



27 May 2021

To Whom It May Concern:

Thank you for the opportunity to paint a clearer picture for you on the absolute insurance market failure facing our industry.

- 1 AALARA is the peak industry body for the amusement, leisure and recreation industries. We are a not-for-profit, Member-based Association, though we represent, advocate and lobby on behalf of the wider industry, in addition to our Members.
- 2 We are looking to establish an industry-owned Discretionary Mutual Fund (DMF), managed by Aon.
- 3 Our primary focus and concern remains the absolute market failure for our industry's public liability needs, which is having a devastating impact on businesses in our sector and will continue to gather momentum over the next 10 months.
- 4 It is not the expense of insurance; it is the fact that there are no longer any insurance companies writing insurance for our industry. This market failure has been confirmed in writing by the Insurance Council of Australia and is **attached**.
- 5 In 2020, AALARA made a submission to the Australian Small Business and Family Enterprise Ombudsman Insurance Inquiry, and the Insurance Inquiry Report is **attached**.
- 6 On behalf of the industry, AALARA represents 621,000 jobs and \$123.1 billion dollars to the Australian economy. Within AALARA Membership there are approximately 7,053 jobs at stake, with an average team size of 17.
- 7 AALARA's Membership base of 406 organisations ranges from some larger groups such as Village RoadShow Theme Parks, Dreamworld and BridgeClimb, through to caravan parks, indoor play centres and transportable ride operators, throughout all states of Australia.
- 8 AALARA represents 11 sectors of the industry – theme parks, outdoor attractions, indoor play centres, laser tag, manufacturers and suppliers, aquatics, agricultural shows, go karting, caravan parks, transportable rides, engineers, trampoline parks.
- 9 The larger operators within our industry are currently insured, however when their renewals fall due over the course of this year, we expect they will have the same difficulty as the rest of the industry. They too are looking to AALARA to provide the solution via a DMF. We are currently in talks with Dreamworld about these same issues.

10 Aon is currently conducting an industry-wide survey and requesting claims history for all sectors of our industry, going back 10 years, which will give a very clear picture on the claims history of the industry. This information will be used to set premiums and excesses for members of the mutual and to negotiate terms with international underwriters.

11 Once current policies are due, no underwriters will offer renewal terms. Luna Park Melbourne was the last known member to renew on 31 March 2021. Pen and Miramar were the last companies to insure our industry, completely withdrawing from the market in March/April 2021. The possibility of gaining insurance has passed. The matter is not that it is too expensive, it is not available at all, domestically or internationally.

There is no avenue for our Members, or the wider tourism and attractions community to gain public liability cover. AALARA receives daily phone calls from Members and non-members nation-wide, unable to gain public liability coverage.

AALARA has pursued both Australian insurers and international insurers and has exhausted all avenues over the last 12 months in our endeavours to gain public liability insurance for attractions industry operators. We have worked closely with all insurance brokers, underwriters and Insurance Council of Australia to encourage an insurance company to provide necessary public liability insurance cover for our industry.

12 There are approximately 228 Members with current policies, though due for renewal in the next 10 months. Each day this figure will continue to decline to zero.

13 There are approximately 178 Members without public liability coverage and this number continues to grow each day. AALARA strongly recommends to the industry not to operate any equipment that is not insured. The potential risk to the owner/operator and general public not to be compensated and the reputation of the industry, is all at stake.

14 If we don't establish a DMF now, by March next year, there will be no Gold Coast theme parks, no tenpin bowling centres, no caravan parks, no Ekka, no Sydney Royal Easter Show, no Christmas Carnivals, no school fetes, no skating, no water parks, no petting zoos, no go kart tracks, no ferris wheels, no indoor play centres – the list goes on. There will be no fun in Australia. All jobs in the attractions and leisure industry will be gone. The economy will suffer. Reliance on the social security system will increase.

15 Due to COVID, our industry has been hit harder than most. The burden of funding a mutual is beyond even the biggest operators in our industry, who are also struggling with the loss of inbound international tourism and border closures. We have had discussions and they have provided letters of support for the DMF but cannot offer funding. This is also the case for smaller operators, who, whilst have the ability to pay a premium, could not contribute to the pool.

16 After working on finding a solution for the last 18 months, AALARA has identified a DMF as the only long-term, self-sustainable solution for the industry.

Following exploring two other DMF providers, AALARA has partnered with Aon as the most well-regarded organisation to establish the DMF with, and for them to manage.

17 The reasons we are experiencing total market failure for our industry are varied and have more to do with the call on insurance funds, not so much directly with the claims from the

industry. Driven by disasters both here and overseas - bush fires, floods, and COVID-19 impacts. Insurers in these circumstances reduce activity and become risk adverse.

- 18 Councils throughout Australia mandate that a \$20m Public Liability Policy be in place and current, before they can operate on private or Council land.
Parks that operate on Crown Land are required to hold a quantum of Public Liability insurance as a lease condition. Without PL insurance these parks will be in breach of the lease with termination clauses triggered: Example Sydney Luna Park, one of the oldest parks in the country. There are a few attractions and smaller theme parks on private property, but they also could not operate without the safety net of an insurance policy to protect them, their family and their business against public liability claims. All capital city Royal Shows and all Regional Shows require carnival operators to have current \$20 million PL insurance as a condition to operate.
- 19 Engineers who inspect rides are not be able to gain professional indemnity cover, therefore they will not perform inspections. No engineers, no rides, no theme parks. The proposed industry DMF would include engineers. The Mutual will handle the claims management of these cases, which would reduce the burden on engineers. The flow on effect would see more engineers confident to enter our industry, which would address the current lack of engineers.
- 20 AALARA has just finalised conferences in Sydney, Melbourne and the Gold Coast to discuss the DMF and the state of the industry. All members present (over 100 in each State with others joining via Zoom) are all saying that their policies have expired or cannot be renewed. The AALARA office is receiving many inbound calls from members in distress, with the very real prospect of all amusement, leisure and recreation businesses closed in the next 10 months.
- 21 AALARA has spoken to the Hon. Stirling Hinchliffe MP, Simon Westaway from ATIC, Daniel Gschwind from QTIC, the Australian Caravan Association, Play Australia, Big 4, Insurance Council of Australia and many more other industry stakeholders, who are extremely supportive of AALARA's proposed DMF, and that one, unified industry mutual is the best option. Industry suppliers are acutely aware of the downstream negative economic impact of closures in our industry and the job losses that will occur not just in our industry but also in a multiplicity of suppliers. These suppliers provide the maintenance services, printing and signage supplies, uniforms, marketing and promotional activities and a wide range of other products and services.

Feel free to reach out if you have any queries.

With respect,



Kristy Ahrens
General Manager
AALARA Inc



Shane McGrath
President
AALARA Inc

30 April 2021

Kristy Ahrens
General Manager
Australian Amusement, Leisure and Recreation Association
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27 Connor Street
Burleigh Heads Queensland 4220

By email: info@aalara.com.au

Dear Kristy

Public liability insurance for the Amusement and Leisure sector

We refer to our recent meeting on 26 April 2021 where we discussed the difficulties your members are experiencing obtaining public liability insurance.

We have raised this insurance availability issue with our members and the National Insurance Brokers Association (NIBA).

They have confirmed that liability insurance for the amusement park and leisure sector in Australia has, for several years, only been provided through overseas based foreign insurers. We can also confirm that insurance availability in this sector has largely dried up following withdrawal of these overseas based insurers from this sector of the insurance market.

Therefore, we expect that ongoing public liability insurance coverage is not currently available to many of your members.

The ICA will continue to engage with our members and National Insurance Brokers Association in relation to insurance options for this sector.

If you have any queries, please feel free to contact Tom Lunn, Senior Policy Manager, Consumer Outcomes via email tlunn@insurancecouncil.com.au or phone (02) 9253 5122.

Yours sincerely



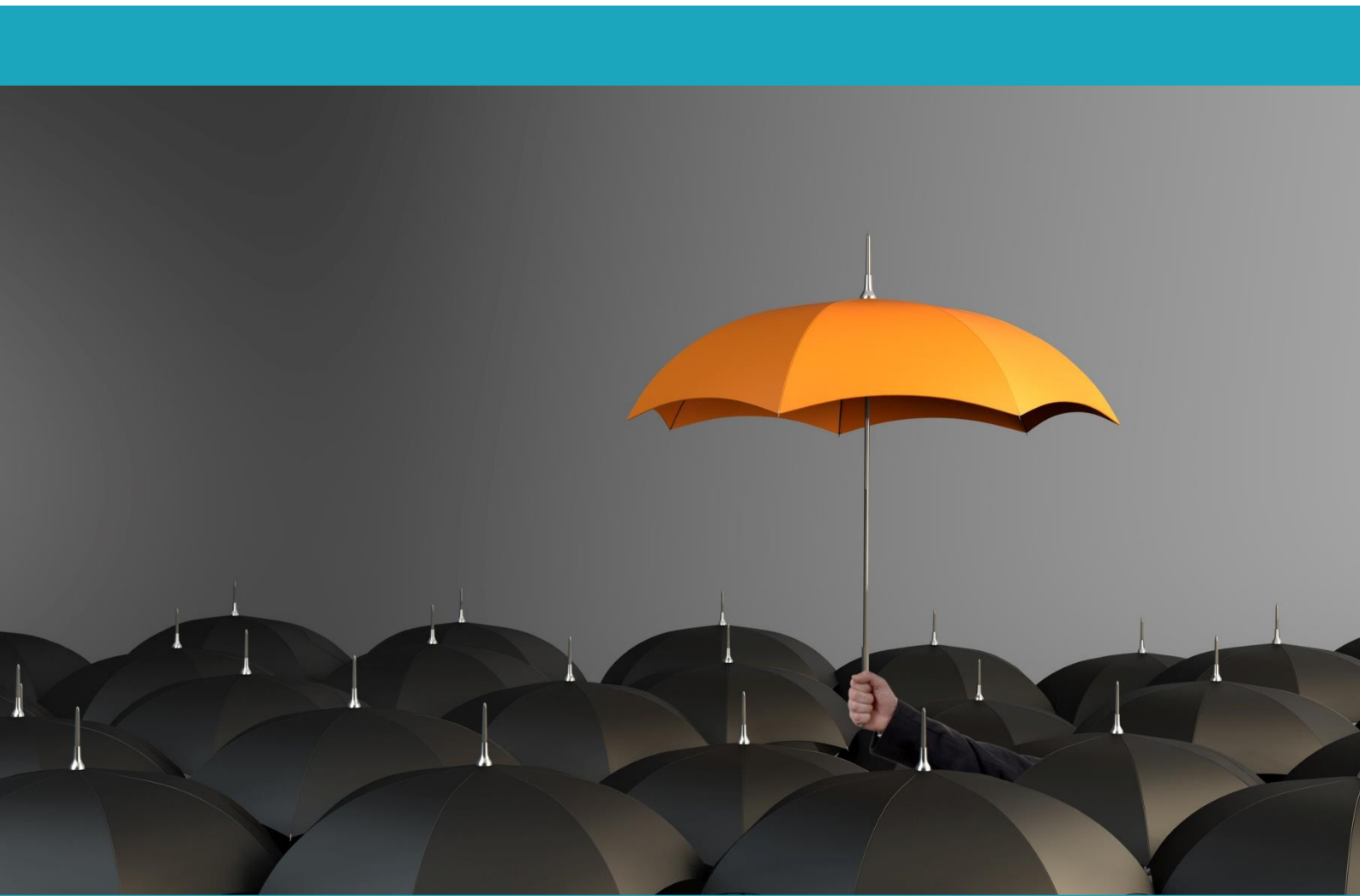
Andrew Hall
Executive Director & CEO



Australian Government



Australian
Small Business and
Family Enterprise
Ombudsman



Insurance Inquiry Report

December 2020

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Foreword

Insurance is a necessary part of life as a small business owner to prepare for when things go wrong. Many small business loan contracts and licences require full ongoing insurance coverage. Insurance is a regular expense, and business owners view it as something they should have, but (if they are fortunate) will rarely need to call on.

For a significant number of small businesses, however, insurance has become a daily stressor and the primary reason for considering closure.

The last year has thrown the need for adequate insurance into stark relief. Businesses affected by the 2019 bushfires saw numerous years' worth of hard work literally go up in smoke, and in many instances immediately went into battle with insurance companies to secure payments. A number of businesses were under or un-insured, and ultimately turned to their communities to try to get back on their feet. Some have successfully reopened, some have unfortunately closed.

As business owners thought they might be seeing signs of recovery, COVID-19 hit. Borders closed, lockdowns started, and businesses went from reopening and looking to the future, to desperately trying to survive. Then business owners took another hit, this time from insurance companies reducing or removing coverage, introducing significant price hikes, and in many instances refusing to renew coverage.

This is not a new phenomenon. The Australian insurance market has been hardening for several years, as global insurers adapt their risk weightings to increasing threats. Climate change impacts mean that, increasingly, businesses in rural and regional areas are unable to secure against fires and floods, leaving businesses like country pubs and camping sites uninsured. Our increasingly litigious culture has led to adventure tourism businesses including horse riding, jet boating, and show ride operators being too risky to cover. International disasters such as the Grenfell tower fire in London have changed insurer's views of the building sector, leaving geotechnical engineers and certifiers unable to secure the insurance they need to maintain their licences and registrations.

Over the course of this inquiry we heard from hundreds of small businesses facing closure because they cannot secure insurance. The insurance market is opaque and small businesses desperately need help navigating it.

There is market failure that will have extreme consequences for the Australian economy if left unaddressed. The recommendations in this report are designed to provide much needed clarity and certainty for small businesses, rebalance risks for insurers, and allow businesses access to the insurance products to protect themselves for when things go wrong.



Kate Carnell

Australian Small Business and Family Enterprise Ombudsman



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Abbreviations

ACCC	Australian Competition and Consumer Commission
AFSL	Australian Financial Services License
APRA	Australian Prudential Regulation Authority
ARPC	Australian Reinsurance Pool Corporation
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CDR	Consumer Data Rights
DMF	Discretionary Mutual Fund
FPA	Financial Planning Association of Australia
GDP	Gross Domestic Product
GICGC	General Insurance Code Governance Committee
GWP	Gross Written Premium
IBCCC	Insurance Brokers Code Compliance Committee
NDIS	National Disability Insurance Scheme
NIIS	National Injury Insurance Scheme
NZ	New Zealand
PC	Productivity Commission
SME	Small and medium enterprise
UFI	Unauthorised foreign insurer
UK	United Kingdom
US	United States (of America)

Findings and Recommendations

Overall finding: Small businesses find various types of insurance hard or impossible to obtain at affordable prices. This market failure is the result of a mix of regulatory, geographic and industry factors. Any response to improve the availability of insurance for small business needs to be multi-faceted and focused on addressing this market failure.

REGULATION

Inconsistent definitions of “small business”

Finding: Relevant legislation, the Australian Financial Complaints Authority’s rules and the General Insurance Code of Practice use different definitions of ‘small business’ and ‘small business insurance products’ thereby creating gaps in protections for small businesses. The Australian Financial Complaints Authority also lacks dispute resolution coverage of some categories of insurance.

Recommendation 1

The definition of “small business” as those businesses with (a) turnover of less than \$10 million per annum or (b) less than 100 employees should be standardised for all insurance legislation, regulations and codes.

Recommendation 2

The Australian Financial Complaints Authority’s rules should be expanded to cover all insurance products (including wholesale insurance) purchased by small businesses for claims assessed at \$1 million or less.

Self-regulation has failed

Finding: The insurance industry’s service and practice standards set by voluntary codes of practice (the General Insurance Code of Practice and Insurance Brokers Code of Practice) are rarely enforced and are not taken seriously by industry.

Recommendation 3

The General Insurance Code of Practice and the Insurance Brokers Code of Practice should be mandatory and amended as follows:

- a. The Insurance Code of Practice to require:
 - i. subscriber’s boards to acknowledge receipt of, read and apply guidance and reports of the General Insurance Code Governance Committee; and
 - ii. all staff handling small business clients to be trained specifically to assist small business; and
- b. The Insurance Brokers Code of Practice be amended to require:
 - i. disclosure of all fees and costs in all policy quotes provided to small businesses; and
 - ii. all communication from an insurer to be provided to the relevant client within 7 calendar days of receipt by a broker.
- c. Both Codes to provide for the Australian Financial Complaints Authority to deliver dispute resolution and enforcement, with a focus on customer-centred outcomes and including the ability to apply significant financial penalties for breaches.

Recommendation 4

Conflicted remuneration for insurance brokers should be banned with a phased transition period.

CRITICAL INSURANCE PRODUCTS

Lack of availability of public liability and professional indemnity insurance

Finding: Many small businesses report being unable to obtain public liability and professional indemnity insurances. The open-ended nature of injury claims and potential for large damages mean that insurance availability is becoming limited.

Recommendation 5

Following the approach taken in New Zealand, liability for personal injury should be subject to statutory caps.

Recommendation 6

The Federal Government, in coordination with the states and territories, should urgently progress work on a National Insurance Injury Scheme in line with the recommendations of the 2011 Productivity Commission Inquiry Report into Disability Care and Support.

Recommendation 7

Where there is only one or no insurers left in a professional indemnity market, the Federal Government should provide an insurance scheme of last resort for small business.

Lack of availability of natural disaster insurance

Finding: Businesses report being unable to obtain natural disaster insurance, or being offered policies where the cost is prohibitive.

Recommendation 8

Expand the Australian Reinsurance Pool Corporation to provide reinsurance for all natural disasters for commercial property insurance.

Recommendation 9

Local Councils and State and Territory Governments that release new land for development, or rezone existing land for further development must undertake a suitability and natural peril assessment of all land (assessed for a 1 in 100 year risk) before commercial release and publish the results of the assessment prior to land release. Where land is released with known issues that are not disclosed to a purchaser or are otherwise not apparent, the relevant authority should carry the liability for the known issue in perpetuity.

Refusal on basis of industry, location or other generic factors

Finding: Through our consultations, businesses have reported being unable to obtain insurance based on industry (such as the mining industry), location (such as remote locations) or other generic factors. Insurance is an “essential service” for business alongside services such as electricity, gas and banking. As such, the provision of insurance should not be denied to legal businesses on arbitrary “ethical” and other bases.

Outcome A

The Australian Small Business and Family Enterprise Ombudsman will continue its work on a federal essential services regime. Insurance will form a critical component of this work that covers that essential service providers should not be able to discriminate against legal, legitimate and regulated businesses based on generic factors, such as an industry in which a business may operate or be associated.

DISCLOSURE OF COVERAGE & FEES

Insurance products are difficult to navigate

Finding: Small businesses are unaware of all commissions, fees and taxes that make up significant portions of their insurance premiums. Insurance product documentation is so complicated, opaque and difficult to navigate that small businesses purchase unsuitable policies and obtain inadequate cover.

Recommendation 10

All insurance quotes should include a clear breakdown of commissions, fees and taxes, including administrative costs and broker fees.

Recommendation 11

Insurance product documentation on creation and renewal should:

- a. Set out the most common mitigations that businesses can make to premises and how they operate to reduce their premiums and ensure continued coverage;
- b. Clearly list exclusions, limitations and conditions early in the documentation, together with standard policy checklists (with checkboxes) that show all inclusions and exclusions;
- c. Set out the most common reasons why claims are denied under the policy, including a chart with percentages;
- d. Use standard definitions, particularly covering natural perils, across all insurers operating in Australia; and
- e. For products offered to Australian purchasers by foreign insurers, be written in Australian legal terminology.

CLAIMS EXPERIENCE

Claims decisions are not always made promptly

Finding: Small businesses can be left in limbo while insurers assess their claim, leading to uncertainty of business survival and reduced resilience.

Recommendation 12

Decisions about claims should be shortened:

- a. For general timeframes from 4 months to 3 months.
- b. For 'extraordinary catastrophes' from 12 months to 4 months.

BARRIERS TO SWITCHING & MARKET ENTRY

Notification periods for renewal terms are too short

Finding: The current 14-day statutory notice period for renewal terms or the non-renewal of insurance is not long enough for small businesses to make informed decisions, change insurers and secure insurance. Small businesses would benefit from technology that allows them to more easily compare and change insurers. The expansion of the Consumer Data Right system (CDR) to insurance products for small business would facilitate this.

Recommendation 13

Require insurance companies to provide 60 calendar days' notice for a renewal refusal, premium increases above 15%, or changes in exclusions or excesses, together with a statement providing reasons for the change and any specific modifications that a business can make to continue their insurance or reduce premiums, exclusions and excesses.

Recommendation 14

The Australian Government should give priority to the extension of consumer data rights into the insurance market.

Insurtech has failed to gain broad-based industry traction

Finding: The insurance industry has high potential for benefits to small business by disruption through technology. However, where there is innovation, existing insurance companies commonly purchase that innovation for their self-use (for example, algorithms that are purchased for use to de-risk existing insurance business). This means that innovation is lost to the broader market and market concentration is fortified.

Recommendation 15

The Australian Securities and Investments Commission should explicitly include insurtech as a category in its communications and online guidance for its innovation hub to enhance awareness of existing support mechanisms.

Outcome B

The Australian Small Business and Family Enterprise Ombudsman will include investigation of the treatment of innovation in the insurance industry in its work to eliminate unfair business practices arising out of the Ombudsman's Access to Justice report.

Small business needs insurance

Australian governments require thousands of small businesses hold expensive insurance products to legally operate. From professional indemnity in the financial services industry to public liability for electricians, insurance is a requirement of doing business. When it is not a legislative requirement, insurance is a *de facto* requirement for many, with public liability referred to as a ‘compulsory’ insurance type on *business.gov.au*.¹

Small and family businesses have reported significant problems in accessing insurance. These businesses are underinsuring, taking loans to pay premiums, being denied coverage and closing down. These closures severely impact communities, including regional communities where the local pub, tourist attraction and caravan park are facing escalating costs and restrictions that they cannot meet.

Loans, professional licences, leases, operating licences and contracts (including Government tenders) commonly require businesses to hold insurance, with some contracts requiring insurances (such as for professional indemnity insurance) to be held for 7 years after completion. Small businesses see limited options to continue trading and obtain capital funding if they are unable to secure insurance. Businesses that cannot afford to obtain insurance discover they regularly have no option but to shut.

We consulted extensively with small business and the result of our survey of over 800 small businesses is set out in the Appendix. In brief, the survey found:

1. Insurance is an essential service – For many small businesses, unavailability or unaffordability of insurance essentially makes their business unviable.
2. Cost is the biggest issue, but coverage comes close – cost is by far the most common complaint with a number of respondents reporting that insurance is their single largest expense and many businesses are under-insured.
3. Insurance is becoming less available – this is falling disproportionately on regional and rural businesses, and particular sectors such as adventure tourism (including alpine), caravan parks, accommodation venues, and amusement industry operators.
4. The risk profile of individual business is not taken into account – excellent claims histories do not appear to be taken into account whilst businesses are commonly grouped with other businesses that have materially different risks.
5. Existing offerings are often unfit for purpose – available cover often does not match business needs, which tends to lead to either insufficient cover (underinsurance) or additional cost in order to be sufficiently insured (often with significant excesses and overlapping covers).
6. Comparing and taking out policies is difficult and time-consuming – the annual process of obtaining and renewing insurance is time-consuming with significant difficulties in comparing policies.
7. Insurance is a topic of significant stress for small businesses – uncertainty of continued availability and cost increases is significant stress.
8. Uncertainty of cover creates a major business risk – there is a reported lack of confidence of small business owners in their cover should they need to make a claim, and their ability to receive a pay-out without significant delay that imperils their viability.

¹ Business.gov.au (2020), *Business Insurance*.

9. The conduct of insurers is not customer-centric – There were many reports of poor conduct by insurers, including very late notice of renewal terms and price hikes, which puts businesses in a position of either accepting the terms or risking being uninsured. There were also complaints about the conduct of brokers, including possible conflicts of interest and lack of accountability.

“We cannot work without public liability. We need insurance to [work and] pay our bills because we are self employed and 5th generation. Please help.”

Small business insurance survey respondent

The Australian general insurance market

The *Insurance Act 1973* (Cth) divides the Australian insurance market into three: general insurance, life insurance (including friendly societies), and private health insurance.² General insurance products used by small business are the focus of this inquiry.

Small businesses typically purchase insurance directly or through an intermediary, often a broker. Authorised general insurers, unauthorised foreign insurers (UFIs) and Lloyd’s of London syndicates all underwrite (sell) insurance in Australia. Authorised general insurers operating in Australia are licenced by the Australian Prudential Regulation Authority (APRA)³ which ensures that insurers have the financial resources (sufficient capital and levels of solvency) to pay claims when they are due.⁴ There are fewer than 100 authorised general insurers in Australia.⁵ Authorised general insurers handle 91% of the Australian private insurance market, approximately \$47 billion in premiums each year.⁶

Lloyd’s of London is unusual in that it operates as independent syndicates (or mini insurers) within the Lloyd’s structure. APRA regulates the Australian activities of Lloyd’s syndicates. In comparison with the \$47 billion handled by authorised general insurers, \$2.3 billion of insurance business was placed with Lloyd’s of London syndicates in 2017.⁷ This amount helps provide for the gap in the capacity of the local Australian insurance and risk markets.

“Company we started with 12 years ago refused to insure us because we had the name backpackers. Insurance broker secured [Lloyds] of London. Then they refused too. Price doubled for no reason, we’ve not had a claim in 14 years, building and contents insurance not affordable anymore.”

Small business insurance survey respondent

Limited regulatory exemptions allow UFIs to carry on business in Australia. These exemptions allow UFIs to insure atypical risks, high-value insureds and other risks that cannot reasonably be placed in Australia⁸, for example high cost fire and industrial special risks insurance.⁹

² APRA (2020), *Licensing guidelines for general insurers*.

³ *Insurance Act 1973* (Cth) s 12(1).

⁴ Dr Ian Enright, Peter Mann, Prof Rob Merkin QC and Greg Pynt (2019) *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: General Insurance* p52.

⁵ APRA (2020) *Annual Report 19/20* p16.

⁶ APRA (2020) *Quarterly general insurance institution-level statistics June 2020*.

⁷ APRA (2020) *Quarterly general insurance institution-level statistics December 2019*.

⁸ Productivity Commission (2018) *Competition in the Australian Financial System Inquiry Report*, p392.

⁹ APRA (2020) *Intermediated general insurance statistics September 2020*, table 3c.

General insurers decide the risks they are prepared to insure and the industries and locations they are prepared to offer insurance to. There are some industries and locations with a higher than average level of risk. An example is professional indemnity insurance for building surveyors, which in Australia has been unprofitable for insurance companies since 2011.¹⁰ This higher risk may mean an insurance company withdraws from that market and no longer offers that insurance. When this happens a Lloyd's syndicate or a UFI may insure the risk if they deem it acceptable. A key factor in insurers' attitude towards a risk are the decisions made by reinsurance companies.

Reinsurance companies

Reinsurance is insurance for insurance companies. An insurance company contracts a reinsurance company to take on all or part of the insurance risks underwritten by the insurance company. This allows insurance companies to spread their risk and can protect them if a large claims event happens. The total gross written premium for reinsurers for the year ended June 2020 was \$4.4 billion or 9% of the private sector general insurance market. Some companies operate as both insurers and reinsurers.

Brokers

Insurance is commonly sold to a small business through an insurance broker. Insurance brokers act as intermediaries and experts linking small businesses to insurance companies and can be a deciding factor in the quality or availability of insurance for small business. Insurance brokers either hold, or are authorised representatives of a company that holds, an Australian Financial Services Licence which is regulated by ASIC. Brokers are normally agents for the insured (small business) and are paid through a combination of fees and commissions from insurance companies. Small businesses that engage brokers rely on them to act professionally and ethically as financial service professionals.

"If not for our insurance broker continuing to fight for us we would be in an even worse situation."

Small business insurance survey respondent

Insurance brokers will negotiate an insurance contract for their clients either with an insurance provider or through an underwriting agency. An underwriting agency is a specialised insurance agent or broker that normally has permission from an insurance company to underwrite and sign binding insurance policy documents on the insurer's behalf. Underwriting agencies can fill niche risk markets as they often have specialised expertise that the insurance company lacks, for example in cyber risk.

International comparisons

Small businesses utilise both personal (insurance normally sold to consumers) and commercial (insurance normally sold to businesses) categories of insurance. Swiss Re Institute estimated that in 2017 Australia's "commercial insurance" market was the 10th largest in the world.¹¹ In terms of GDP Australia is the 13th largest economy¹² and our usage of commercial insurance as a percentage of GDP is broadly in line with that of our advanced-country peers. The Australian general insurance market is less concentrated than the New Zealand market but more concentrated than the UK

¹⁰ PwC (2019) *Strengthening the professional indemnity insurance environment for building professional interim report*, p21.

¹¹ Swissre (2018), *The Australian commercial insurance market*, p4.

¹² IMF (2020), *datamapper October 2020*.

market. In 2020 the three largest private sector general insurers in the UK held about 19% market share, and in New Zealand about 82% market share.^{13,14} The three largest insurers in the Australian general insurance market held 46% market share.¹⁵

Government as an insurer

Governments also participate in the general insurance market and operate outside of APRA's control. They dominate in two classes of general insurance: compulsory third party (CTP) motor vehicle insurance and employer's liability insurance (workers' compensation).

Workers compensation is governed by individual states and territories and several states offer the choice of government schemes or self-insurance.¹⁶ The Australian Government operates its own insurance schemes for both workers compensation and all normally insurable risks for entities within the general government sector (excluding workers' compensation).

In response to a crisis of medical indemnity insurance availability in the early 2000's, the Australian Government stepped in to stabilise the market. Over 15 years on, there are nine schemes that provide government support for medical indemnity insurance for eligible privately practicing medical practitioners, allied health professionals and midwives.¹⁷ In the 2018-19 financial year, these schemes cost the Government \$85 million in administration and payments.¹⁸

The Australian Reinsurance Pool Corporation is an Australian Government owned reinsurer established under the *Terrorism Insurance Act 2003* (Cth) to administer the Terrorism Reinsurance Scheme. The scheme provides reinsurance cover for eligible terrorism losses, involving commercial property, associated business interruption losses and public liability.¹⁹ For the year ended June 2019, the scheme received gross written premiums of \$204 million and provided terrorism reinsurance cover to more than 220 insurer customers.²⁰

Public sector insurers receive less than one quarter of the general insurance industry's gross premiums, and that figure has been falling as insurance previously underwritten by state governments has increasingly been privatised.²¹

Competition in the general insurance market

General insurance market

There is a long-term trend towards consolidation within the Australian general insurance industry.²² The Australian Prudential Regulation Authority reports that as of 30 June 2020, there were 95 authorised general insurers in Australia, including 14 run-off insurers permitted to handle existing policies only (and prohibited from writing new policies) and 10 specialist reinsurers.

¹³ IBIS World (2020), *General insurance in New Zealand March 2020*.

¹⁴ IBIS World (2020), *General Insurance in the UK March 2020*.

¹⁵ APRA (2020), *Quarterly general insurance institution-level statistics as at 30 June 2020*.

¹⁶ SafeWork Australia; SIRA, NSW; Worksafe, QLD.

¹⁷ Department of Health (2020), *The Commonwealth Medical Indemnity schemes*.

¹⁸ Department of Health (2019), *Annual Report 2018-19* p99.

¹⁹ ARPC (2020), *About ARPC*.

²⁰ ARPC (2019), *Annual Report 2018-29*.

²¹ IBIS World (2020), *General Insurance in Australia August 2020*.

²² APRA (2020), *APRA 2019 Year in Review*, p26.

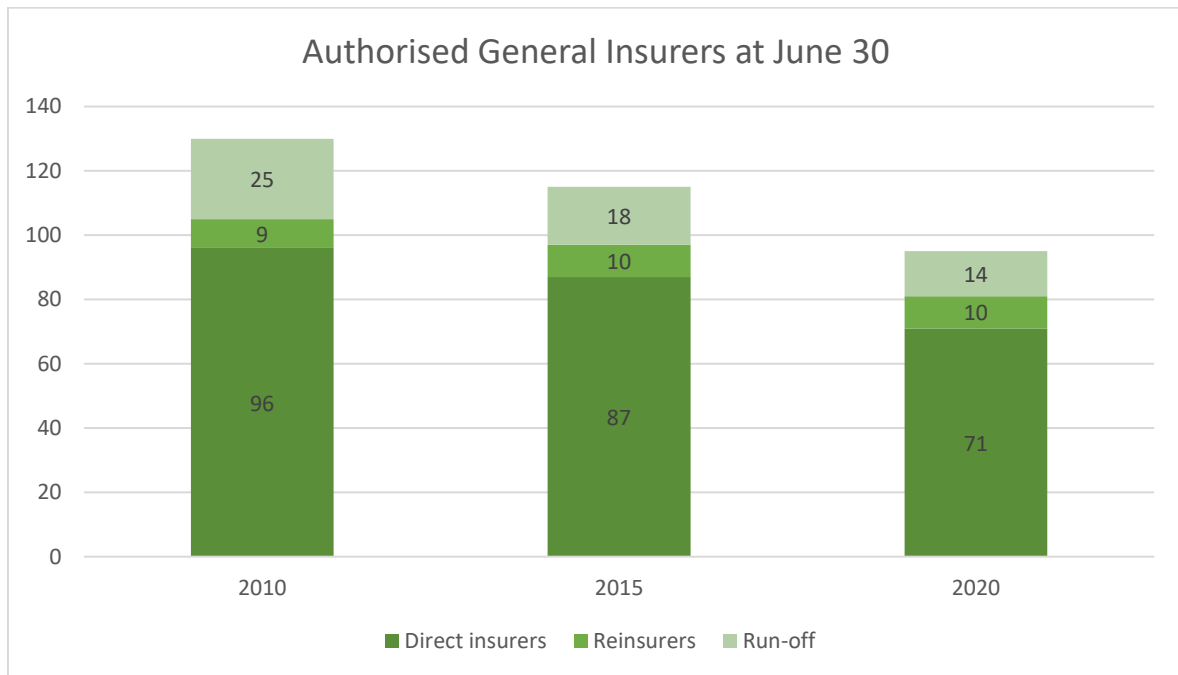


Figure 1: Authorised General Insurers in Australia as at June 30²³

This market concentration has occurred despite 30 new insurers entering the market in the decade up to 2017.²⁴

The Productivity Commission views the overall Australia insurance market as having sufficient competition,²⁵ although customers experience a false sense of choice as insurers offer the same product under a variety of different brand names.²⁶ Reports from small business indicate that competition is severely lacking in some commercial market segments in Australia, with those segments being geographical or industry-specific.

In the 2019-2020 financial year, the five largest general insurers; Insurance Australia Limited (IAG), AAI Limited (Suncorp), Allianz Australia Insurance Limited, QBE Insurance (Australia) Limited and Insurance Manufacturers of Australia Pty Limited accounted for about 64% of the gross written premium (GWP) of Australian Prudential Regulation Authority authorised direct insurers.²⁷ This is an increase of market share (in terms of GWP) held by the five largest insurers from June 2016 (54%) and from 2006 when they wrote 42% of GWP only.²⁸

Brokerage market

Mergers and acquisitions within the brokerage market are impacting competition in the sector. The top 4 industry participants account for almost 70% of the total premiums placed.²⁹ One company

²³ Productivity Commission (2018), *Competition in the Australian Financial System, Inquiry Report*, Figure 14.2; APRA Statistics 2020.

²⁴ Productivity Commission (2018), *Competition in the Australian Financial System, Inquiry Report*, p389.

²⁵ Productivity Commission (2018), *Competition in the Australian Financial System, Inquiry Report*.

²⁶ Productivity Commission (2018), *Competition in the Australian Financial System, Inquiry Report*.

²⁷ APRA (2020), *Quarterly general insurance institution-level statistics as at 30 June 2020*.

²⁸ Senate Economics Reference Committee (2017), *Australia's general insurance industry: sapping consumers of the will to compare* p10.

²⁹ IBIS World (2020), *Insurance Brokerage in Australia September 2020*.

may hold equity in several smaller companies which creates an appearance of false competition. Other brokers work as networks of smaller companies that share resources.

The Steadfast network is a global network of 458 insurance brokers³⁰ and in 2019 held 31% of the Australian market.³¹ In 2019, Steadfast announced a \$100 million capital raising effort to fund future acquisitions.³² The AUB Group that practises insurance broking under Austbrokers has about 20% of the Australian commercial SME insurance broking market share³³ and is the largest equity-based broking network in Australia and New Zealand.³⁴ Importantly, a large proportion of the broking industry are small businesses employing fewer than 20 staff.³⁵

Regulation

Inconsistent definitions of small business

Finding: Relevant legislation, the Australian Financial Complaints Authority’s rules and the General Insurance Code of Practice use different definitions of “small business” and “small business insurance products” thereby creating gaps in protections for small businesses. The Australian Financial Complaints Authority also lacks dispute resolution coverage of some categories of insurance.

The general insurance industry in Australia is regulated by the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). APRA authorises insurance companies to operate in Australia and regulates the stability of the general insurance industry.³⁶ ASIC regulates market conduct to protect consumers and has responsibility for the administration of the *Corporations Act 2001* (Cth) and the *Insurance Contracts Act 1984* (Cth).

The *Insurance Contracts Act 1984* provides protections to small business insurance customers and creates a number of statutory provisions on the duty of good faith, insurable interests, disclosures, general provisions, claims, expiration, renewals and cancellations, and subrogation. Insurers and insurance brokers require an Australian Financial Services License from ASIC.

From 5 April 2021, the unfair contracts terms regime under the *Australian Securities and Investments Commission Act 2001* (Cth) will apply to standard form insurance contracts covered by the *Insurance Contracts Act 1984*, except for contracts providing medical indemnity cover.³⁷ New legislation tailors the existing unfair contract terms regime to three areas of insurance contracts; main subject matter, transparent excess terms and third party beneficiaries.³⁸

The current protections will apply to all small businesses with fewer than 20 employees. The current format of the protections will apply a limit on the value of the contracts the protections can apply

³⁰ Steadfast (2020), *About us*.

³¹ Steadfast (2020), *Annual report*.

³² Australian Financial Review (2019), *Steadfast raising \$100m for acquisitions*.

³³ AUB (2020), *2020 Annual report*.

³⁴ IBIS World (2020), *Insurance Brokerage in Australia September 2020*.

³⁵ IBIS World (2020), *Insurance Brokerage in Australia September 2020*.

³⁶ *Australian Prudential Regulation Authority Act 1998* (Cth) s11(1).

³⁷ *Financial Sector Reform (Hayne Royal commission Response-Protecting Consumers (2019 Measures)) Act 2020* (Cth).

³⁸ *Financial Sector Reform (Hayne Royal commission Response-Protecting Consumers (2019 Measures)) Act 2020* (Cth) Replacement Explanatory Memorandum.

to.³⁹ However, a recent announcement⁴⁰ details an agreement between the federal, state and territory governments to expand the definition of small business and remove the financial limits. The timeline for the removal of these caps is unknown. When this is done and the regime applies to insurance contracts, small businesses will gain important protections.

The unfair contracts terms regime current definition of a small business as one with fewer than 20 employees differs from definitions used in other regulations surrounding insurance, creating a more complicated and confusing system for small business to navigate. Adopting a common definition that is widely in use will help regulators, insurers and small business.

Definitions of small business:

- **Unfair Contracts Terms Regime:** less than 20 employees (proposed to increase to a turnover of less than 10 million per annum or less than 100 employees).
- **Insurance Contracts Act (via the Insurance Contracts Regulations):** Under \$1 million in turnover and 5 or less full time equivalent workers.
- **Australian Financial Complaints Authority (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 \$10 million in annual turnover.

Recommendation 1: The definition of “small business” as those businesses with (a) turnover of less than \$10 million per annum or (b) less than 100 employees should be standardised for all insurance legislation, regulations and codes.

ASIC provides oversight of AFCA⁴¹ by ensuring it complies with regulatory requirements and setting standards for dispute resolution. AFCA is an independent authority that replaced the Financial Services Ombudsman in 2018. It administers a free binding external dispute resolution scheme to consumers and small businesses for financial products and services, including insurance, that are provided by its members. Financial firms who hold ASIC issued Australian Financial Services Licenses and deal with retail products must have an internal dispute resolution that meets ASIC’s requirements and be members of AFCA.⁴² ASIC does not intervene in AFCA’s decision-making processes and has no role in individual complaints handling.

AFCA will provide dispute resolution for small businesses dealing with consumer or small business insurance products. AFCA’s definition of small business insurance products excludes contractors all risks, fidelity guarantee, legal liability (including public liability and products liability), professional indemnity and industrial special risks.⁴³ Our survey indicated that 93% of respondents held public liability insurance and 40% held professional indemnity. However, AFCA has limited ability to resolve small business insurance disputes in these products. The restrictive definition of a small business insurance product is a significant issue with AFCA’s model of dispute resolution. An expansion of AFCA’s rules to cover more small businesses would assist them, and insurance companies, in avoiding costly litigation.

³⁹ Clayton Utz (2020), *The laws on unfair contract terms will soon apply to contracts subject to the Insurance Contracts Act.*

⁴⁰ Michael Sukkar (2020), *Media Release: Penalties to be introduced for unfair contract terms.*

⁴¹ ASIC (2018), *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority.*

⁴² ASIC (2018), *Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority.*

⁴³ AFCA (2020), *Complaints Scheme Rules.*

Recommendation 2: The Australian Financial Complaints Authority’s rules should be expanded to cover all insurance products (including wholesale insurance) purchased by small businesses for claims assessed at \$1 million or less.

The failure of self-regulation

Finding: The insurance industry’s service and practice standards set by voluntary codes of practice (the General Insurance Code of Practice and Insurance Brokers Code of Practice) are rarely enforced⁴⁴ and are not taken seriously by industry.⁴⁵

Both the general insurance and insurance broker industries have voluntary Codes of Practice designed to hold members accountable and allow customers to seek external dispute resolution. The General Insurance Code of Practice (GI Code) is overseen by the GI Code Governance Committee (GICGC) and the Insurance Brokers Code of Practice (IB Code) is overseen by the IB Code Compliance Committee (IBCCC). These codes are not approved or governed by ASIC.⁴⁶

The GI Code does not cover all aspects of insurance that would apply to many small businesses because of prohibitive definitions and exclusions. For example, a small business is defined as having less than 20 employees, or 100 if operating in the manufacturing sector.⁴⁷ Insurance products sold to businesses larger than this are considered wholesale insurance, and the GI Code does not cover the buying, cancelling or making a claim on a wholesale insurance product.⁴⁸ This restrictive definition, for example, means that a restaurant with 20 full time employees is unprotected compared to one with 19 employees.

Historically, Australia has seen a widespread failure of compliance with voluntary codes in financial services industries. These failures are replicated in the insurance industry. The GICGC released the *Living the Code* report in June 2020 and found “*weaknesses in subscribers’ compliance frameworks and highlighted issues or potential issues from a cultural, leadership and governance perspective in many subscribers’ organisations that indicate subscribers are not “living the Code”*”.⁴⁹ The GICGC determined that “*subscribers are adopting a lax attitude to breach and significant breach identification*”.⁵⁰ The *Living the Code* report’s first recommendation is that code subscribers “*take breach identification and reporting seriously*”.⁵¹

There is also an apparent reluctance to apply penalties, since between 2014 and 2018 the GICGC recorded 31,000 breaches of the Code without a single sanction applied.⁵² Attitudes towards compliance and breaches of the Codes needs to change. Voluntary self-regulation has only served to set standards that prioritise short-term gain, reduce any focus on consumer outcomes, and absolve insurers of responsibility for poor compliance culture. Making the Codes mandatory with significant enforceable penalties should change these attitudes.

⁴⁴ The Sydney Morning Herald (2018) *31,000 breaches of insurance code but no sanctions*.

⁴⁵ General Insurance Code Governance Committee (2020), *Living the Code Embedding Code obligations in compliance frameworks – June 2020*, Insurance Brokers Code of Practice Code Compliance Committee (2020), *Annual review 2019-20*.

⁴⁶ ASIC (2013), *Regulatory Guide 183: Approval of financial services sector codes of conduct*.

⁴⁷ Insurance Council of Australia (2020), *General Insurance Code of Practice*, p56.

⁴⁸ Insurance Council of Australia (2020), *General Insurance Code of Practice*, p56.

⁴⁹ GICGC, *Living the Code Embedding Code obligations in compliance frameworks – June 2020*, p6.

⁵⁰ GICGC, *Living the Code Embedding Code obligations in compliance frameworks – June 2020*, p7.

⁵¹ GICGC, *Living the Code Embedding Code obligations in compliance frameworks – June 2020*, p8.

⁵² The Sydney Morning Herald (2018) *31,000 breaches of insurance code but no sanctions*

The IB Code binds its members to act competently, honestly and in their client's best interests including identifying the client's reasonably apparent needs and financial situation. It has faced similar difficulties as the GI Code with the IBCCC concerned that subscribers were failing to self-report. The IBCCC 2019-2020 Annual Report found 43% of reported breaches related to broker integrity and competency.⁵³ The IBCCC's 2019-20 report stated breach data "*raises serious questions about ... subscribers' willingness to implement an organisational culture that encourages breach reporting.*"⁵⁴ As the IB Code is voluntary, there are brokers who do not subscribe to even the voluntary and unenforced service standards, to the detriment of small business.

Recommendation 3: The General Insurance Code of Practice and the Insurance Brokers Code of Practice should be mandatory and amended as follows:

- a. The Insurance Code of Practice to require:
 - i. subscriber's boards to acknowledge receipt, read and apply guidance and reports of the General Insurance Code Governance Committee; and
 - ii. all staff handling small business clients to be trained specifically to assist small business; and
- b. The Insurance Brokers Code of Practice be amended to require:
 - i. disclosure of all fees and costs in all policy quotes provided to small businesses; and
 - ii. all communication from an insurer to be provided to the relevant client within 7 calendar days of receipt by a broker.
- c. Both Codes to provide for the Australian Financial Complaints Authority to deliver dispute resolution and enforcement, with a focus on customer-centred outcomes and including the ability to apply significant financial penalties for breaches.

The IB Code requires that brokers inform their clients when they receive conflicted remuneration from an insurer. However, small businesses report uncertainty over how much of the broker's income results from insurer commissions. Small businesses also report viewing this conflicted remuneration as evidence that the broker may not truly seek the best outcome for the small business.

The ban on conflicted remuneration in other financial services sectors does not apply to the insurance sector and insurance brokers can still receive volume-based commissions from insurance companies. The Royal Commission into Financial Services has demonstrated the dangers of conflicted remuneration in financial service industries. For many small businesses, their broker is a key business relationship and vital to them accessing the insurance they need. However, for others the issue of conflicted remuneration has led to a belief that their broker is not operating in their best interests.

"Our insurance brokers have been absolutely useless, and most troubling, there seems to be no incentive for them to work on our behalf. They depend on the insurance companies to give them policies, so they don't want to anger them. This is a conflict of interest."

Small business insurance survey respondent

⁵³ IBCCC (2020), 2019-2020 Annual review.

⁵⁴ IBCCC (2020), 2019-2020 Annual review p5.

Small businesses have reported being shocked at discovering that their insurance broker has received conflicted remuneration from the insurance company. Even if they are aware the broker is receiving a commission, they may not be aware of the amount of the commission or how the commission would differ between policies. Small businesses who engage a broker must be able to rely on the broker to act ethically, competently and professionally when representing the interests of the small business. Allowing conflicted remuneration to continue fundamentally undermines this expectation.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry did not address brokers comprehensively. The Commission recommended that ASIC should further review the question of commissions for brokers in 2022.⁵⁵ Given the importance of brokers to small business' access to insurance, the conflicts involved, and the existing confusion over how brokers are paid, conflicted remuneration needs to be urgently addressed.

Recommendation 4: Conflicted remuneration for insurance brokers should be banned with a phased transition period.

Availability of critical insurance products

Insurance availability is declining at a worrying rate across Australia.⁵⁶ Lack of competition in geographic areas, risk averse underwriters and rapidly rising premiums are forcing small businesses into difficult decisions about ongoing operations.

Businesses close when insurance becomes inaccessible through premium cost increases, reduction of coverage, extraordinary excess charges or withdrawal from markets. Small businesses facing closure due to inaccessible insurance have reported taking out loans to pay premiums, deliberately underinsuring their properties, closing completely, and suffering anxiety and depression due to the inability to access appropriate insurance. If small business opts for an insurance product that is unsuitable to simply 'tick a box', small business owners are likely to be left just as vulnerable as if they had no insurance.

"We own and operate a beachfront caravan park QLD. Our insurance broker could only find one insurer who would insure us. The fees are extremely high and excess if there is a cyclone is \$100,000. This excess means that we are not adequately covered. We have seriously considered stopping the cover."

Small business insurance survey respondent

Insurance can become unavailable due to insurance not being offered or being refused, or where it is simply unaffordable. Functional insurance requires premiums to be affordable to the majority and significantly lower than the cost of the risk. Limited insurance options are linked to higher costs due to reduced market pressures.

The global insurance market is hardening. This hardening means reduced competition, higher costs, and fewer available insurance policies. The hardening market creates a significant challenge for Australian businesses who have reported price increases in double-digit percentages. This is especially clear for financial and professional liability insurance offerings in Australia, New Zealand,

⁵⁵ Australian Financial Review (2019), *Insurance brokers buoyant after Hayne report*.

⁵⁶ ASBFEO Small business insurance survey.

the United Kingdom and the United States.⁵⁷ According to the Fitch report “*Commercial Insurance Market is Hardening*” insurance rates have risen for nine consecutive quarters.⁵⁸ A recent decision by the NSW Court of Appeal opens the potential for pandemic-created business interruption claims regardless of intended policy wording exclusions.⁵⁹ This may further limit offerings by insurers, whilst investment losses, lost business claims and defaulting customers will continue to add pressure in the Australian market.

Insurance costs and coverage are also shaped by the risk environment that the business operates in and the risk appetite of the insurer. High premiums can operate as price signals that a risk has increased and indicate to a business seeking insurance that it should seek to mitigate its specific risks. However, the price signal in many circumstances will not relate to risks that a business can mitigate or where it does relate to a risk the business can mitigate, the cost of mitigation is itself prohibitive. Inherent risks to some activities cannot be mitigated by small business without that activity ceasing completely.

In our survey, over 90% of small businesses that have had an issue with their insurance report they hold public liability insurance, whilst over 60% had fire or accidental damage and contents insurance.⁶⁰ Overall, rising premium costs was the most reported issue, and over 80% stated that insurance has placed their business under financial stress. The impact of insurance becoming unavailable at an affordable price resulted in 17% of respondents reporting that they were becoming unable to trade and 18% reported that they were unable to enter into contracts due to insurance requirements.

Along with the increase in premiums, small businesses report that some insurance companies are imposing additional requirements on them before they will consider providing insurance. Small businesses are already struggling to afford insurance premiums let alone having the resources to undertake improvements to satisfy arbitrary conditions.

A small business in Queensland that had their premium increase by 20% was told by their insurer that they needed to install CCTV and any liability claims without CCTV footage would have an excess of \$50,000.

Small business insurance survey response

⁵⁷ Fitch (2020), For *Global Insurers, Pandemic Likely to Erase Profits Until 2021 Second Half*.

⁵⁸ Fitch (2020), *Commercial Insurance Market is Hardening*.

⁵⁹ Australian Financial Review (2020), *Insurers lose COVID-19 business interruption test case*.

⁶⁰ ASBFEO Small business insurance survey.

Public liability and professional indemnity insurance

Finding: Many small businesses report being unable to obtain public liability and professional indemnity insurances. The open-ended nature of injury claims and potential for large damages mean that insurance availability is becoming limited.

Some sectors report being unable to obtain public liability insurance at all. Many insurers do not offer it, and when asked why, they cite the unpredictable nature of civil liability damages and Australia's increasing litigation culture. When a slip or fall can cost a small business millions, operating without public liability insurance is not an option. For businesses in tourism or outdoor activities the lack of available insurance is seeing businesses close. These closures risk taking with them the Australian tradition of caravan family holidays, outdoor trekking on school camps, and children's horse riding adventures.

"If we are unable to find a [public liability] policy for our horse riding then we will have to [permanently] close our horse riding business which has been operating for 34 years."

Small business insurance survey respondent

Public liability insurance has become almost impossible to obtain for many types of small business, particularly for recreational activities. Industries that have been particularly heavily impact by a lack of public liability insurance include:

- caravan parks
- amusement operators (show rides)
- horse riding businesses
- donkey riding businesses
- outdoor camps
- quad bike tours
- jet boating

Public liability insurance protects small businesses from claims of injury by people injured while using the business' services. For the injured party obtaining compensation can be a drawn out and costly process.⁶¹ For insurers, the risks posed by uncertain costs and a high litigation culture make public liability insurance an unattractive market.⁶²

Small businesses have already shut down because they were unable to obtain public liability insurance.⁶³ The risk of non-renewal also meant that small business with current insurance were unable to suspend their insurance during the current pandemic even though they were not operating.

"I was told that if I cancelled my insurance due to COVID I would never get insurance again."

Small business operator during Ombudsman consultation

The risk environment for public liability litigation can only change through government intervention. The Australian government should take urgent steps to work with the states and territories to

⁶¹ Productivity Commission Inquiry Report (2011), *Disability Care and Support Overview and Recommendations* p53.

⁶² ASBFEO insurance stakeholder consultation.

⁶³ ASBFEO Small business insurance survey.

ensure that Australia has a civil liability framework that works. The current framework of fault-based injury compensation creates uncontrollable risks for both insurers and small business.

Recommendation 5: Following the approach taken in New Zealand, liability for personal injury should be subject to statutory caps.

The Productivity Commission Report into Disability Care and Support recommended two schemes: the National Disability Insurance Scheme (NDIS) that has been rolled out across Australia, and a no-fault National Injury Insurance Scheme (NIIS) to cover lifetime care for acquired catastrophic injuries. The NIIS would provide every Australian with lifetime care and support if they were critically injured. The lifetime care would remove the right to sue for lifetime care costs for catastrophic injuries. The removal of catastrophic injury lifetime care costs would change the risk environment for small businesses and this would in turn change the risk appetite of insurers.

The scheme proposed by the Productivity Commission would not cover non-catastrophic care costs or economic loss and pain and suffering for catastrophic injuries. By retaining these risks, businesses would have ample incentive to undertake risk mitigation and continue to hold public liability insurance (subject to statutory caps).

Nine years on from the Productivity Commission Report a NIIS is still under consideration,⁶⁴ to the detriment of Australians and small businesses.

Recommendation 6: The Federal Government, in coordination with the states and territories, should urgently progress work on a National Insurance Injury Scheme in line with the recommendations of the 2011 Productivity Commission Inquiry Report into Disability Care and Support.

Small businesses are facing significant challenges in accessing professional indemnity and public liability insurance, especially in the tourism and construction industries.⁶⁵ For those small businesses that manage to obtain insurance, it comes at great cost. A number of small businesses surveyed commented that insurance premiums took up a significant portion of their cash flow, and that increases were significant, with one seeing a premium increase from \$7,300 to \$18,000 in one year.

Results from our survey showed that 93% of respondents had public liability insurance for their business. Over the past 5 years, the average cost for Public and Product Liability has increased by almost 20%, for Professional Indemnity the increase has been 42%.⁶⁶ With an average annual inflation rate of 1.7% between 2015 and 2019,⁶⁷ these increases show how quickly the cost of insurance is outstripping income.

It has been reported to us that professional indemnity insurance in particular has become almost impossible to obtain for business in financial services and the construction industry.⁶⁸

The Financial Planners Association of Australia survey of professional financial planning practices in May 2020 showed 77% of respondents experiencing a rise in premium costs for professional indemnity insurance of over 10% this year. A third of practices had an increase of over 25% and 15% of practices experienced a 100% increase. Professional indemnity insurance is a requirement to hold

⁶⁴ The Australian Broadcasting Corporation (2020), *Catastrophically injured Australians still waiting for national insurance scheme meant to roll out with NDIS*.

⁶⁵ Insurance News (2020), *PI pain set to worsen as insurers harden risk appetite*.

⁶⁶ KPMG (June 2020), *General Insurance Insights Product Level Dashboard*.

⁶⁷ Reserve Bank of Australia (2020), *Inflation Calculator*.

⁶⁸ ASBFEO Insurance Stakeholder Consultation.

an Australian Financial Services Licence, a licence required to be a financial planner. Without professional indemnity insurance these businesses will close, and access to financial advice will become increasingly difficult.

Without professional indemnity insurance, particularly in industries where the government mandates such insurance, small businesses will close. The pressures small businesses face in costs and negotiating power are not as great for bigger businesses. Big business will absorb the small businesses that are closing, leading to markets with less competition.

Recommendation 7: Where there is only one or no insurers left in a professional indemnity market, the Federal Government should provide an insurance scheme of last resort for small business.

Natural disaster insurance

Finding: Businesses report being unable to obtain natural disaster insurance, or being offered policies where the cost is prohibitive.

Small businesses are reporting that natural disaster coverage is inaccessible, with extraordinary price increases or an outright refusal to cover. For some sectors, particularly rural pubs and regional accommodation businesses, property insurance is almost impossible to obtain. For other sectors, property insurance can be obtained but is so expensive as to be inaccessible, excludes key natural perils or has an excess so high the insurance is useless. Without insurance many small businesses will not be able to recover from a natural peril without government assistance.

Insurance companies have invested in determining the natural disaster exposure for properties around the country and in modelling the impact of climate change on natural disaster risks. Events such as bushfires, floods, severe cyclones and damaging hail will become more common across Australia.⁶⁹ As the claims for the last decade have been more than double the claims made in the decade before⁷⁰ natural disasters are becoming increasingly expensive to insure against.

The Australian Prudential Regulation Authority views the current general insurance industry as resilient and well capitalised despite COVID-19 and recent natural disasters,⁷¹ but has recently drawn attention to the risk posed to the financial system by the impact of climate change, including the need for mitigation to reduce the costs of recovery.⁷² However, the trends identified in our survey suggest that losses in the insurance industry are not being absorbed by insurance companies and their existing capital. Rather they are being passed onto customers through higher premiums or outright denial of coverage.

The risk environment for natural perils has and is changing significantly due to climate change. Natural disaster insurance is 'an important way for ... businesses to manage financial risks from natural hazards'.⁷³ If small businesses cannot access relevant insurance they, and their communities, are exposed in the case of natural disasters. This is not an issue that impacts only one industry or that can be mitigated by individual businesses. The local pub cannot control the weather.

⁶⁹ IAG (2020), *Fact Sheet Severe Weather in a Changing Climate 2nd Edition September 2020*.

⁷⁰ Royal Commission into Natural Disaster Arrangements (2020), *Report* p417.

⁷¹ APRA (2020), *Corporate Plan 2020/24*, p9.

⁷² APRA (2020), *Executive Board Member Geoff Summerhayes - Speech to Australian Business Roundtable for Disaster Resilience and Safer Communities webinar*.

⁷³ Royal Commission into Natural Disaster Arrangements (2020), *Report* p416.

In the wake of the September 11 2001 terrorist attack in the United States of America, the insurance and reinsurance market withdrew from providing terrorism insurance. This created economic uncertainty with a large pool of assets uninsured for terrorism risk. To fill the market gap in terrorism insurance the Australian Government created the *Terrorism Insurance Act 2003* that required commercial property insurance to provide coverage for terrorism.⁷⁴ The government set up the Australian Reinsurance Pool Corporation (ARPC), which offers terrorism reinsurance to commercial insurers that offer commercial property and business interruption insurance.

The circumstances that led to the establishment of the ARPC included a changed risk environment, a risk that individual businesses could not mitigate, and a communitywide impact of the risk remaining uninsured (lowered investment and business uncertainty). These conditions are being recreated for small businesses nationwide as they and insurers grapple with the consequences of climate change.

The Australian Government must step in to ensure accessible property insurance for natural perils for small business. It is possible to expand the existing ARPC to provide commercial property significant natural peril reinsurance. By expanding this pool to offer reinsurance for significant natural perils, the Government can provide a vital increase in reinsurance options for commercial insurers and change the risk environment.

Changing this risk environment should lead to lower property insurance premiums. A pooled cyclone insurer would lower insurance premiums in cyclone risk areas by 10-15%.⁷⁵ The year 2020 has demonstrated how important insurance is to disaster recovery and our national resilience. Making commercial property insurance more accessible will strengthen the resilience of small businesses and the communities they support.

Recommendation 8: Expand the Australian Reinsurance Pool Corporation to provide reinsurance for all natural disasters for commercial property insurance.

Expanding the ARPC scheme would ease property premiums for existing small business, but it should not be an incentive to build commercial property in areas that are at high risk of natural perils. The Royal Commission into Natural Disaster Arrangements recommends mandatory consideration of natural disaster risk in land-use planning decisions.⁷⁶ The Ombudsman supports this recommendation but believes more should be done to prevent the continual inappropriate development of high-risk land.

The best time to prevent inappropriate development of land is before it is released or zoned for development by local authorities. The parties in the best position to assess the risk of unreleased or undeveloped land are local governments and state governments. As the authorities to approve new development in local areas and release land for development the responsibility for the land's risk should appropriately rest with them.

⁷⁴ *Terrorism Insurance Bill 2003* (Cth), Explanatory Memorandum.

⁷⁵ The Treasury (2015), *Northern Australia Insurance Premiums Taskforce Final Report* p43.

⁷⁶ Royal Commission into Natural Disaster Arrangements (2020), *Report* Recommendation 19.3.

Recommendation 9: Local Councils and State and Territory Governments that release new land for development, or rezone existing land for further development must undertake a suitability and natural peril assessment of all land (assessed for a 1 in 100 year risk) before commercial release and publish the results of the assessment prior to land release. Where land is released with known issues that are not disclosed to a purchaser or are otherwise not apparent, the relevant authority should carry the liability for the known issue in perpetuity.

Refusal on basis of industry, location or other generic factors

Finding: Through our consultations, businesses have reported being unable to obtain insurance based on industry (such as the mining industry), location (such as remote locations) or other generic factors. Insurance is an “essential service” for business alongside services such as electricity, gas and banking. As such, the provision of insurance should not be denied to legal businesses on arbitrary “ethical” and other bases.

There are a number of services that are essential to conduct business in the modern world, including insurance, telecommunications, and banking services. Governments have long recognised that the economic participation, social cohesion and general welfare of their citizens rely on certain “essential services” being available.

In Australia, the states and territories make legislative provisions to provide or regulate many of the traditional essential services, although not all. In New South Wales for example, a minister on behalf of the Governor has sweeping powers to “regulate, control, direct, restrict and prohibit the provision of an essential service” and to “direct a person who provides or is engaged in the provision of the essential service” if a state of emergency is declared, restricting the ability of workers to engage in labour actions (i.e. strikes).⁷⁷ While in Victoria, the Essential Services Commission has powers to undertake price determinations, license vendors, and oversee market conduct.⁷⁸ Examples of essential services at other levels of government include the federal provision of Australia’s defence force and locally, councils’ maintenance of waste disposal. The ultimate goal of essential services regimes is to ensure parity and continuity of vital services.

There are many services that are essential for conducting business but are not legislated as so. This is because business has long been seen as not needing the protections afforded to individual customers. However, where private businesses provide essential services, there is little incentive to ensure complete market coverage at the expense of profits. This Office has assisted businesses with many examples of this problem, such as the withdrawal of banking services from legitimate businesses in the adult services, precious metal trading and remittance services industries. Insurance is yet another essential service where this practice is becoming common.

Where small businesses are operating within the law, the denial or removal of essential services is a clear market failure. While the reasons may vary across products and regions, the outcomes are strikingly similar – these private decisions by large operators create hard barriers to opening and sustaining a small business and impact the commercial environment especially in a regional setting.

⁷⁷ *Essential Services Act 1988* (NSW).

⁷⁸ Essential Services Commission (2020), *How we regulate*.

This office will continue to assist small businesses and its broader advocacy work on the form that an expanded essential services regime could take. Insurance will form a critical component of this work.

What are businesses paying for?

Finding: Small businesses are unaware of all commissions, fees and taxes that make up significant portions of their insurance premiums. Insurance product documentation is so complicated, opaque and difficult to navigate that small businesses purchase unsuitable policies and obtain inadequate cover.

Insurance premiums have multiple components within the larger sum that small businesses pay. This includes broker’s commissions, fees, the base premium costs and government taxes. If small businesses are unaware of the fees and commissions that they are paying, they are unable to properly compare insurance products, negotiate their insurance and make an informed choice.

The taxes alone can consist of 70% of the value of a business’s insurance premium. Some businesses are aware of this but others are not. Some levies change every year and differ in percentage of the premium across different types of insurance. These differences make it very difficult for a small business to determine how much tax they are paying in their premium.

Figure 2: Table of impact of taxes and levies on business insurance premiums⁷⁹

State	Impact of taxes and levies on premium price for businesses
ACT	GST is 10% of the premium cost
NSW	The emergency Service Levy, GST and stamp duty is up to 70% of the premium cost
NT	GST and stamp duty is 21% of the premium cost
QLD	GST and stamp duty is 19.9% of the premium cost
SA	GST and stamp duty is 21% of the premium cost
VIC	GST and stamp duty is 21% of the premium cost
WA	GST and stamp duty is 21% of the premium cost
TAS	The fire levy, GST and stamp duty is up to 49% of the premium cost

Recommendation 10: All insurance quotes should include a clear breakdown of commissions, fees and taxes, including administrative costs and broker fees.

Is insurance fit for purpose?

There is no ‘one-size-fits-all’ when it comes to insuring a business. As businesses are not all the same, insurance needs to be appropriate for the needs of the business taking it out. It is hard for

⁷⁹ Royal Commission into Natural Disaster Arrangements (2020), *Report*, p423; Tasmanian Government (2018), Review of the *Fire Service Act 1979* (Tas) p28.

businesses to determine whether this is the case since policy documentation is complicated, opaque and difficult to navigate.

For an insurance product to be fit for the purposes of a business, it needs to:

1. provide protection against the key risks that the policy states that it is for;
2. be able to be understood by the small business owner, especially conditions of the policy that limit or exclude liability; and
3. when a claim is made, provide practical coverage in line with the reasonable interpretation of the terms and conditions of the contract.

The results from our survey indicate that insurance is not fit for purpose for many small businesses. Respondents also indicated that this problem represented a major source of stress for them.

A large number of respondents said that available insurance products did not match their business needs. Insurers often combine multiple insurance policies into a package. The package may combine general liability, commercial property and business interruption insurance. This can lead to under-insurance or over-insurance (and overpayment of premiums) because businesses have multiple insurance products, with overlapping coverage, for the cover they want.

A regional tourism organisation in Queensland said that it needed to take out many different types of cover and pay a premium for some of the inclusions that were not applicable to their industry.

Another tourism business said that insurers did not understand or care about the needs of small businesses, especially sole traders or businesses that operate part-time or seasonally.

Small business insurance survey responses

Finding appropriate insurance for a small business can be very time-consuming. Small businesses are notoriously time-poor and the process of finding insurance must be repeated every year. One solution to the problem of finding appropriate insurance is to rely on a broker, but as previously covered this comes with its own issues. Making insurance policies easier to read and compare would assist small businesses make faster and better decisions. It would assist small businesses in identifying what insurance packages contain unnecessary coverage so that small businesses can negotiate for the excess coverage to be removed.

A small equipment manufacturer that sells to the defence industry commented on the sheer amount of time it takes them to try to find insurance and said, "And we are not alone, other companies have the same problems."

Small business insurance survey respondent

Many small businesses have reported insurance excesses set so high that they leave the business exposed and prevent the most common claims. A higher excess will often mean a lower premium so small businesses will accept the trade-off and simply hope that they will not need to make a claim. For some small businesses the excess is so high that it makes the insurance non-functional.

A business in the accommodation and food services sector said, "to get cover that we could afford, we have been limited to only making claims for items over \$10,000 in value. This eliminates a substantial number of claims for damage to our property and contents."

A number of businesses said that their excesses for cyclone damage had increased to \$100,000 or even \$200,000, which would often exceed the cost of damage.

Small business insurance survey respondents

Terms and conditions

Small businesses lack confidence in their protection through insurance because they find it hard to understand the terms and conditions. Different definitions for natural perils used by insurers make it difficult for small business to compare policies or have certainty over their coverage.

Understanding why a claim would be denied and the line between covered and excluded events is key to having confidence in coverage.

“It feels like a lottery as to whether a claim will be paid out.”

Small business insurance survey respondent

Of the 7,969 general insurance complaints received during the first AFCA six month reporting period, 2,238 complaints (approximately 28%) related to a claim denial, either outright, or due to an exclusion or condition.⁸⁰ Due to the limited remit of AFCA to handle small business insurance products the true number of issues will be significantly higher. Publicising reasons that claims are normally denied under an insurance policy would assist small business to manage their expectations and to draw attention to exclusions and conditions the small business had not considered.

“Without insurance it is impossible to operate our business, but we have no faith in our insurance.”

Small business insurance survey respondent

Providing a chart of reasons why claims are denied would draw a small business’ attention to exclusions or risks they were not aware of. Awareness of these risks and exclusion will allow small businesses to make a more informed choice.

Different insurance policies have different structures and use different definitions. Policy wording is often difficult to understand. Even if the overall wording of a policy document is in plain language, often there are legalistic terms, and conditions and exclusions that are difficult for small businesses to identify. A lack of standardisation across policies make it difficult to compare coverage quickly and easily for time poor small businesses.

“The Policy is not written in ‘plain’ English and definitions of coverage are difficult to understand... Most insured small businesses would not be aware they are underinsured or not insured for their specific needs”

Small business insurance survey respondent

A small business needs to be able to make an informed choice in insurance policies. To allow an informed choice, policies must provide certainty in coverage and be comparable. To provide certainty in coverage insurance companies, businesses and government should agree on, use and legislate (as necessary) a set of standard definitions for natural perils and other key terms. Standard definitions would make it easier for businesses to compare policies and make appropriate choices.

⁸⁰ AFCA (2019), *Six Month Report*.

If information were provided to small business in a standardised format with standardised definitions, it would be easier to compare insurance products and make an informed choice. Presenting this information in a checklist would help small business read and understand policies. This understanding would help empower small business to make appropriate insurance choices.

“They make it very complicated so it’s hard to understand what you actually need and because of different components with different underwriters they can make you pay more for things because it’s so confusing.”

Small business insurance survey respondent

The Ombudsman has also received reports that insurance products offered by foreign insurers (sometimes the only insurers left in a particular risk market) are often written in non-Australian legal terminology. Insurance documents should always be written in plain English and for an Australian audience.

An arts studio in South Australia said, “Very challenging to compare insurance policies as they all differ, particularly with excess on claims and standard coverage amounts”.

Small business insurance survey respondent

Recommendation 11: Insurance product documentation on creation and renewal should:

- a. Set out the most common mitigations that businesses can make to premises and how they operate to reduce their premiums and ensure continued coverage;
- b. Clearly list exclusions, limitations and conditions early in the documentation, together with standard policy checklists (with checkboxes) that show all inclusions and exclusions;
- c. Set out the most common reasons why claims are denied under the policy, including a chart with percentages;
- d. Use standard definitions, particularly covering natural perils, across all insurers operating in Australia; and
- e. For products offered to Australian purchasers by foreign insurers, be written in Australian legal terminology.

Claims

Finding: Small businesses can be left in limbo while insurers assess their claim, leading to uncertainty of business survival and reduced resilience.

The handling and payment of a claim is crucial to the insurance process. For many small and family businesses, the time taken to handle a claim and its decision directly affect the business’s ability to restart or continue operations.

The process and management of claims are governed by a number of different rules from various sources, including the insurer’s policies, *Insurance Contracts Act 1984*, and any voluntary codes the insurer may be subscribed to, such as the GI Code.

In making a claim, a policyholder is required to prove a loss has occurred and the loss has been caused by an insured peril. In handling the claim, the fundamental burden of an insurer is to show

that the claimed loss falls within the terms of a policy exclusion.⁸¹ As such, an insurer's business model is not based on upholding its customer's best interests, or even on assisting its customers. Its focus is on determining whether it can make no payment when its clients are most in need.

Of the top general insurance issues reported to the Australian Financial Complaints Authority (AFCA) in their first Six Months Report, delays in claims handling, the claim amount paid, and denial of claims were the most common.⁸² Delays in claim handling accounted for 1,476 general insurance complaints in AFCA's Six Months Report.⁸³ Historically claims processing times complaints increase following natural disasters when claims spike in number.⁸⁴ For a small or family business, a denied or delayed claim can have a significant effect on business continuity or recovery. This adds further stress onto small business owners who are already undergoing hardship. Our survey showed approximately 22% of respondents experienced claim related issues (denied claim or slow claim payment).

"In March 2017, [we] suffered a direct landfall from Tropical Cyclone Debbie, which was a severe and slow-moving category 4 cyclone. The island suffered considerable damage and was closed for a number of weeks. During this time, [we] largely funded repairs to reopen out of [our] other family resources, and then subsequently worked through the insurance claim process for claim recovery. For some other people, such as certain sub-tenants, the claim process is still ongoing."

Small business insurance survey respondent

Claims handling

Traditionally, claims handling has been excluded from financial service requirements to hold an AFSL. Legislation is currently before parliament to change this and require people conducting claims handling, for example assisting a person to lodge an insurance claim and assessing and settling a claim, to hold an Australian Financial Services License or be an authorised representative of a licensee.

"During the assessment and claim process we were bullied by the assessor, including being pressured into making a decision and accepting the settlement which fell well short of expectations and requirements causing significant hardship."

Small business insurance survey respondent

Payment times and terms

Where there is significant loss, a claim that is not processed in a timely manner can 'make or break' the future of a business. In rural and remote areas, small businesses form the backbone of the local community, and their loss often means the loss of essential goods and services, and employment opportunities within the area. Timely processing of a claim is therefore crucial to the survival of a small and family business, especially where a total loss has occurred. Under the GI Code a decision must be made within 4 months of receiving a claim,⁸⁵ unless it fits within one of these exceptions;

- the claim arises from an Extraordinary Catastrophe;

⁸¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *General Insurance*, Background Paper 14, Part 14 – Claims, paragraph 1.2.

⁸² AFCA (2019), *Six Month Report*.

⁸³ AFCA (2019), *Six Month Report*.

⁸⁴ The Treasury (2011), *Natural Disaster Insurance Review*.

⁸⁵ Insurance Council of Australia (2020), *General Insurance Code of Practice* p55.

- the claim is fraudulent, or the insurer reasonably suspects it is fraudulent;
- the claimant does not respond to reasonable requests for documents or information;
- there is communication with the claimant about their claim due to circumstances beyond the insurers control; or
- the claimant requests a delay in the claims process;

If the final claims decision timeframe is not met, the insurer must tell the claimant in writing about their complaints process.⁸⁶

This timeframe is too long for small businesses that need certainty about their cover so they can make decisions regarding the future. Having said that, we understand that even in the wake of disasters, most claim decisions are still made within three months.

If the circumstances fall within an exception, specified in the Code, then the timeframe to reach a claim decision is extended to 12 months.⁸⁷ The 12 month claim decision timeframe is wholly inappropriate for small and family businesses, especially where business continuity and/or trade capacity is contingent on receiving a claim payout. Our survey responses found this to particularly be the case in the hospitality, accommodation and tourism industries, where delayed claim handling either left businesses unable to trade to their full capacity or, in worst case scenarios, unable to trade at all and forcing the business to fold.⁸⁸ It is also unnecessary. The 2011 Queensland's Floods Commission of inquiry found that 84% of claims across six insurers were decided in 4 months or less.

Recommendation 12: Decisions about claims should be shortened:

- a. For general timeframes from 4 months to 3 months.
- b. For 'extraordinary catastrophes' from 12 months to 4 months.

Barriers to switching & market entry

Even where insurance products are accessible and understandable, there are significant impediments to proper market functioning where businesses are denied the practical ability to change insurance providers at the end of contract periods in response to price or coverage changes. Similarly, market failure due to concentration accompanied by significant barriers to entry means that competitive pressures are diminished and small businesses, unable to negotiate standard form contracts, suffer as a result.

Notification periods for renewal changes are too short

Finding: The current 14-day statutory notice period for renewal terms or the non-renewal of insurance is not long enough for small businesses to make informed decisions, change insurers and secure insurance.

Trade credit insurance provides protection against the risk of a customer failing to pay invoices. In response to COVID-19, QBE announced sweeping changes to its trade credit policies in late March 2020.⁸⁹ Following a backlash, the company did not proceed with the full extent of the announced

⁸⁶ Insurance Council of Australia (2020), *General Insurance Code of Practice*, p28.

⁸⁷ Insurance Council of Australia (2020), *General Insurance Code of Practice*, p28.

⁸⁸ ASBFEO Small business insurance survey results.

⁸⁹ Australian Financial Review (2020), *QBE stops writing credit policies, withdraws guidance*.

changes but still committed to stop writing trade credit policies for two-thousand companies and reduce the coverage limit for future policies by 50% for an additional 7,000 businesses.⁹⁰ Then, in June 2020, QBE announced it would no longer provide cover for suppliers to Myer and David Jones from 16 July 2020.⁹¹ These changes, with very little notice, left many small businesses with the choice of no longer doing business with some of their most significant customers or taking on the full risk of those customers failing to pay – despite having insurance in place for many (good) years.

Small business consistently reports increases in cost, or lowering of coverage, without an apparent trigger. For some small businesses, they have been insured for decades and never made a claim when renewal was suddenly refused or they had their costs increase rapidly.

“The past few years, it has been more difficult to obtain renewal and it was always at the last minute. Our insurance this year increased by 400% and we had no choice.”

“The insurance company/broker waits until the day after or even weeks after the renewal date to send me a renewal notice and invoice for payment. I have no advance notice of the proposed cost nor the opportunity to shop the policy around.”

Small business insurance survey respondents

Small businesses have reported only being given two weeks’ notice (the current statutory requirement) before their insurance was not renewed or if they were offered renewal they had significantly different terms and prices. Fourteen days is a manifestly inadequate timeframe for small businesses to source alternative insurance. Requiring insurers to give more notice for non-renewal or significant policy changes would give small businesses vital time to find alternative insurance or make business decisions. This would also help increase competitive pressures and address to some degree market failure.

Recommendation 13: Require insurance companies to provide 60 calendar days’ notice for a renewal refusal, premium increases above 15%, or changes in exclusions or excesses, together with a statement providing reasons for the change and any specific modifications that a business can make to continue their insurance or reduce premiums, exclusions and excesses.

Consumer Data Right

Small businesses would benefit from technology that allows them to more easily compare and change insurers. The expansion of the Consumer Data Right system (CDR) to insurance products for small business would facilitate this.

CDR gives consumers and businesses of all sizes, greater control over their own data. Under the CDR consumers and businesses will be able to direct that their data be shared via a secure online system with an accredited provider of their choice. Only an accredited business can provide services under the CDR and those providers must comply with strong regulation to ensure privacy is protected. CDR aims to help consumers and businesses monitor their finances, utilities and other services, and compare and switch between different offerings more easily.⁹²

⁹⁰ Australian Financial Review (2020), *QBE backs down on trade credit controversy*.

⁹¹ The Sydney Morning Herald (2020), *Major insurer QBE pulls cover for ‘high risk’ retailers Myer, DJs*.

⁹² OAIC (2020), *What is the Consumer Data Right?*

The CDR regime also aims to encourage innovation and competition between service providers, helping consumers and businesses access products and services that better suit their needs.⁹³

The CDR is first being phased into the banking sector with the energy sector to follow.⁹⁴ Although the ACCC has previously raised general insurance as a sector for potential economy-wide rollout, it is unclear which sectors the Australian Government will prioritise after banking and energy.⁹⁵ Allowing small business to compare insurance products and easily change insurers would encourage insurers to better respond to those small business' needs.

Recommendation 14: The Australian Government should give priority to the extension of Consumer Data Right into the insurance market.

Insurance alternatives and insurtech

Finding: The insurance industry has high potential for benefits to small business by disruption through technology.⁹⁶ However, where there is innovation, existing insurance companies commonly purchase that innovation for their self-use (for example, algorithms that are purchased for use to de-risk existing insurance business). This means that innovation is lost to the broader market and market concentration is fortified.

Where the existing concentrated market refuses to insure a small business or offers insurance at unaffordable prices, the choices for a small business are limited. This is the place in the market where Lloyds of London and unregulated foreign insurers may offer a product, but even this option is increasingly becoming unavailable to small business. In these cases, the options for a small business owner are to close or self-insure and run the risk of catastrophic loss and personal bankruptcy.

An approach to self-insurance is for a small business to seek to put aside amounts from limited cashflow for future losses and hope that any loss does not arise before sufficient money is put aside. Obviously, this will not be an option for almost all small businesses since there will be insufficient cashflow and, where money is put aside, it comes at a massive cost for business growth.

Discretionary mutual funds (DMFs) are an alternative form of self-insurance that seeks to spread risk across a group of small businesses. At its most basic, a group of people pay into a pool they use to pay out claims for a pre-determined event. Our consultations found many small businesses, and even whole industries, are considering insurance alternatives with DMFs being a popular option.

DMFs are usually set up by industry or corporate groups with a common business purpose, generally with the aim of providing cover for similar business, property and liability risks. The DMF model is increasingly being used for 'hard to place' or 'uninsurable' risks, or to improve the buying power of industry groups who:

- are traditionally charged high premiums, but can show a low loss and/or low claims history; and

⁹³ OAIC (2020), *What is the Consumer Data Right?*

⁹⁴ ACCC (2020), *Consumer data right (CDR)*.

⁹⁵ ACCC (2019), *submission to Senate Select Committee on Financial Technology and Regulatory Technology – Issues paper*.

⁹⁶ IBIS World (2020), *General Insurance in Australia August 2020*.

- have the technology to assess their own risks and develop innovative products (which the traditional insurance market may be slow to embrace).⁹⁷

DMFs can function as general insurance substitutes and provide insurance alternatives to their members. Because they tend to be industry-specific schemes they do not play a strong role in overall market concentration and may not be captured in data.

A DMF requires two or more members to pay into the fund to create a ‘pool’, usually referred to as the aggregate. The purpose of the DMF is to make payments ‘in respect of liabilities, losses, damages or expenses of the contributors’ caused by a defined event where there is uncertainty as to whether, or when the event will happen. The aggregate is utilised to manage the primary layer of risk. Above the aggregate, a DMF may take out reinsurance to protect the fund from catastrophic loss and cap members’ liability at the aggregate.⁹⁸

In addition, a DMFs risk profile is further lowered by its ability to positively influence their members’ risk management behaviour.⁹⁹ Examples include a vetting process upon membership application or renewal, incentivising risk mitigation, or regulating its members through a code of conduct. As such, DMFs are incentivised and work with small businesses to mitigate risks. Discretionary protection is similar to insurance in that it offers protections against prescribed risks and/or events to its members who pay into the fund; however it is important to remember that discretionary risk products are *not* insurance. Whereas an insurance policy makes a contractual promise to pay out all eligible claims, DMFs do not provide a right in equity or law that a payment will be made. The payment is governed by the rules of the fund and is discretionary.¹⁰⁰

In contrast, insurtech is when technology and innovation are used to disrupt the traditional way of doing business within the insurance space. As a long-established industry, insurance has a high potential for disruption through the use of technology.¹⁰¹ Insurtech is often adapted through Artificial Intelligence (AI), machine learning and the use of smartphones to increase user detail and customisation.¹⁰² There is also potential for the Internet of Things to allow devices to communicate and expedite claims processing.¹⁰³ Insurtech companies could also operate solely online and push speed of service as one of their benefits.¹⁰⁴

Despite the fact that disruption is often touted as a key component of insurtech, many reports suggest that insurtech is more often regarded as being a partnership as opposed to a disruptor. A recent report indicates that the most common way that insurtech is integrated into the insurance industry is through partnerships with existing insurance companies and a small number of insurtech companies.¹⁰⁵ Insurance companies may be seeking insurtech partnerships to stem the level of disruption and increase collaboration, opportunity and efficiency.¹⁰⁶ Insurance products are included in ASIC’s Enhanced Regulatory Sandbox which is designed to allow testing of innovative

⁹⁷ The Fold Legal (2019), *Insurance alternatives (Part 4: Discretionary mutuals)*.

⁹⁸ AB Phillips and KJ Risk Group, *Alternate Risk Financing: Discretionary Mutual Funds*, fact sheet.

⁹⁹ The Fold Legal (2019), *Insurance alternatives (Part 4: Discretionary mutuals)*.

¹⁰⁰ *Financial Sector (Collection of Data) Act 2001* (Cth).

¹⁰¹ Investopedia (2020), *Insurtech*.

¹⁰² Insurance Business Mag (2020), *Brokers feel under threat, insurtech boss on insurer interests in the sector*.

¹⁰³ APRA (2020), *Insights from APRA’s 2020 Insurtech Survey*.

¹⁰⁴ Evari Services Australia (2020).

¹⁰⁵ EY (2020), *Insurtech: partnering to deliver value at scale*.

¹⁰⁶ EY (2020), *Insurtech: partnering to deliver value at scale*.

financial services. However, the ASIC Innovation Hub website only refers to fintech and regtech making insurtech-specific searches impossible.

Even where there is innovation via insurtech, existing insurance companies commonly purchase that innovation for their self-use (for example, algorithms that are purchased for use to de-risk existing insurance business). This means that innovation is lost to the broader market and market concentration is further fortified. We will include investigation of the treatment of innovation in the insurance industry in its work to eliminate unfair practices arising out of the Ombudsman's Access to Justice report.

Recommendation 15: The Australian Securities and Investments Commission should explicitly include insurtech as a category in its communications and online guidance for its innovation hub to enhance awareness of existing support mechanisms

APPENDIX: Small business insurance survey results

The small business insurance survey was open in July and August of 2020. The survey was promoted by the Ombudsman’s office through media channels and direct stakeholder engagement. The survey was targeted at small businesses and there were 816 responses in total.

Selected graphs from the survey responses are presented below. ‘Other’ and free text responses were offered throughout the survey, the results of these options are not reported in the below graphs but did inform the qualitative insights drawn from the survey results. Not all respondents answered all questions, due to the logic of the survey not all respondents were presented with all questions.

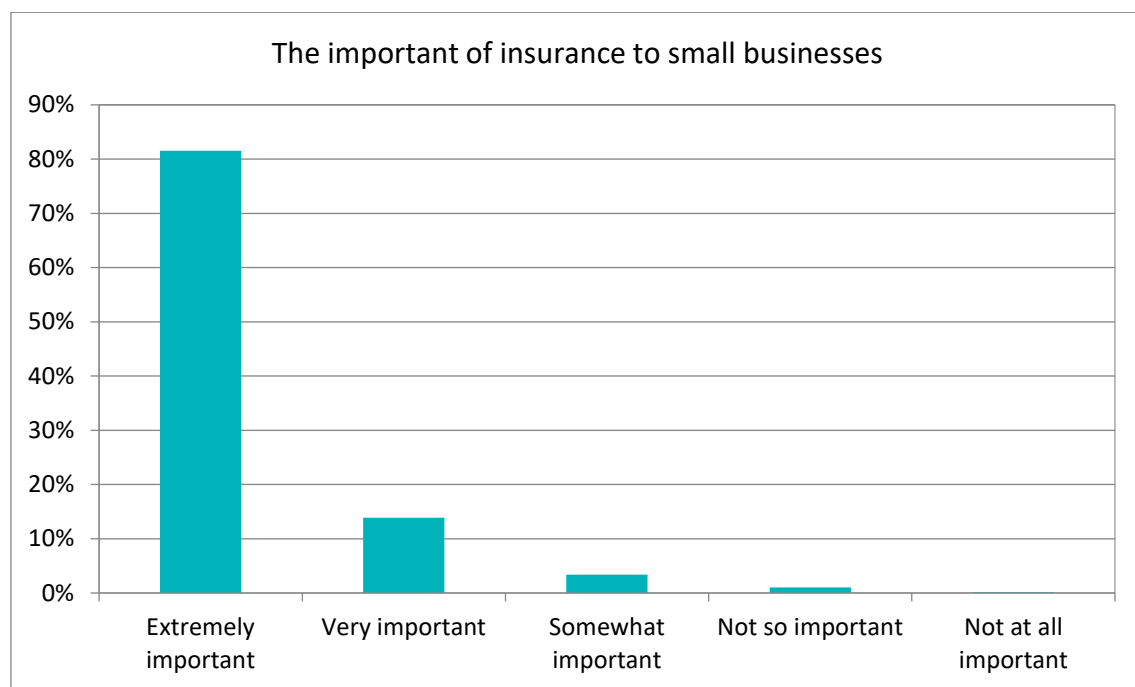


Figure 1: ASBFEO Small business insurance survey responses to question 3; 769 respondents. Original question ‘How important is insurance to your business?’, single selection allowed.

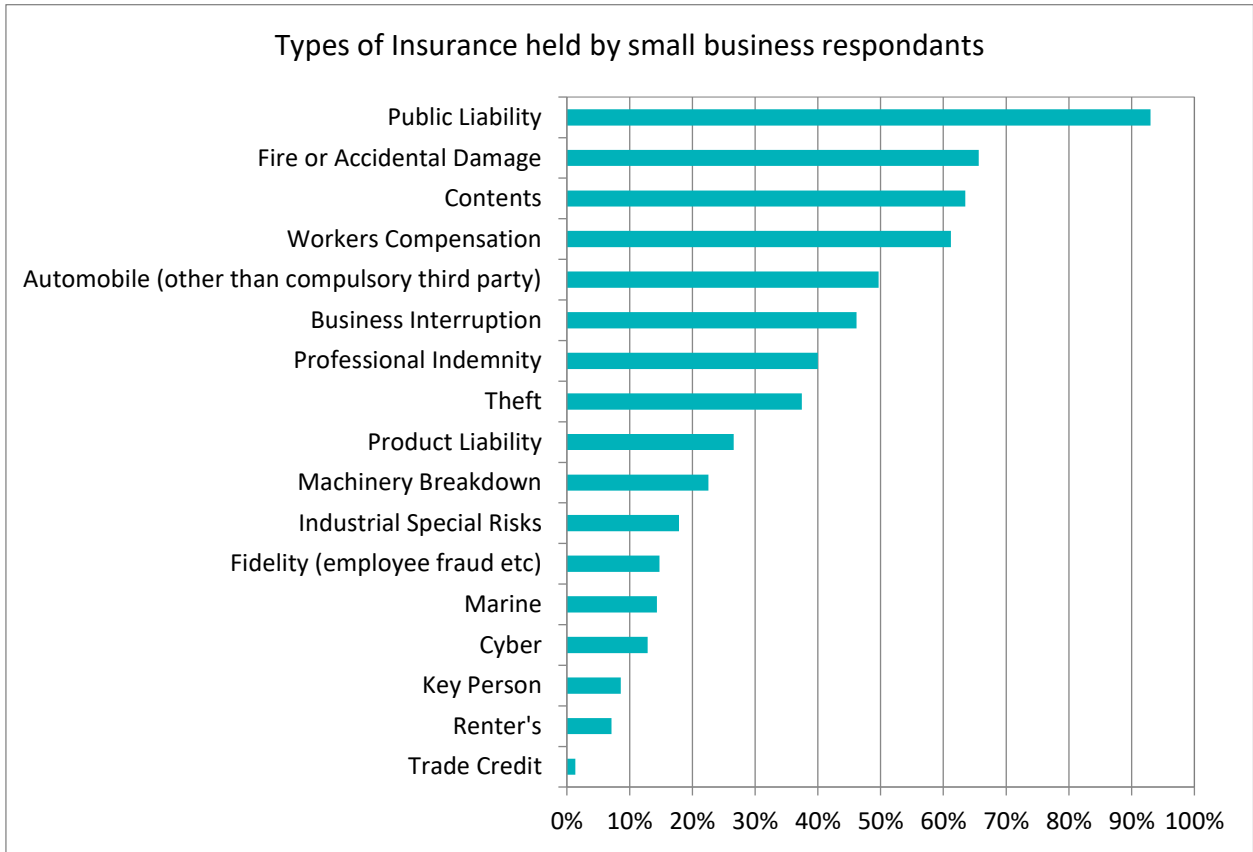


Figure 2: ASBFEO Small business insurance survey responses to question 4; 745 respondents. Original question ‘Which of the following types of insurance does your business currently have? (Check all that apply)’, multiple selections allowed.

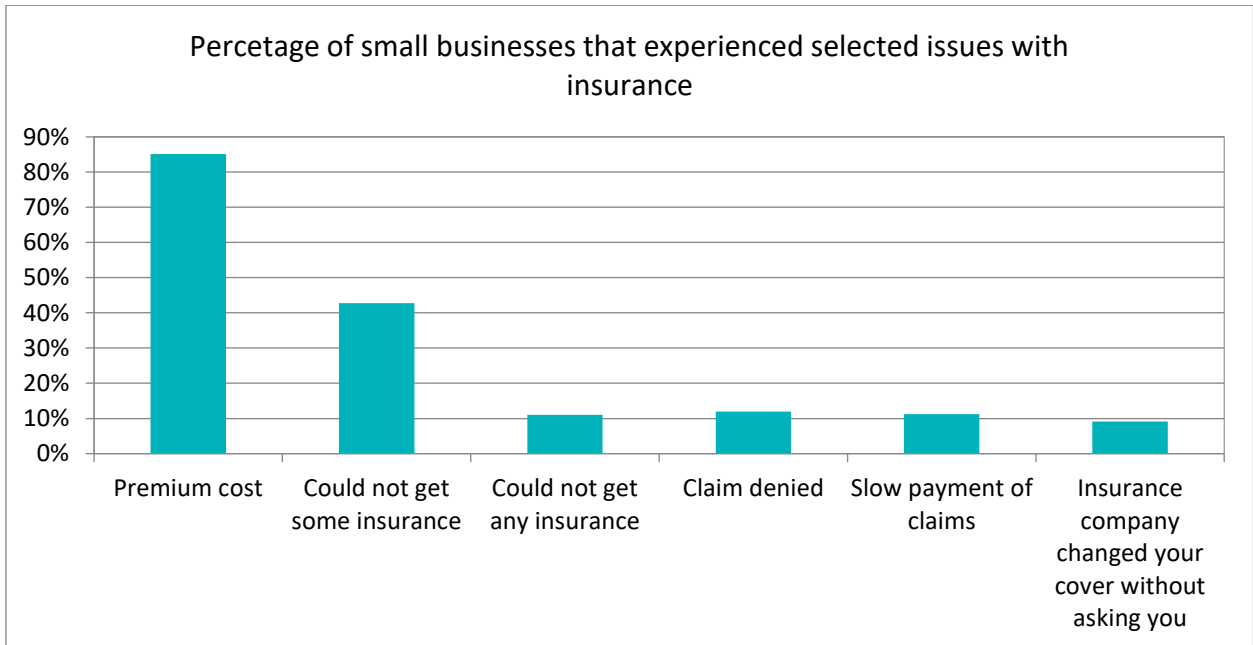


Figure 3: ASBFEO Small business insurance survey responses to question 6; 545 respondents. Original question ‘Please select all issues relevant to your business’, multiple selections allowed. Question logic required respondents to select they had had an issue with their insurance to access this question.

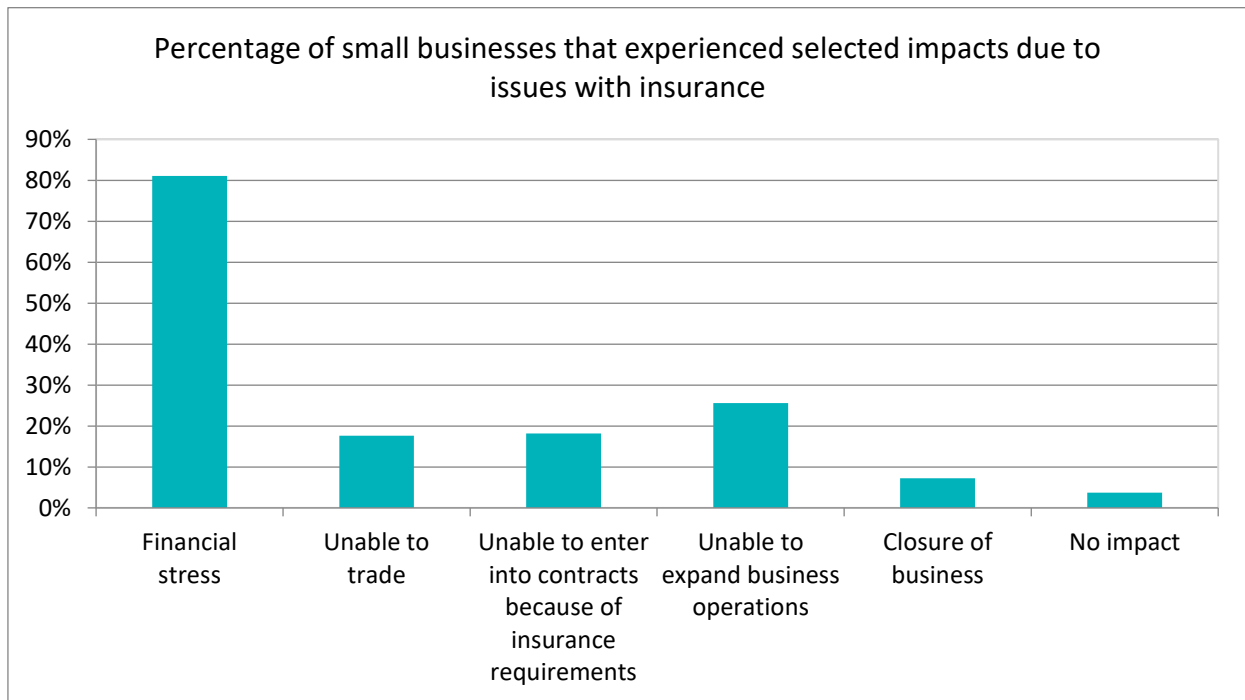


Figure 4: ASBFEO Small business insurance survey responses to question 7; 539 respondents. Original question ‘*Have insurance issues had any of the following impacts on your business?*’, multiple selections allowed. Question logic required respondents to select they had had an issue with their insurance to access this question.

Survey free-text answer Qualitative Insights:

Insurance as an essential service

- For a number of businesses, unavailability or unaffordability of insurance essentially makes their business unviable. Some respondents reported that a denial of insurance, or unaffordable insurance, has forced their business to close down.

Cost/affordability

- Cost is by far the most common complaint. A number of respondents said that insurance is their single biggest expense and costs can make insurance unaffordable.
- Small businesses report increasing premiums with reduced cover, with some small businesses forced to lower their cover due to cost.
- Small businesses report that lack of competition in the insurance sector is a major driver because it gives insurers considerable pricing power and, if the business has to have insurance, the business has to accept the price they are offered.
- A number of respondents perceived that no-win-no-fee legal services has meant an increasing number of customer public liability claims, which the insurers generally settle. This then leads to increasing premiums for the insured business.
- Small businesses report that premiums are partly based on turnover, so that when turnover goes up premiums go up, but when turnover falls, the premiums are not adjusted downwards.
- Many small businesses state they did not receive any kind of relief or support from their insurers during COVID-19.

- Some respondents identified stamp duty, fees and taxes as factors in cost.

Availability

- The impact of reduced availability and rising costs fall disproportionately on regional and rural businesses, and particular sectors including: adventure tourism (including alpine), caravan parks, accommodation venues, and amusement industry operators.
 - This is connected to an extent with recent bushfire and tropical cyclone events.
 - Small businesses report having renewal denied without being informed why or having enough time to find alternate cover.

Risk profile of individual business not taken into account

- Small businesses are frustrated that their excellent claims history does not appear to be taken into account. They do not perceive their insurance as a 'new contract' every year, but rather a continuation of the same relationship.
- Small businesses feel they are being 'grouped in' with other businesses that actually have materially different risks, either because they operate in other geographic areas, provide different services, or don't have the same risk mitigation measures in place.

Fitness for purpose of cover

- Available cover often does not match business needs, which tends to lead to either insufficient cover (underinsurance) or additional cost in order to be sufficiently insured.
- A large number of respondents mentioned extreme excesses e.g.:
 - they are set so high that they leave the business considerably exposed.
 - or prevent the sorts of claims that a business is likely to want to claim for (low value ones).
- Small businesses report accepting higher excesses in order to bring the cost of premiums down to a manageable amount.
- Businesses report requiring multiple insurance products, with overlap, because there is no single product that suits their business needs.

Other costs

- As well as the cost of premiums, businesses have issues with the process of getting insurance being extremely time-consuming and normally repeated on an annual basis.
- Small businesses report that the complexity of policies and the difficulty of comparing policies increase these time and effort costs.
- Other costs identified include audits and other compliance measures.

Stress

- Uncertainty around availability and cost increases creates a major business risk for small business, which is then a source of significant stress. Stress was reported by a large number of respondents, as were adverse mental health impacts.

Claims/disputes

- Small businesses report lacking confidence in their insurance coverage.
 - Complexity of the product lines comes into this.

- There is frustration over claims processes, including reluctance of insurers to pay and delays with repairs.
- Business interruption was identified as an issue – failure to cover for interruption due to COVID-19 (multiple complaints) and bushfires.

Conduct

- Some reports of poor broker conduct, including conflicts of interest and lack of accountability.
- Reports of poor conduct by insurers, including very late notice of renewal terms, which essentially denies the business the chance to switch providers.
 - Notification periods appear to be an important issue.