merits of the claim'.<sup>10</sup>

Substantive legal and trauma-informed principles justify retroactive legislation removing the statute of limitations for child abuse.<sup>11</sup> These principles include prevention, liability, publicity, and monetary consequences.<sup>12</sup> Nonetheless, religious institutions today bear the financial burdens of compensating for historical wrongs that may be many decades old, and in current circumstances of having meagre or no insurance coverage.

The legacy of sexual abuse is a proper subject in insurance law when religious institutions with general liability policies lodge claims.<sup>13</sup> The sudden onset of liabilities and claims has triggered the collapse of a major faith-based insurer with a large religious clientele.<sup>14</sup> A flood of claims caused many commercial insurers to decline cover for physical and sexual abuse.<sup>15</sup>

This article analyses the role of insurance in a legal setting of historical abuse compensation

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<sup>5</sup> James A Serritella, 'Insurance Coverage Issues in Cases of Clergy Misconduct' (1999) 39(1) *Catholic Lawyer* 55.

<sup>6</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Recommendations* (Final Report, 2017) 88–90 ('RCIRCSA Recommendations').

<sup>7</sup> See, eg, *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld).

<sup>8</sup> *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) s 12; *Children Legislation Amendment Act 2019* (Vic) s 32; *Civil Liability Amendment (Child Abuse) Act 2021* (NSW).

<sup>9</sup> D Kloss, *Occupational Health Law* (John Wiley & Sons, 2020) 184.

<sup>10</sup> Erica W Rutner and Corey K Brady, 'Heads Plaintiffs Win, Tails Defendants Lose: The Asymmetrical Reality of Serial Class Action Relitigation' (2018) 38(1) *Review of Litigation* 69, 69–70.

<sup>11</sup> Ben Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27(3) *University of New South Wales Law Journal* 631; DR Katner, 'Delayed Responses to Child Sexual Abuse, the Kavanaugh Confirmation Hearing, and Eliminating Statutes of Limitation for Child Sexual Abuse Cases' (2020) 47(1) *American Journal of Criminal Law* 1.

<sup>12</sup> Timothy J Muyano, 'A Not So Retro Problem: Extending Statutes of Limitations to Hold Institutions Responsible for Child Sexual Abuse Accountable under State Constitutions' (2018) 63(6) *Villanova Law Review* 47.

<sup>13</sup> Peter Nash Swisher and Richard C Mason, 'Liability Insurance Coverage for Clergy Sexual Abuse Claims' (2011) 17(2) *Connecticut Insurance Law Journal* 355; James T O'Reilly and Margaret SP Chalmers, 'Church Insurance and Abuse Claims' in James T O'Reilly and Margaret S P Chalmers (eds), *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press, 2014) 81; David S Florig, 'Insurance Coverage for Sexual Abuse or Molestation' (1995) 30(3) *Tort & Insurance Law Journal* 699.

<sup>14</sup> Australian Prudential Regulation Authority, 'APRA to Monitor CCI Following its Decision to Enter Run-off' (Media Release, 30 May 2023) ('APRA Media Release') <<https://www.apra.gov.au/news-and-publications/apra-to-monitor-cci-following-its-decision-to-enter-run-off>>.

<sup>15</sup> Christopher Knaus, 'State Governments Forced to Indemnify Church Bodies for Child Abuse Due to Insurance "Market Failure"', *The Guardian* (online, 11 May 2023) <<https://www.theguardian.com/australia-news/2023/may/11/state-governments-forced-to-indemnify-church-bodies-for-child-abuse-due-to-insurance-market-failure>>.

and investigates what happened to one major faith-based insurer as a result of a deluge of new and reopened claims. It becomes evident that the financial difficulties faced by religious organisations occurred after the changes in legislation recommended by the Royal Commission's *Final Report* ('*Final Report*'). Such challenges were also caused by an increasingly litigious environment following the removal of limitations periods for child abuse. Recent multimillion dollar jury awards for damages have intensified the risk exposure, the necessity of insurance, and the need to find a way forward so religious institutes can continue to serve their communities while offering compensation to victims.

The article begins by recalling some relevant discussion in the *Final Report*, particularly the anticipated consequences for insurance after the proposed abolishing of limitation periods for historical abuse. Next, there is an examination of the judicial treatment of insurance in some court decisions relating to institutional liability. Then, two historical commercial comparisons are revisited to highlight the response of governments to the lack of insurance after the collapse of the insurers. The article further considers a case example of what happened to a major faith-based insurer after the legislative changes were passed by state and territory parliaments in Australia. Finally, some alternative perspectives on legal costs are explored before looking to the future and considering ideas for a solution.

## II. THE ROYAL COMMISSION AND ANTICIPATED CONSEQUENCES FOR LIABILITIES AND INSURANCE

The insurance difficulties began to emerge after the legislative changes recommended by the Royal Commission. It is helpful to review the thinking at the time regarding civil litigation, a redress scheme, the benefits for victims and survivors, the role of insurance, and what the predicted outcomes for institutions might be.

The *Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report* ('*RCIRCSA Redress Report*') considered insurance issues and forecasted some expected outcomes. This Report predicted the removal of limitation periods and strict liability would mean that

relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. If it were even possible to obtain insurance for retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.<sup>16</sup>

Civil litigation would be available for anyone seeking damages.<sup>17</sup> Such actions would be different from any redress scheme. The *RCIRCSA Redress Report* commented on the question of costs:

If those survivors were to receive payments as if they had brought successful common law claims, the cost of funding the scheme would be likely to be unaffordable for governments and non-government institutions or at least

<sup>16</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation* (Report, 2015) 55 ('*RCIRCSA Redress Report*').

<sup>17</sup> *Ibid* 248.

unaffordable without significantly affecting other services and programs.<sup>18</sup>

The submission of Catholic Church Insurance ('CCI') was quoted in the *RCIRCSA Redress Report*.

It is likely then that insurance protection for determinations made on re-opened old settlements will not be available, leaving many non-government institutions vulnerable to settlements. In cases where insurers have indemnified policyholders in the original settlements, those insurers are likely to not provide any additional contribution where the original legal liability has been extinguished by an apparently valid settlement.<sup>19</sup>

The report conceded that removing the limitation period with retrospective effect will have an impact on some insurers and reinsurers.

However, it is not clear to us that, in the past, institutions generally have had insurance cover with an insurer that remains solvent or provided adequate coverage. The evidence available to us does not indicate that there is likely to be any significant impact on insurance or reinsurance. We acknowledge that institutions may face additional claims if limitation periods were removed with retrospective effect. However, we are satisfied that limitation periods have worked great injustices against survivors for some time.<sup>20</sup>

The change will favour survivors despite the difficulties foreseen. The thinking then was that aftermaths were manageable. As the *RCIRCSA Redress Report* concluded:

We consider that institutions' interests are adequately protected by the need for a claimant to prove his or her case on admissible evidence and by the court's power to stay proceedings in the event that a fair trial is not possible. Institutions can also take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.<sup>21</sup>

The last point is premised on institutions holding insurance at the historical period to meet all future claims including claims which are doubtful, overstated, or seemingly false.<sup>22</sup> Doubtful cases have been proven in other countries such as the United States, Spain, Ireland, and England.<sup>23</sup> Some have found that lawyers have searched for clients and proposed they claim they were abused when they were young and the lawyers then offered to file lawsuits against religious institutions on a contingency basis; no fee is charged if the litigation does not end in

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<sup>18</sup> Ibid 248.

<sup>19</sup> Ibid 258–9, quoting Catholic Church Insurance, *Submission to Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper into Redress and Civil Litigation* (2015) 2.

<sup>20</sup> Ibid 457–8.

<sup>21</sup> Ibid. 458.

<sup>22</sup> James Valladares, *Hope Springs Eternal in the Priestly Breast: A Research Study on Procedural Justice for Priests: Diocesan and Religious* (iUniverse, 2012).

<sup>23</sup> Virginia Miller and Seumas Miller, 'Child Sexual Abuse, Integrity Systems and the Anglican Church: Truth, Justice and Love' (2021) 19(2) *Journal of Anglican Studies* 193; Andrew Hemming, 'Why the Jury in *Pell v The Queen* Must Have Had a Doubt and the High Court was Right to Quash the Guilty Verdicts' (2022) 1 *Australian Journal of Law and Religion* 57.

a settlement or a win in court.<sup>24</sup> However, suggestions that a claim of sexual abuse may be false or invented are frequently met with objections of blaming the victim.<sup>25</sup> Nonetheless, if the aim is to see justice is carried out, the authenticity of each claim must be substantiated.

The *RCIRCSA Redress Report* predicted that the insurance policy and the insurer (if they are found and deemed solvent) may help to overcome an absence of assets.<sup>26</sup> Yet, for religious organisations the reality is very different: lack of insurance, risks of insolvency, and huge unanticipated financial burdens.

Such difficulties faced by institutions are more clearly evident and public when the matters are the subject of civil litigation. Although many cases are settled before or during the trial, other cases proceed to judgement. The arguments presented by plaintiffs and defendants before the courts as well as the ideas of judges are significant, and some notable decisions are considered next.

### III. COURTS AND EMERGING PRINCIPLES

Insurance is important for religious institutions and is frequently involved in responding to church abuse claims.<sup>27</sup> While not always a factor in civil proceedings,<sup>28</sup> insurance has emerged as a significant consideration in the case law of torts where faith-based organisations are named as defendants.

In *Roads & Traffic Authority of NSW v Batistatos* ('*Batistatos NSW*') the proceedings were permanently stayed.<sup>29</sup> The plaintiff suffered catastrophic disabling injuries in a motor vehicle accident in 1965 and subsequently lived in hospital and then in home care. The defendants were sued in 1994; they argued a fair trial was impossible due to the delay. The NSW Court of Appeal upheld that contention and stayed the proceedings permanently. The NCC and RTA gave as one of the essential grounds of appeal that the primary judge<sup>30</sup> failed to give sufficient weight to the defendants' affidavit evidence that NCC had insurance at the time but could not establish who the insurer was.<sup>31</sup> Bryson JA commented:

Hoeben J did not refer to the unavailability of insurance and NCC's counsel

<sup>24</sup> Francis G Morrissey, 'Addressing the Issue of Clergy Abuse' (2001) 35 *Studia Canonica* 407.

<sup>25</sup> David R Price and James J McDonald Jr, 'The Problem of False Claims of Clergy Sexual Abuse' (2003) 50(1) *Risk Management* 51.

<sup>26</sup> *RCIRCSA: Redress Report* (n 16) 511.

<sup>27</sup> *Steen v Trustees of the Diocese of Tasmania* [2024] TASSC 3; *Fields v Trustees of the Marist Brothers* [2022] NSWSC 739 [81]; *O'Callaghan v Trustees of the Marist Brothers* [2023] NSWSC 432 [47]–[48]; *Grant v Bird* [2021] VSC 380 [10]; *Pearce v Missionaries of the Sacred Heart* [2022] VSC 697; *BJP1 v Salesian Society (VIC) Inc* [2021] NSWSC 241; *Roman Catholic Trusts Corporation for the Diocese of Sale v WCB* [2020] VSCA 328 [31]; *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Ltd (Liability Judgment)* [2023] FCA 190.

<sup>28</sup> *GWG v Province Leader of the Oceania Province of the Congregation of the Christian Brothers* [2024] WADC 8; *DJW v State of Queensland* [2023] QSC 138; *Willmot v State of Queensland* [2022] QSC 167; *ADA v State of Queensland* [2023] QSC 159; *Peters v Trustees of the Marist Brothers* [2023] NSWSC 8; *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2021] NSWSC 1204; *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78; *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 ('*GLJ HCA*'). As of this writing, the case of *Willmot v State of Queensland* [2023] QCA 102 is currently on appeal in the High Court of Australia, *Willmot v The State of Queensland* Case B65/2023.

<sup>29</sup> [2005] NSWCA 20 ('*Batistatos NSW*').

<sup>30</sup> *Andrew Batistatos by his tutor Nita Lavinia Batis v Roads and Traffic Authority* [2004] NSWSC 796.

<sup>31</sup> *Batistatos NSW* (n 29) [24], [71].

conceded that this was not put forward in a clear way to his Honour as an element which NCC asked him to consider. It is available for reconsideration on any re-exercise of the discretion. The availability or non-availability of insurance appears to me to be an important factor.<sup>32</sup>

The High Court dismissed the plaintiff's appeal against the permanent stay (*Batistatos HCA*).<sup>33</sup>

*Batistatos HCA* features as an authority in recent religious institution cases. In *Smith v The Council of Trinity Grammar School* (*Smith*),<sup>34</sup> the plaintiff filed proceedings against the defendant, alleging sexual abuse suffered in 1981 while in Year 6 and sought damages for personal injury. The questions concerned delays affecting the evidence or its lack thereof, the defendant's inability to give evidence, and whether the delay resulted in an inability to have a fair trial. A permanent stay of proceedings was granted. The court recognised the incapability to benefit from insurance due to the effluxion of time. This resulted from the inability to locate the underwriter of the defendant's public liability insurance and 'imposes an unfair burden on the defendant. This was acknowledged by the High Court in *Batistatos* in deciding that a defendant was entitled to a stay where there had been a delay in the prosecution of proceedings'.<sup>35</sup>

Moreover, in *Smith*, Harrison AsJ thought the lack of insurance cover was the same as the situation in *The Council of Trinity Grammar School v Anderson* (*Anderson*).<sup>36</sup> This matter was an application for a permanent stay of proceedings in a case concerning sexual assaults allegedly perpetrated by a teacher against a student between 1974 and 1976. While the primary judge dismissed the motion, the proceedings were permanently stayed on appeal.

Quoting the Chief Justice, Harrison AsJ stated:

The primary judge also dismissed the absence of insurance as a relevant consideration ... I have referred [...] to material which would suggest that insurance covering a claim of this nature existed at the time. The remarks of the primary judge that Trinity could meet the liability in any event, in my view, overlooks the prejudice which was described by Bryson JA in the Court of Appeal in *Batistatos* at [71] ...<sup>37</sup>

Chief Justice Bathurst in *Anderson* also referred to *Batistatos HCA* and the effects of the lapse in time. The inability to locate any record that could assist in proving the insurer on risk at the relevant time held significance before the Court of Appeal.<sup>38</sup> Associate Justice Harrison concluded 'the lack of insurance is a relevant consideration and causes prejudice to the defendant even where there is nothing to suggest that the School could not meet any verdict'.<sup>39</sup>

Another principle is that insurance is sometimes a consideration in applications to set aside a

<sup>32</sup> Ibid [71] (Bryson JA, Mason P agreeing at [1] Giles JA agreeing at [2]).

<sup>33</sup> *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 (*Batistatos HCA*).

<sup>34</sup> [2021] NSWSC 1592 (*Smith*).

<sup>35</sup> [2021] NSWSC 1592 [123] (Harrison AsJ).

<sup>36</sup> [2019] NSWCA 292 (*Anderson*).

<sup>37</sup> *Smith* (n 34) [184] (Harrison AsJ) quoting *Anderson* (n 36) [487].

<sup>38</sup> *Anderson* (n 36) [123] citing *Batistatos HCA* (n 33).

<sup>39</sup> *Smith* (n 34) [185], [188] (Harrison AsJ).

settlement agreement pursuant to amendments made in 2016 to the *Limitation of Actions Act 1974* (Qld). There was the Queensland case of *TRG v The Board of Trustees of the Brisbane Grammar School* ('TRG') in 2019.<sup>40</sup> Davis J dismissed the application to set aside the settlement agreement and thought a loss of insurance was a relevant factor. 'There was evidence that when the claims were first made in 2000 the insurers were reluctant to indemnify the school but ultimately partially did.'<sup>41</sup> The judge wrote, '[t]he only finding that can be made on the evidence in its present state is that there must be some unquantifiable risk that the respondent will be without effective insurance cover in relation to any new proceedings'.<sup>42</sup> Since the evidence was so vague, Davis J did not give it any weight,<sup>43</sup> although it remains as a consideration.

A further principle is that insurance provides an understanding of an organisation's liabilities; this principle was featured in *Batistatos NSW*. The judges explained, 'Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period'.<sup>44</sup> The decision quoted the *Limitation of Actions for Latent Personal Injuries* (1992) Report No 69 of the Law Reform Commissioner of Tasmania.

[M]anufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability.<sup>45</sup>

When limitation periods are abolished, subsequent burdens ensue especially for religious organisations who have limited financial resources.

Court judgements also manifest awareness of the effects of high volumes of claims. For example, '[w]hen a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries or in some industries in recent years, the financial consequences for an insurer can be drastic.'<sup>46</sup> Many religious institutions are experiencing this 'out of time' deluge of claims and without adequate insurance.

The decision in *Batistatos NSW* examined the issue of equity for those impacted by 'a large number of claims'.<sup>47</sup> The New South Wales Court of Appeal judges quoted the High Court in *Brisbane South Regional Health Authority v Taylor* ('Brisbane South').<sup>48</sup> This case concerned an extension of time to bring an action against the appellant. The District Court of Queensland dismissed the application for an extension of time, but the Court of Appeal allowed an appeal against that refusal and granted the extension. However, the High Court reinstated the order of the judge at first instance. Justice McHugh found that

<sup>40</sup> [2019] QSC 157 (Davis J) ('TRG').

<sup>41</sup> *Ibid* [261].

<sup>42</sup> *Ibid* [262].

<sup>43</sup> *Ibid* [275].

<sup>44</sup> *Batistatos NSW* (n 29) [59] (Mason P, Giles, Bryson JA).

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> [1996] HCA 25 ('Brisbane South').

[e]ven where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.<sup>49</sup>

Now those limitation periods are abolished in all states and territories in Australia so that an action for damages resulting from child abuse of the person may be brought at any time and is not subject to any limitation period.<sup>50</sup>

Courts comprehend too that these claims are often of high value. Bryson JA in *Batistatos NSW* recalled how the trial judge predicted that if the plaintiff was wholly successful, the damages would result in a substantive sum.

The large amount involved is it seems to me a fact which has to be considered when deciding whether proceedings should be permanently stayed, because the decision will bear, potentially unjustly, on the defendants just as it may potentially bear unjustly on the plaintiff. The large size of the amount involved makes the perception of the injustice of an unfair trial particularly acute.<sup>51</sup>

The resultant burden is viewed as oppressive, the court noting ‘[t]he inability [of the defendant] to avail itself of cover which on the balance of probabilities was found to exist and respond to the liability...’<sup>52</sup> The delay in proceedings resulted ‘in the loss of records relating to insurance and so the delay becomes an engine of the oppression of a party’.<sup>53</sup> This reflects Harrison AsJ in *Smith* who commented on the school’s senior counsel submission that the delay in proceedings has ‘resulted in the loss of records relating to insurance and has consequently become an engine of their oppression’.<sup>54</sup>

The thinking of Australian courts discussed above is reflected in courts overseas. The Supreme Court of the United Kingdom heard the case of *The Catholic Child Welfare Society v Various Claimants* on the question of whether a religious institute was responsible in law for the alleged acts of abuse of children at a school committed by its members. The UK court explained how an unincorporated association with no legal personality generally established a charitable trust to enable management and ownership of property and conduct financial transactions.<sup>55</sup> It was the trustees who would be covered by insurance should liability be established. The judges commented that ‘[a]t the end of the day what is likely to matter will be access to the funds held by the trusts, or to insurance effected by the trustees’.<sup>56</sup> The standards are

those who set in motion and profit from the activities of their employees should

<sup>49</sup> *Brisbane South* [1996] HCA 25 [6] (McHugh J).

<sup>50</sup> For example, *Limitation Act 1969* (NSW); *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld); *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA).

<sup>51</sup> *Batistatos NSW* (n 29) [70] (Mason P, Giles, Bryson JA).

<sup>52</sup> *Smith* (n 34) [125] (Harrison AsJ) citing Balla DCJ in *Lake v Trinity Grammar School* (New South Wales District Court, Balla DCJ, 28 March 2018).

<sup>53</sup> *Smith* (n 34) [126] (Harrison AsJ).

<sup>54</sup> *Ibid* [183].

<sup>55</sup> [2012] UKSC 56, [29].

<sup>56</sup> *Ibid* [32] (Lord Phillips with Lady Hale, Lord Kerr, Lord Wilson, and Lord Carnwath agreeing).



compensate those who are injured by such activities, even when performed negligently. Liability was extended to the employer on the practical assumption that because he could spread the risk through pricing and insurance, he was better organised and able to bear the risk and was, at the same time, encouraged to control the risk.<sup>57</sup>

In sum, the principles relating to insurance for religious institutions in responding to claims are, firstly, that insurance is so important that it is a consideration for judges to weigh when deciding permanent stay applications and applications to set-aside previous settlements. Secondly, insurance is necessary because it permits knowledge of an institution's liabilities. Thirdly, huge volumes of claims out of time and of high value are calamitous events which can create unfairness. The financial consequences for an insurer can be drastic.<sup>58</sup> What happens when an insurer fails? It becomes devastating for the insured.

#### IV. COMMERCIAL COMPARISONS

Before examining the case of a faith-based insurer severely impacted by recent legislative changes, for some financial and community context it is worth briefly recalling the insolvencies of two commercial insurers. One was from last century and had implications for many policy holders in the State of New South Wales. The other example had national repercussions and involved major interventions by the Australian Government.

Insurance was identified as a significant issue in *Smith* where the court made references to the company Bishopsgate. Its shares were sold to a 'rogue', the company was stripped of its assets and failed, leaving considerable liabilities.<sup>59</sup> Since 1976 in the state of New South Wales, Bishopsgate was a licensed workers' compensation insurer.<sup>60</sup> The company was purchased from P and O Australia Limited in January 1983 by Richardson Mann Corporation; its two principal shareholders were Mr A Stathis and Dr E Vilo. An urgent winding-up order for Bishopsgate was granted in the Supreme Court of Victoria on 18 August 1983 with the estimated default of \$19 million; approximately \$5.7 million related to the workers' compensation in New South Wales.<sup>61</sup> The victims were brokers, banks, and public companies.<sup>62</sup> Many recipients of workers compensation lacked financial support when Bishopsgate became insolvent.<sup>63</sup> Some injured employees were off work and not receiving workers' compensation payments.<sup>64</sup> Stathis departed Australia under the name Andreas Stathopoulos using a Greek passport on 4 August 1983 while his Australian passport was with state authorities.<sup>65</sup>

<sup>57</sup> Ibid [42]. As one panel in Australia observed, 'The only way of avoiding vicarious liability is not to be an employer': *Review of the Law of Negligence* (Final Report, September 2002) 167 [11.11] ('*Ipp Report*').

<sup>58</sup> *Brisbane South* (n 48) [6] n. 23.

<sup>59</sup> *Smith* (n 34) [163].

<sup>60</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1983, 1463 (Frank Walker, Minister for Youth and Community Services, Minister for Aboriginal Affairs, and Minister for Housing) ('Walker').

<sup>61</sup> Ibid.

<sup>62</sup> Peter Grabosky, 'The Collapse of Bishopsgate Insurance' in Peter Grabosky and Adam Sutton (eds), *Stains on a White Collar: Fourteen Studies in Corporate Crime or Corporate Harm* (Federation Press, 1989) 31–43 ('Collapse of Bishopsgate').

<sup>63</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1983, 1463 (Garry McIlwaine).

<sup>64</sup> Ibid.

<sup>65</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1984, 92 (Lionel Bowen, Minister representing the Attorney-General).

In response, the State's parliament passed the *Bishopsgate Insurance Australia Limited Act 1983* (NSW) for claims against Bishopsgate Insurance Australia Limited relating to policies of insurance or indemnity under the *Workers' Compensation Act 1926* (NSW). Minister Walker told the NSW Parliament, '[t]he collapse of a workers' compensation insurance company results in financial difficulties for workers and their families who rely on workers' compensation insurance during periods of incapacity'.<sup>66</sup> However, all other claims such as fire, household, and car insurance became subject to the company's financial situation.<sup>67</sup>

One white-collar criminologist commented that an insurance company which fails through incompetence, misfortune, or by design results in customers having no coverage and therefore susceptible to calamitous loss.<sup>68</sup> Nonetheless, the plaintiff in *Smith* submitted, 'Many defendants sued were left without insurance cover of any kind. No quarter was given to those so affected. It was treated as "the rub of the green", as it were'.<sup>69</sup>

Now, a second example. Australia's largest corporate collapse was HIH Insurance Limited.<sup>70</sup> The liquidators' estimate of the asset deficiencies of the HIH group on 15 March 2001 was between \$3.6 billion and \$5.3 billion.<sup>71</sup> The HIH Royal Commission into HIH Insurance ('*HIHRC Final Report*') documented the harms of this 'far-reaching calamity ... with consequences of the most serious kind'.<sup>72</sup> The aftermath fell on policyholders, together with the loss and hurt experienced by shareholders, employees, and other creditors.<sup>73</sup> The ill-effects dispersed rapidly in the community.

Thousands of holders of professional indemnity, public liability, home warranty, and travel insurance were then uninsured for claims made by them or against them.<sup>74</sup> A court judgment exposed a rural authority in Western Australia to a liability estimated at \$6 million because of a fire that started in its rubbish tip and destroyed surrounding farms. The *HIHRC Final Report* pinpointed that the local authority's lead insurer at the time was HIH, and found, 'those who suffered loss or damage to property and all ratepayers in the district are victims of the collapse'.<sup>75</sup>

Federal, state, and territory governments were pressured to offer help. The states and territories estimated that outstanding HIH builders' warranty and compulsory third-party insurance to be approximately \$1.444 billion.<sup>76</sup> The Commonwealth formed a non-profit industry-run company called HIH Claims Support Pty Ltd which commenced operations on 1 July 2001.<sup>77</sup> This company distributed \$640 million allocated by the Commonwealth to cover claims apart from builders' warranty and workers' compensation. By the end of February 2003, payments to 5850 eligible claimants were made out of 11,400 applications. Payments totalled about \$195

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<sup>66</sup> New South Wales, *Parliamentary Debates*, 'Walker' (n 60).

<sup>67</sup> Lenore Nicklin, 'Australia's Missing Tycoon' (23 August 1983) *The Bulletin* 29.

<sup>68</sup> Grabosky, 'Collapse of Bishopsgate' (n 62) 35.

<sup>69</sup> *Smith* (n 34) [163].

<sup>70</sup> Fiona Haines, 'Crime? What Crime? Tales of the Collapse of HIH' in HN Pontell and G Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer, 2007) 523.

<sup>71</sup> *Royal Commission into HIH Insurance* (Final Report, April 2003) vol 1 598 ('*HIHRC Final Report I*').

<sup>72</sup> *Ibid* xiv.

<sup>73</sup> *Ibid* 62.

<sup>74</sup> *Ibid* xiv.

<sup>75</sup> *Ibid* xv.

<sup>76</sup> *Ibid* 62.

<sup>77</sup> *Ibid* 63.

million covering vehicle, household, commercial, and property policies.<sup>78</sup>

The *HIHRC Final Report* concluded that reasons for the collapse included the inadequacy of management information and accounting methods, the inadequacy of auditors and regulators, failures in governance, and misuse of corporate resources.<sup>79</sup> Royal Commissioner Justice Neville Owen concluded that:

HIH was not a case where wholesale fraud or embezzlement abounded. [. . .] Past claims on policies that had not been properly priced had to be met out of present income. This was a spiral that could not continue indefinitely. In the language of the industry, the failure to provide adequately for future claims is called 'under-reserving' or 'under-provisioning'. This, in my view, is the primary reason for HIH failing — and not only failing but doing so in such an egregious way.<sup>80</sup>

Similarly, the collapse of a religious insurer has similar effects on clients and the community as commercial companies. Yet, its decline and difficulties occurred following legislative changes recommended by the '*RCIRCSA Redress Report*'. The circumstances of one such religious insurance company are analysed next.

## V. CASE EXAMPLE OF A FAITH-BASED INSURER

With origins dating back to 1911,<sup>81</sup> Catholic Church Insurance Limited ('CCI') is rather unique in the insurance landscape. Its recent demise is explainable but has left many religious policyholders needing to find new insurance. In its centenary year 2011, CCI was one of the oldest national insurance companies, owned by the Catholic Church to serve the community.<sup>82</sup> Their founding principles endured to create specialist products and services tailored to the needs of the Church, to manage insurance costs, and to keep the surplus within the Church.<sup>83</sup> They offered property, motor vehicle, liability, workers compensation insurance, and retail products, and in 1987 CCI provided superannuation administration services.<sup>84</sup> In 2022 CCI underwrote the property, workers' compensation, and casualty risks of entities of the Australian Catholic community and some clients in the wider Christian community.<sup>85</sup> Through commercial agreements CCI provided domestic residential plus personal motor vehicle insurance and travel insurance.<sup>86</sup>

However, the consequences of the steep and swift increase in claims arising from historical abuse occurred after the removal of statutes of limitations and other legislative changes discussed above. The corporate decline can be tracked progressively in the annual reports. There were only three mentions of 'professional standards' in 2018 in the customary commercial contexts.<sup>87</sup> For example, 'Public Liability includes general liability and

<sup>78</sup> Ibid 63.

<sup>79</sup> *HIHRC* (n 71) vol 3.

<sup>80</sup> *HIHRC 1* (n 71) xvi–xvii.

<sup>81</sup> Jane Carolan, *Serving Church: A History of Catholic Church Insurances Limited* (Utber & Patullo Publishing, 2011).

<sup>82</sup> Catholic Church Insurances Ltd, *CCI Annual Report 2011* (Report, 2011) 4.

<sup>83</sup> Ibid 4.

<sup>84</sup> Ibid 4.

<sup>85</sup> Catholic Church Insurances Ltd, *CCI Annual Report 2022* (Report, 2022) 27 ('*CCI Annual Report 2022*').

<sup>86</sup> Ibid.

<sup>87</sup> Catholic Church Insurances Ltd, *CCI Annual Report 2018* (Report, 2018) 40–1, 60.

professional standards claims.<sup>88</sup> The next year, CCI's overall financial loss was reported as \$15.8 million and associated with professional standards claims, causing considerable uncertainty in the public liability class.<sup>89</sup> By 2020, one newspaper headline summed up the situation, 'Catholic Church's insurance company in financial trouble over abuse payouts'.<sup>90</sup> That year, the impacts were more devastating. CCI explained how the volume of claims lodged for abuse of more than 30 years ago caused an adverse experience together with property losses arising from major bushfires and floods during the year and a deterioration in CCI's workers' compensation portfolio.<sup>91</sup> The *CCI Annual Report* in 2020 made remarks on the developments:

The estimation of the outstanding claims liability arising from abuse claims (referred to as Professional Standards claims) under the public liability insurance contracts is a critical accounting estimate. The latent nature of these claims is such that there is significant uncertainty as to (i) the ultimate total number of claims, (ii) the amounts that such claims will be settled [for] and (iii) the timings of any payments.<sup>92</sup>

In that year 2020 the Group reported a loss for the year of \$247.2 million,<sup>93</sup> and an increase in the outstanding claims liability for Professional Standards of \$238.9 million.<sup>94</sup>

CCI's losses were unstoppable. In 2021, CCI reported a loss for the year of \$192 million due to the restructuring for the estimated costs of future professional standards claims.<sup>95</sup> Simultaneously, the floods in 2022 were Australia's costliest to date. CCI over the previous ten years had paid \$500 million for claims linked to severe weather.<sup>96</sup>

In June 2021, 18 CCI shareholders from Catholic dioceses and religious orders contributed \$168.9 million to 'solidify' CCI's broader insurance business, but particularly to alleviate pressures caused by historical abuse claims.<sup>97</sup> In 2022 CCI reported:

Over years, and more recently, the amounts that we paid in settling Professional Standards claims were consistently higher than projected. This is unsustainable. While so many insurers are walking away from providing any cover at all for this cohort of claimants, our desire is to continue supporting our clients in relation to these matters.<sup>98</sup>

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<sup>88</sup> *Ibid* 40.

<sup>89</sup> Catholic Church Insurances Ltd, *CCI Annual Report 2019* (Report, 2019) 4, 41.

<sup>90</sup> Chris Vedelago, 'Catholic Church's Insurance Company in Financial Trouble Over Abuse Payouts' *Sydney Morning Herald* (online, 22 December 2020) <<https://www.smh.com.au/national/catholic-church-s-insurance-company-in-financial-trouble-over-abuse-payouts-20201222-p56pg0.html>>.

<sup>91</sup> CCI, *CCI Annual Report 2020* (Report, 2020) 29.

<sup>92</sup> *Ibid* 84.

<sup>93</sup> *Ibid* 5.

<sup>94</sup> *Ibid* 84.

<sup>95</sup> CCI, *CCI Annual Report 2021* (Report, 2021) 9.

<sup>96</sup> CCI, *CCI Annual Report 2022* (n 85) 7.

<sup>97</sup> Staff Writers, 'Church Insurance Company Receives Capital Injection to Cover Claims' (8 November 2021) *Catholic Leader* <<https://catholicleader.com.au/news/the-churchs-insurance-company-receives-a-big-capital-injection-to-cover-abuse-claims/>>; 'Church Shores Up Ability to Support Victims, Survivors', *Australian Catholic Bishops Conference Media Blog* (Media Release, 8 November 2021) <<https://mediablog.catholic.org.au/church-shores-up-ability-to-support-victims-survivors/>>.

<sup>98</sup> CCI, *CCI Annual Report 2022* (n 85) 11: 'CCI will continue to walk alongside Church leaders and their organisations to do the right thing today for people who have been wronged by misconduct in professional standards.'

Many claims were latent due to the lengthy time interval between the date of the incident to the date when the incident was reported.<sup>99</sup> The uncertainties were significant in relation to the final count with respect to claims, the amounts that such claims will be settled for, and the scheduling of insurance payments.<sup>100</sup> CCI discovered there was inadequate historical data as well as forward looking data, which affected the capacity of its appointed actuary to create models of the circumstance. It necessitated much professional judgement to work out assumptions about the number of future Professional Standards claims.<sup>101</sup> Nevertheless, the deterioration worsened, as captured by the headline ‘Abuse Cases Send Catholic Insurer to Brink’.<sup>102</sup> The growth of abuse cases and the effects of natural disaster claims seriously affected CCI’s financial position.<sup>103</sup> Insurance specialists noted issues like the vigorous lodgement of legal claims by lawyers had resulted in a greater burden of payouts.<sup>104</sup>

At this point, CCI found itself lacking the significant amounts of capital needed to sustain its normal operations. It began

discussing with shareholders the closure of [its] new and renewal general insurance business. [. . .] [S]hareholders have already made substantial contributions to the equity of the organisation in recent times . . . [but if] CCI is unable to raise the required capital it will continue to operate for some years while current assets are used to fund operations, settle all known insurance claims and [settle] any new claims which are made against existing policies which remain in-force.<sup>105</sup>

In response Catholic leaders issued a statement assuring the Catholic and wider community that it ‘remains fully committed to continuing to engage with survivors of abuse’<sup>106</sup> CCI pointed out, ‘[t]he Church is also working closely with all Catholic ministries currently affiliated with CCI to ensure continuity of general insurance cover . . . The bishops and the leaders of religious institutes have been working for many years to ensure abuse claims are handled fairly, whether cases are covered by insurance policies or not’.<sup>107</sup>

Finally, on 30 May 2023 CCI announced that its board had decided to voluntarily place the organisation into ‘run-off’.<sup>108</sup> CCI was unable to secure adequate capital contributions from shareholders to operate the business according to regulatory requirements. ‘It will no longer issue any new or renewal policies for all insurance business,’ CCI Chair, Joan Fitzpatrick, said. ‘The CCI Board and management deeply regret that it has been necessary to make this decision and would like to assure all staff, policyholders and suppliers that it has sufficient assets to

<sup>99</sup> Ibid 47.

<sup>100</sup> Ibid 78.

<sup>101</sup> Ibid 78.

<sup>102</sup> John Ferguson, ‘Abuse Cases Send Catholic Insurer to Brink’, *Weekend Australian* (Sydney, 6–7 May 2023) 10.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> CCI, ‘Media Statement: 5 May 2023’ (Media Release, 5 May 2023)

<<https://www.ccinsurance.org.au/news/cci-media-statement-5-may-2023>>.

<sup>106</sup> Timothy Costelloe and Peter Jones, ‘Statement Regarding Catholic Church Insurance Ltd’, *Catholic Australia* (Media Release, 5 May 2023) <<https://www.catholic.au/s/article/Statement-Regarding-Catholic-Church-Insurance-Ltd>>.

<sup>107</sup> Ibid.

<sup>108</sup> CCI, ‘Catholic Church Insurance Update’ (Media Release, 30 May 2023) <<https://www.ccinsurance.org.au/news/cci-media-statement-30-may-2023>>.

meet its commitments as they currently stand'.<sup>109</sup>

The Australian Prudential Regulation Authority ('APRA') noted the CCI announcement, describing it as 'a commercial decision'. The authority explained, 'APRA's mandate is to supervise financial institutions so the community can have confidence in those institutions and that they are able to meet their prudential obligations. APRA will continue to closely supervise CCI'.<sup>110</sup> Hundreds of church entities that had been insured were affected by the pressing need to find new insurers.<sup>111</sup> The run-off amounted to the ending an era for the oldest continuously operating general insurer in Australia.<sup>112</sup>

The run-off also caused uncertainty about the development of claims from policyholders. Thus CCI proposed a 'scheme of arrangement' under pt 5.1 of the *Corporations Act 2001* (Cth) — 'as a precaution to ensure a fair, equitable and managed regime [. . .] to the benefit of policyholder creditors in the event CCI might otherwise become insolvent.'<sup>113</sup> This scheme of arrangement was proposed to the Federal Court of Australia on 27 September 2023, whereby all liabilities of CCI would be met on a business as usual basis.<sup>114</sup> Should CCI experience a 'Trigger Event' at any stage, then CCI would enter the 'Reserving Period'. A 'Trigger Event' envisaged CCI becoming insolvent, or becoming likely to become insolvent, and/or the value of CCI's assets being, or likely becoming, less than its liabilities taking into account its contingent and prospective liabilities.<sup>115</sup> The Court recognised 'the Scheme is one which seeks to preserve CCI's capital position and avoid the adverse consequences of insolvency, so as to achieve an orderly run off and the settlement of Scheme Claims as quickly and fairly as possible'.<sup>116</sup> During the Reserving Period, the claims of Scheme Creditors continue to be assessed as and when they arise, but paid proportionally based on a prudent estimate of CCI's overall asset position, following an assessment of CCI's total liabilities and the assets available.<sup>117</sup> Justice Jackman approved the scheme of arrangement on 2 November 2023.<sup>118</sup>

In other words, the scheme is an agreement on how claims would be handled if there ever was a deterioration in CCI's liabilities resulting in further pressure on CCI's capital position and to

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<sup>109</sup> Ibid.

<sup>110</sup> 'APRA Media Release' (n 14).

<sup>111</sup> 'Statement Regarding Catholic Church Insurance Ltd Run-off', *Catholic Australia* (Media Release, 28 May 2023) <<https://www.catholic.au/s/article/Statement-Regarding-Catholic-Church-Insurance-Ltd-Run-off>>; John Ferguson, 'Catholic Insurer Folds, But Abuse Payouts to Stand', *The Australian* (Sydney, 30 May 2023) 9.

<sup>112</sup> CCI, *CCI Annual Report 2023* (Report, 2023) 4 ('*CCI Annual Report 2023*'). The Group reported a loss in 2023 of \$274,151,000 (2022: \$866,000 profit): at 15.

<sup>113</sup> CCI, 'Update on the Orderly Run-off of CCI Business' (Media Release, 20 July 2023) <<https://www.ccinsurance.org.au/news/update-on-the-orderly-run-off-of-cci-business>>.

<sup>114</sup> *Catholic Church Insurance Ltd, in the Matter of Catholic Church Insurance Ltd* [2023] FCA 1197 (Jackman J). See also Order of Jackman J in *Catholic Church Insurance Ltd, in the matter of Catholic Church Insurance Ltd* (Federal Court of Australia, VID715/2023, 27 September 2023) for Annexures omitted in the judgement.

<sup>115</sup> Ibid [3].

<sup>116</sup> *Catholic Church Insurance Ltd, in the Matter of Catholic Church Insurance Ltd (No 2)* [2023] FCA 1352 [34] (Jackman J). The judge commented, 'I accepted on the last occasion that CCI's commercial rationale for proposing the Scheme was bona fide, fair and reasonable, that Scheme Creditors would be sufficiently informed of the Scheme ahead of voting on it, and that the Scheme raised no aspect of commercial fairness or morality, or public policy, which suggested it should be stopped in its tracks'.

<sup>117</sup> Ibid [33].

<sup>118</sup> See Order of Jackman J in *Catholic Church Insurance Ltd, in the Matter of Catholic Church Insurance Ltd (No 2)* (Federal Court of Australia, VID715/2023, 2 November 2023) which contains Annexure 1 omitted from the judgement.

avoid potential insolvency.<sup>119</sup> Insurance companies use schemes of arrangement to hasten the run-off of their business or parts thereof, while they are still solvent.<sup>120</sup>

Overseas, the experiences differ where religious organisations are covered by business insurers. When the lawsuits increase, churches find themselves at variance with their insurers, even finding insurers denying coverage in abuse claims.<sup>121</sup> Many dioceses are uninsured because the cases are so old that they cannot prove they have insurance (or cannot find documents), while insurance companies have adopted a hard position in court regarding the kinds of proof needed to prove coverage.<sup>122</sup> In many cases, cumulative claims may amount to hundreds of millions of dollars in damages while only a very small percentage of defendants will be covered by insurance.<sup>123</sup> Without their own faith-insurer, these churches that held policies must look for commercial providers and may even need to sue them to resolve disputes over coverage.<sup>124</sup>

## V. ALTERNATIVE PERSPECTIVES

Another way to think about the issues is from a costs viewpoint. It is worthwhile considering the hefty legal costs for defendants, the financial compensation received by victims, the tort law system for pursuing wrongdoers for damages, and statutory arrangements like the National Redress Scheme.

There are legal costs for religious institutes when they are sued in personal injury compensation claims. Like all defendants, they need lawyers to investigate the claims, to prepare the defences, and to (if it reaches that stage) represent them in court during interlocutory hearings and trials. Quite often the defendants' lawyers need to find and brief counsel.

However, legal costs mean less funds can be spent on compensating victims. It was reported that Cardinal Rainer Maria Woelki of Cologne, Germany spent €2.8m (AUD \$4.2m) on financial experts, media attorneys, and communication consultants between 2019 and 2021.<sup>125</sup> In comparison, over the last 11 years since 2010, the Archdiocese of Cologne spent less than half that sum, namely €1.5m (AUD \$2.25m) on compensation for the victims of clerical sexual abuse. The fees for lawyers was quoted at €460 (AUD \$700) per hour. Similarly, in Canada, where from the late 1990s lawsuits have been filed against the government and four Christian churches on behalf of over 12,000 indigenous people, research showed the money continues to be paid unevenly.<sup>126</sup> One scholar found, out of the CAD \$5 million spent by the Anglicans by mid-2001, scarcely 1% had reached plaintiffs by way of settlements. The outstanding 99% was paid to the courts, to lawyers, and for public relations work.<sup>127</sup>

<sup>119</sup> 'CCI Proposes Scheme of Arrangement to Address Claims Uncertainty', *insuranceNEWS.com.au* (online, 21 July 2023) <<https://www.insurancenews.com.au/daily/cci-proposes-scheme-of-arrangement-as-claims-uncertainty-lingers>>.

<sup>120</sup> *Ibid.*

<sup>121</sup> Dan M Clark, 'Archdiocese Sues Insurers Over Denied Coverage for Child Abuse claims', *PropertyCasualty360* (Web Page, 2 July 2019) <<https://www.propertycasualty360.com/2019/07/02/ny-archdiocese-sues-insurers-after-coverage-denied-for-child-sex-abuse-claims-414-158236/>>.

<sup>122</sup> Edward Walsh, 'Insurance a Worry for Catholic Church: Premiums Skyrocket Old Policies Unreliable in Sex Abuse Settlements', *Washington Post* (10 July 2002) A.03.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Aviva Insurance Company of Canada v. L'Évêque catholique romain de Bathurst* [2018] NBCA 64.

<sup>125</sup> Christa Pongratz-Lippitt, 'Cologne Cardinal Spent 2.8m Euros on Lawyers' Fees' (11 December 2021) 275 (9431) *The Tablet* 26.

<sup>126</sup> R Murray Thomas, 'Can Money Undo the Past? A Canadian Example' (2003) 39(3) *Comparative Education* 331.

<sup>127</sup> *Ibid* 336.

It is interesting to note that the Canadian churches have also experienced insolvency pressures due to historical abuse cases. The Anglican Church of Canada had faced threats of bankruptcy, but reached an agreement with the Government of Canada to share the costs of compensation arising from thousands of lawsuits filed by Native students who allege abuse while students at residential schools.<sup>128</sup> The Catholic Diocese of St. George, Newfoundland, sought bankruptcy protection in 2005 due to claims totalling over \$40 million.<sup>129</sup> Also, in the same Canadian province, the Catholic Archdiocese of St. John's filed for creditor protection in insolvency proceedings on 22 December 2021, arising from sexual abuse claims.<sup>130</sup>

Undoubtedly, one factor behind this problem is the 'monetization of lawsuits', when monetary negotiations driven by lawyers become the primary method of settlement. As one scholar observed, 'if you can't haggle over money, what can you haggle over?'<sup>131</sup> Some argue the operation of 'no win, no fee' arrangements for lawyers in England and Wales since 2000 was at least partly responsible for the rise in the costs of civil litigation in that period.<sup>132</sup>

The British jurist Lord Steyn said that in the marketplace, everyone becomes conscious of their rights. 'The impact of lawyers, who advertise in the media for clients, on the expectation of potential claimants is significant. Is there a danger that we have become a litigation driven society expecting a remedy for every loss suffered?'<sup>133</sup> He thought for many, the practice of law has become a business:

I would say in England there is a perception among many judges, in this respect possibly reflecting public opinion, that the tort system is becoming too expensive and wasteful. There may also be an unarticulated but nevertheless real conviction among many judges that a determined effort must be made to prevent our social welfare state from becoming a society bent on litigation.<sup>134</sup>

What happened in the medical negligence field may be reflected in personal injury claims for abuse. Medical malpractice lawyers in the United States use television commercials, billboards, and other advertisements to make known their services.<sup>135</sup> Consider the town of Weslaco, Texas, a community adversely affected by medical liability. In 1994 a woman died after undergoing knee surgery. Her family sued the Knapp Medical Center and was awarded US \$10.1 million from an understanding judge.<sup>136</sup> The facility, the lone hospital in the mid-Rio Grande Valley, faced bankruptcy and closure. It was only self-insured for up to \$2 million and closure of the 200-bed hospital would have caused 700 people to be unemployed. The town of 39,000 would have lost a \$15-million payroll. The advocacy group Citizens Against Lawsuit

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<sup>128</sup> James Solheim, 'Anglican Church of Canada and government ready to settle lawsuits', Anglican Communion News Service (ACNS) (Web Page 2 December 2002), <<https://www.anglicannews.org/news/2002/12/anglican-church-of-canada-and-government-ready-to-settle-lawsuits.aspx>>.

<sup>129</sup> Jonathan C. Lipson, 'When Churches Fail: The Diocesan Debtor Dilemmas', (2006) 79 *Southern California Law Review* 366.

<sup>130</sup> *Roman Catholic Episcopal Corporation of St. John's (Re)* [2022] NLSC 81.

<sup>131</sup> David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83(7) *Georgetown Law Journal* 2619, 2646–7.

<sup>132</sup> P Fenn, V Grembi and N Rickman, 'No Win, No Fee', Cost-shifting and the Costs of Civil Litigation: A Natural Experiment' (2017) 127(605) *Economic Journal* F142.

<sup>133</sup> Lord Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (2002) 37 *Irish Jurist* 1, 2.

<sup>134</sup> *Ibid* 15.

<sup>135</sup> Milan Korcok, 'Medicolegal Hell in Texas' (1995) 153(7) *Canadian Medical Association Journal* 963.

<sup>136</sup> *Ibid*.



Abuse marshalled public sentiment and opposed the closure. The plaintiffs and the hospital settled for \$2 million and permitted the hospital to remain open.<sup>137</sup> The Texas lawmakers passed major reforms, such as caps on punitive damages.<sup>138</sup>

Recently in Australia the balance between access to justice for plaintiffs versus fairness for defendants has shifted further away for religious defendants. When the High Court of Australia decided the personal injury compensation for abuse case of *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*,<sup>139</sup> it overturned a permanent stay of proceedings granted in the New South Wales Court of Appeal. The High Court ruled that a permanent stay must be a last resort and that only an exceptional case justifies the exercise of the power.<sup>140</sup> In Victoria, 2023 saw two jury verdicts with record damages in this area: the cases of *TJ*<sup>141</sup> and *Kneale*.<sup>142</sup> Yet another significant win for plaintiffs was the matter of *RWQ v The Catholic Archdiocese of Melbourne*.<sup>143</sup> The plaintiff claimed damages against the Catholic Archdiocese of Melbourne for nervous shock which he alleged arose from the sexual abuse of his son by the late Cardinal George Pell.<sup>144</sup> After the verdict, the Archdiocese's leave to appeal was refused,<sup>145</sup> and the High Court refused special leave to appeal.<sup>146</sup> The trial court's decision means that the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) applies to secondary victims of abuse.<sup>147</sup>

An alternative to civil litigation is the National Redress Scheme established for people who experienced institutional child sexual abuse.<sup>148</sup> Many faith-based institutions are participants in the scheme. As Justice Garling in the Supreme Court of New South Wales wrote:

[T]he Australian Parliament has made provision by the National Redress Scheme, established pursuant to the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), for compensation for sexual abuse which may be paid to a person such as the plaintiff in these proceedings which does not require the establishment of liability in any court according to the principles of the common law.<sup>149</sup>

<sup>137</sup> Ibid.

<sup>138</sup> Milan Korcok, 'Texas Pledges an End to "Lawsuit Abuse"' (1999) 161(7) *Canadian Medical Association Journal* 865.

<sup>139</sup> See *GLJ HCA* (n 28). The decision was by a narrow majority (Kiefel CJ, Gageler and Jagot JJ; Steward and Gleeson JJ dissenting).

<sup>140</sup> Ibid [3].

<sup>141</sup> *TJ (a pseudonym) v The Bishop of the Roman Catholic Diocese of Wagga Wagga* [2023] VSC 704 ('*TJ*').

<sup>142</sup> *Kneale v Footscray Football Club Ltd* [2023] VSC 679 [2] and [3] (Richards J) ('*Kneale*').

<sup>143</sup> [2022] VSC 483 (McDonald J).

<sup>144</sup> This civil action comes after the High Court quashed the convictions of George Pell and a judgement of acquittal was entered in their place: see *Pell v The Queen* (2020) 268 CLR 123.

<sup>145</sup> *The Catholic Archdiocese of Melbourne v RWQ (a pseudonym)* [2023] VSCA 197 (Beach, Mcleish, and Kennedy JJA).

<sup>146</sup> *The Catholic Archdiocese of Melbourne v RWQ (a pseudonym)* [2024] HCASL 15.

<sup>147</sup> As one report noted, 'Legal experts have warned the High Court decision will now "open the floodgates" for "secondary" victims to seek damages against a range of organisations for psychological injury. They could include the state Government, WorkSafe, the Transport Accident Commission, schools, clubs, kindergartens, religious organisations and social and cultural groups.' 'Church Refused Leave to Appeal Vic Court Ruling', *CathNews* (online, 9 February 2024) <<https://cathnews.com/2024/02/09/church-loses-fight-to-block-legal-action-from-abuse-victims-loved-ones/>>.

<sup>148</sup> Commonwealth Department of Social Services, 'National Redress Scheme', *National Redress Scheme* (Web Page, 29 April 2024) ('NRS') <<https://www.nationalredress.gov.au/>>.

<sup>149</sup> *Fields v Trustees of the Marist Brothers* [2022] NSWSC 739 [122] (Garling J).

However, it seems odd that a statutory redress scheme with payments ranging from less than \$10,000 through to \$150,000<sup>150</sup> runs parallel with private law remedies subject to judicial determinations which only seem to increase the damages awarded. In 2022 the Supreme Court of Victoria awarded damages of \$1,908,647 for historical abuse of a child by a priest which included general damages of \$525,000.<sup>151</sup> The application for leave to appeal was refused.<sup>152</sup>

In 2023 a jury in a Victorian clergy child abuse trial returned verdicts as follows: pain and suffering damages assessed at \$1.1 million; damages for past economic loss assessed at \$896,000; and future economic loss was \$69,000; an award of exemplary damages was assessed at \$1.3 million.<sup>153</sup> Justice O'Meara calculated interest on past pain and suffering damages at \$462,000 and interest on past economic loss at \$390,353. The total damages plus interest amounted to \$4,217,353.<sup>154</sup>

In the same year, in a claim for loss and damage resulting from sexual abuse by a volunteer at the Footscray Football Club in Victoria, a jury assessed damages of \$3,250,000 for pain and suffering and loss of enjoyment of life; \$2,605,578 for past loss of earnings and loss of earning capacity; and \$87,573 for future medical and related expenses. Justice Richards ordered judgment for the plaintiff in the sum of \$5,943,151.<sup>155</sup> Past loss of earnings was indexed for inflation, and the jury was instructed on that basis.<sup>156</sup> Justice Richards also instructed the jury that damages for loss of future earning capacity should be discounted at the rate of 3% and the jury was provided with a set of calculations that applied the discount rate.<sup>157</sup> It is understood one or both jury verdicts will be appealed. One wonders, what might be the future be like?

## VI. LOOKING TO THE FUTURE

Although the attention has focussed on religious entities, the spotlight is turning to public institutions too. The New South Wales government is reportedly providing taxpayer-funded indemnity to 47 non-government organisations, including church entities, to cover child abuse claims due to the widespread withdrawal of cover by private insurers.<sup>158</sup> The organisations include those working with vulnerable children in youth homelessness services and out-of-home care. In Queensland, temporary indemnity schemes for child abuse claims were inaugurated for 18 organisations, arranged by the state government.<sup>159</sup> Without insurance, the concern is that many non-government organisations will end their care and homelessness services.<sup>160</sup>

<sup>150</sup> Commonwealth Department of Social Services, 'Applying', *National Redress Scheme* (Web Page, 29 April 2024) <<https://www.nationalredress.gov.au/applying/what-can-you-apply>>.

<sup>151</sup> *O'Connor v Comensoli* [2022] VSC 313 (Keogh J).

<sup>152</sup> *Comensoli v O'Connor* [2023] VSCA 131 (Beach, Niall, and Kaye JJA).

<sup>153</sup> *TJ* (n 141), [33] (O'Meara J).

<sup>154</sup> *Ibid* [148], [151].

<sup>155</sup> *Kneale* (n 142), [2]-[3] (Richards J).

<sup>156</sup> *Ibid* [61].

<sup>157</sup> *Ibid* [67].

<sup>158</sup> Christopher Knaus, 'NSW Taxpayers to Fund Indemnity for 47 Organisations Against Child Abuse Claims', *The Guardian* (online, 17 May 2023) <<https://www.theguardian.com/australia-news/2023/may/17/nsw-taxpayers-to-fund-indemnity-for-47-organisations-against-child-abuse-claims>>.

<sup>159</sup> Christopher Knaus, 'State Governments Forced to Indemnify Church Bodies for Child Abuse Due to Insurance "Market Failure"', *The Guardian* (online, 11 May 2023) <<https://www.theguardian.com/australia-news/2023/may/11/state-governments-forced-to-indemnify-church-bodies-for-child-abuse-due-to-insurance-market-failure>>.

<sup>160</sup> *Ibid*.

Furthermore, compensation claims are expected from government schools. There was an inquiry into the Tasmanian Department of Education's responses to child sexual abuse.<sup>161</sup> In 2023 the Victorian government announced a board of inquiry to examine historical child sexual abuse in Beaumaris Primary School and other government schools.<sup>162</sup> The Board of Inquiry found that the Victorian Department of Education, 'woefully failed to protect children from the risk of child sexual abuse at Beaumaris Primary School and certain other government schools between 1960 and 1994. The failings were serious and systemic, and put many children at risk of sexual abuse'.<sup>163</sup>

Some commentators recognise that the Royal Commission into Institutional Responses to Child Sexual Abuse largely ignored historical abuse in government schools.<sup>164</sup> The prospect of multi-million dollars awards of damages naturally affects institutions, insurers, and their re-insurers. It will affect the availability and cost of insurance for today's schools, youth sports, childcare providers, social service organisations, and the like, in both the public and private sector. There are costs to be passed on to the wider community. The economic fallout will impact budgets and taxpayers.

A solution may canvass several areas. The first task would be to comprehensively assess the repercussions of post-*Final Report* legislative changes. The laws need adjustment in light of the difficulties created for religious and government institutions. There also may be lessons from previous insurance concerns. Around 2002, Australia faced an insurance crisis.<sup>165</sup> State and territories amended tort laws, instituting or brokering measures intended to offer affordable public liability cover, or provide financial help to businesses and community groups to procure insurance.<sup>166</sup> Without a response, there were threats to the sustainability of businesses and 'cessation of community activities which in turn had the potential to result in the disruption and loss of community cohesion'.<sup>167</sup> The changes in tort law resulted in an overall decrease in personal injury litigation.<sup>168</sup> Yet in 2023, religious institutions experience the opposite. Legislative reforms have triggered an insurance crisis.

Secondly, any solution should reduce costs. For instance, there could be a reappraisal of the types of damages with statutory limits,<sup>169</sup> though such measures are debated.<sup>170</sup> Critics of tort law and personal injury litigation highlight the heavy costs associated with evaluating damages

<sup>161</sup> *Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse* (Final Report 7 June 2021) <[https://documentcentre.education.tas.gov.au/\\_layouts/15/DocIdRedir.aspx?ID=TASED-1087178304-4101](https://documentcentre.education.tas.gov.au/_layouts/15/DocIdRedir.aspx?ID=TASED-1087178304-4101)>.

<sup>162</sup> 'Appointment of Board of Inquiry into Historical Child Sexual Abuse in Beaumaris Primary School and Certain Other Government Schools' (S339, 28 June 2023) *Victorian Government Gazette*.

<sup>163</sup> Parliament of Victoria, *Report of the Board of Inquiry into Historical Child Sexual Abuse in Beaumaris Primary School and Certain Other Government Schools* (Final Report, 26 February 2024) viii.

<sup>164</sup> Gerard Henderson, 'Historic Abuse in Public Schools Ignored Too Long' *Weekend Australian* (Sydney, 29–30 July 2023) 15.

<sup>165</sup> *Ipp Report* (n 57); Prue Vines, 'Tort Reform, Insurance and Responsibility' (2002) 25(3) *University of New South Wales Law Journal* 842.

<sup>166</sup> Milena Canil, 'Australia's Insurance Crisis and the Inequitable Treatment of Self-Employed Midwives' (2008) 5(6) *Australia and New Zealand Health Policy* <<https://doi.org/10.1186/1743-8462-5-6>>.

<sup>167</sup> *Ibid.*

<sup>168</sup> EW Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14(3) *Torts Law Journal* 233, 266.

<sup>169</sup> Linda McMullen, 'The Impact of Tort Reform' (2023) 64(3) *Journal of the Mississippi State Medical Association* 78.

<sup>170</sup> Kylie Burns, 'The Gender of Damages and Compensation' (2019) 15(1) *Precedent* 9; Katherine Hubbard, 'Breaking the Myths: Pain and Suffering Damage Caps' (2020) 64(2) *Saint Louis University Law Journal* 289.

and in determining liability, particularly for non-economic losses.<sup>171</sup> Costs also erode the compensation claimants have in hand after legal fees are paid, even if there is an award of costs in favour of the plaintiff.<sup>172</sup> This may provide an incentive which directs claimants to the NRS.

Such is a third aspect of a solution: endorsement of the NRS as the principal means to historical compensation. Policy directions could be set by governments. It is an anomaly to run parallel systems of personal injury tort law and a redress scheme. While it offers choice, there are lesser outcomes for redress applicants in a scheme specifically devised by the Royal Commission. Supporting this third element is the principle of equity. Recent multimillion-dollar abuse compensation sums were awarded by juries in Victoria.<sup>173</sup> Most civil jury trials in Australia are now conducted in Victoria.<sup>174</sup> Whereas in Queensland, for example, a personal injury damages claim must be decided by a court sitting without a jury.<sup>175</sup> A national approach would ensure claimants are not disadvantaged by their jurisdiction. Thus, the NRS is a national solution for all of Australia.

Fourthly, we should consider the Queensland model under the *Personal Injuries Proceedings Act 2002* Qld ('PIPA'), the main purpose of which is 'to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury'.<sup>176</sup> This purpose is achieved through making procedures for the speedy resolution of claims, promoting early settlements, ensuring full preparation before starting a court proceeding, putting reasonable limits on damages awarded, minimising costs of claims, regulating inappropriate advertising and touting, enacting measures to eliminate or reduce any giving or receiving of consideration for claims referrals, and prohibiting any soliciting or inducing with respect to claims.<sup>177</sup> The state monitors and enforces the PIPA advertising restrictions and anti-touting provisions.<sup>178</sup> The context in Queensland resembles the current difficulties in the abuse compensation area. As one judge succinctly wrote, 'there was at the time growing disquiet in the community over the cost and availability of public liability insurance'.<sup>179</sup>

A fifth recommendation is to consider other schemes which uphold principles of equity. There are ideas to eliminate the law of personal injury from private law and to substitute a government system which compensates all those injured, generally on a no-fault basis.<sup>180</sup> Such a system of state-guaranteed compensation in return for a ban on all negligence actions functions equitably across the Tasman Sea.<sup>181</sup> In New Zealand, the principles are firstly,

<sup>171</sup> John Keeler, 'Ruminations on Personal Injury Law Since 1960' (2019) 40(1) *Adelaide Law Review* 109, 112.

<sup>172</sup> Prue Vines, Matthew Butt, and Genevieve Grant, 'When Lump Sum Compensation Runs Out: Personal Responsibility or Legal System Failure?' (2017) 39(3) *Sydney Law Review* 365.

<sup>173</sup> *TJ* (n 141); *Kneale* (n 142).

<sup>174</sup> Jacqueline Horan, 'Perceptions of the Civil Jury System' (2005) 31(1) *Monash University Law Review* 120; Jacqueline Horan, 'The Law and Lore of the Australian Civil Jury and Civil Jury System' (2006) 9 *Flinders Journal of Law Reform* 29.

<sup>175</sup> *Civil Liability Act 2003* (Qld) s 73.

<sup>176</sup> *Personal Injuries Proceedings Act 2002* (Qld) s 4(1) ('PIPA'). See also the *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (Qld).

<sup>177</sup> PIPA (n 173) ss 4(2)(a)–(g).

<sup>178</sup> Legal Services Commission Queensland, *Annual Report 2021–2022* (Report, 2022) 11.

<sup>179</sup> *Cocaris v Brisbane City Council* [2015] QDC 319 [52] (McGill DCJ).

<sup>180</sup> John Keeler, 'Ruminations on Personal Injury Law Since 1960' (2019) 40(1) *Adelaide Law Review* 109, 112–13.

<sup>181</sup> Grant Duncan, 'New Zealand's Universal No-Fault Accident Compensation Scheme: Embedding Community Responsibility', in Joannah Luetjens, Michael Mintrom, and Paul 't Hart (eds), *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University Press, 2019) 329.

no satisfactory system of injury insurance can be organised except on a basis of community responsibility. Second, wisdom, logic, and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement.<sup>182</sup>

In the United States, the September 11<sup>th</sup> Victim Compensation Fund operated in a significantly like manner to the New Zealand compensation scheme in several aspects and was successful.<sup>183</sup> Such systems have the benefits of fairer coverage, known procedures, cost advantages, and not having to establish liability and calculate damages, particularly for non-economic losses.<sup>184</sup>

## VII. CONCLUSIONS

The placing of a major faith-based insurance company into run-off ended an era for Australia's oldest continuously operating general insurer, and represents an interesting contrast in events.<sup>185</sup> Instead of financial malfeasance or mismanagement causing the collapse of insurance companies like Bishopsgate and HIH (prompting government intervention through legislative remedies to ensure citizens are protected from harm), paradoxically what happened in the personal injury compensation for abuse context is the opposite. For public policy reasons, parliaments abrogated several legal principles, enabling claimants to use tort law to pursue personal injury compensation for historical abuse. This unleashed sudden onset liabilities for religious institutions predominantly involved in education and social services, which led to the demise of CCI and thus the insurance coverage it provided to hundreds of charities, religious institutions, and individuals. This included professional standards policies which indemnified churches and religious schools for abuse claims. There was no government assistance as with the downfall of Bishopsgate and HIH. The *RCIRCSA Redress Report* considered that the evidence 'does not indicate that there is likely to be any significant impact on insurance or reinsurance';<sup>186</sup> but history disagrees.

It is worthwhile to recall the importance and utility of insurance. Insurance services are produced and delivered after they are bought by policyholders like religious institutions.<sup>187</sup> This is particularly so for long-tail liabilities, which occur when actions lead to individuals suffering personal injuries that manifest at some unknown future time due to a latency period.<sup>188</sup> This is characteristic of public liability insurance which covers professional

<sup>182</sup> *Royal Commission to Inquire into and Report upon Workers Compensation: Compensation for Personal Injury in New Zealand* (Report, December 1967) 20.

<sup>183</sup> James C Harris, 'Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States' (2006) 100(3) *Northwestern University Law Review* 1367.

<sup>184</sup> John Keeler, 'Ruminations on Personal Injury Law Since 1960' (2019) 40(1) *Adelaide Law Review* 109, 112.

<sup>185</sup> CCI, *CCI Annual Report 2023* (n 112) 4.

<sup>186</sup> *RCIRCSA Redress Report* (n 16) 457–8.

<sup>187</sup> Claudio Damiani, Naomi Bourne, and Martin Foo, 'The HIH Claims Support Scheme' 1 *Economic Roundup* 70 (19 June 20215) ('HIH Support').

<sup>188</sup> Corporations and Markets Advisory Committee, 'Long-Tail Liabilities: The Treatment of Ascertained Future Personal Injury Claims' (Discussion Paper, June 2007) 5–6. Another example of long-tailed liabilities is asbestos products, toxic exposure, and the manufacturer James Hardie. They set up the Medical Research and Compensation Foundation to respond to asbestos compensation claims. Later the two former James Hardie companies controlled the Foundation, namely, Amaca Pty Ltd and Amaba Pty Ltd. Special Commissioner David F Jackson QC found '[t]he Foundation's funds are being quickly used up in the payment of current claims against Amaca and Amaba. In my opinion, they will be exhausted in the first half of 2007 and it has no prospect of meeting the liabilities of Amaca and Amaba in either the medium or the long term': *Report of the Special Committee of Inquiry into the Medical Research and Compensation Foundation* (Report, September 2004) 7.

misconduct. However, some of the legal foundations on which historical insurance policies were written, such as statutes of limitations, have been destroyed, resulting in major monetary exposures to liabilities. The burdens fall on the current generation of religious leaders and devotees.

The *HIHRC Final Report* stated what is unquestionable ‘[i]nsurance is a vital element of modern society. It is one of the means whereby the consequences of injury to person or property and the risk of incurring liability to others can be spread. The object is to lighten the burden of loss to individuals and groups in the community. When an insurer fails, the loss lies where it falls.’<sup>189</sup>

Experts explain how insurance enables ‘risk-averse individuals and entrepreneurs to undertake higher risk, higher return activities than they would in the absence of insurance, promoting higher productivity and growth. HIH’s collapse demonstrated that without insurance, a range of essential activities in commerce, trade and community life can simply grind to a halt.’<sup>190</sup>

This is true for faith-based institutions, charities, and not for profit organisations. Without the contributions of social and community services provided by religious groups, the fabric and patterns of care for the marginalised, elderly, young, and the sick would be adversely affected. Society benefits from the work of religious organisations, but many now endure protracted insurance and financial difficulties without an endpoint in sight. It is a disproportionate burden which faith-based institutions and their devotees bear today. Changes are urgently needed.

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<sup>189</sup> *HIHRC Final Report 1* (n 71) xiv.

<sup>190</sup> Damiani, Bourne, and Foo, ‘HIH Support’ (n 187) 70.