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Who should bear the risk – The party least able to refuse or the party best able to manage the risk?

The outsourcing of human services by governments to the nonprofit sector has been accompanied by a transfer of legal liability risks. Human service providers are often required to indemnify the government for adverse consequences of service delivery and to acquire contract specified insurances. The civil liability crisis caused by a recent hard insurance market has exacerbated problems for nonprofit organisations in managing the government's transfer of risk of human service outsourcing.

This paper identifies and examines the risk shifting clauses contained in human service agreements across a range of Queensland government departments. It argues that it is in the interests of all parties for the risk to be allocated to the party best able to manage the risk rather than imposed by the party with the strongest negotiating power. It is argued that prudent risk management on the part of government may be to retain the risks, so it can manage them itself.

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WHO SHOULD BEAR THE RISK – THE PARTY LEAST ABLE TO REFUSE OR THE PARTY BEST ABLE TO MANAGE THE RISK?

Introduction

Risk is one of the pivotal concepts of western market economies and its mastery defines a watershed in human history (Bernstein, 1996). Risk management is based on the notion that the future is more than a whim of the gods and one need not passively accept the 'fortunes' of nature. While one cannot always predict the future, rational risk taking assists us in making choices for the better, rather than passively accepting consequences as fate. To choose to spread your investments over a managed portfolio of stocks, to take out insurance or to have experimental surgery for a life threatening disease rather than consult a mystic, flip a coin or do nothing are examples of this pivotal concept in action.

All levels of Australian government have adopted the management of risk as an organising framework for their endeavours. This approach has been championed by commonwealth and state treasuries, audit offices and public account committees with a plethora of risk management guidance notes, check lists, reports, frameworks and implementation notes (for example, Victorian Auditor General, 2004; Joint Committee of Public Accounts and Audit, 2000; Management Advisory Board, 1996; Queensland Treasury, 1994, 2000; Queensland Audit Office, 2000; Commonwealth of Australia 1996). These are backed by Standards Australia's risk management standard which is the basis for a series of influential standards on legal compliance and governance (Standards Australia, 2003 (a)(b)(c)(d)(e); 2004 (a)(b), 1998) which are being used as a reference point by all elements of the Australian economy (McGregor-Lowndes & Carroll, 2001; McGregor-Lowndes, Hough & Ryan, 2004).

In the last decade, government activities have been guided by the adoption of new public management principles of outsourcing government requirements to private enterprise and nonprofit community service organisations (Smith & Lipsky, 1993; Industry Commission, 1996; Lyons, 1997; Seidenstat 1999; Meagher & Healy, 2003; Pearson, 2003). The Queensland Government makes a major investment in the funding of Queensland nonprofit organisations with the 2005 budget indicating that 14.2% of its current transfers ($1,100 m) and 12.3% of its capital transfers being to nonprofit organisations (Queensland Government, 2005).

The two concepts of outsourcing and risk management integrate nicely and have given rise to *Guidelines for managing risk in outsourcing utilizing the AS/NZ 4360:2004 process (Standards Australia, 2004)* and this is then used by governments and particularly by audit offices to assess outsourcing achievements (McPhee, 2003).

This paper seeks to examine a small, but important, part of risk management by the Queensland government of outsourced human service functions. The provision of services by nonprofit organisations is governed by a combination of legislation and grants, contracts or service agreements which contain the conditions of funding in return for the provision of specified services. Governments face a multitude of risks with the outsourcing of these services which according to its management protocols would be managed through an application of the risk management framework. While these risks are many and varied, this paper focuses on the legal liability risk of a government department for outsourced community welfare services. This focus is chosen because of the recent 'civil liability' crisis. Insurance, which is one tool of risk management, was dramatically affected by a collapse in the international insurance market and rising legal liability exposure of governments in the

civil courts for public liability. This crisis also impacted on nonprofit organisations generally and particularly those delivering government services (Queensland Council of Social Service 2001; Community Centres and Family Support Network Association Queensland South East Queensland Region, 2003; McGregor-Lowndes, 2003).

The paper first examines the principles of risk management and its application to the management of legal risks by government and in particular the Queensland Government. This management of risk was strained in the recent civil liability crisis where the global insurance market contracted. Insurance became very expensive or in some cases unavailable. The paper examines the nature of the crisis and its effect on government and contracted nonprofit service delivery organisations.

With this context in mind, the paper then examines the risk management of potential legal liability of the Queensland government derived from its outsourcing of community and welfare service delivery. This is done by examining the insurance and indemnity terms of a number of Queensland Departmental model agreements for the delivery of community welfare services. The civil liability crisis prompted a range of practices on both sides of the funding fence in relation to these provisions when the supply of cheap and limitless insurance ceased. Finally, the paper turns to examining the policy implications of such provisions at two levels of analysis. The first is reform of some practices that have arisen which threaten to subvert the conditions imposed by government through their outsourcing contracts. The second is to challenge the basis allocation of risk reflected in these clauses and suggest a better framework of risk allocation to the 'cheapest cost avoider'

Risk Management

Risk has many definitions and the usefulness of the definition depends on the context in which it is being examined. In finance risk is defined as "whenever investors are not certain about outcomes an investment produces' (Peirson, Brown, Easton & Howard, 2002, 201); in classic managerial decision theory "risk is most commonly conceived as reflecting variation in the distribution of possible outcomes, their likelihoods and their subjective values" (March and Shipira, 1987, 1404); in evaluation of risk acceptability "risk is taken to mean the chance that harm will occur" (Chicken and Posner, 1998, 7). In risk management publications focused on the nonprofit sector, risk is defined as "a measure of the possibility that the future may be surprisingly different from what we expect." (Herman, Head, Jackson & Fogarty, 2004, 7)

Australian government agencies (Commonwealth of Australia, 1996; Queensland Treasury 1994) adopt the Australian and New Zealand Standard definition of risk as "the chance of something happening that will have an impact on objectives" (Standards Australia, 2004, 4). This standard is also intended to apply to nonprofit organisations. We adopt this as a working definition of risk for the purposes of this paper as it is robust, allows a risk to have positive as well as negative impact and involves the notion of 'objectives' rather than merely 'fiscal' terms. This last issue is important in the context of nonprofit organisations and governments which have dynamics that lead to non-fiscal issues often overshadowing purely fiscal considerations.

Risk management is defined as "the systematic application of management policies, procedures and practices to the tasks of communicating, establishing the context, identifying, analysing, evaluating, treating, monitoring and reviewing risk" (Standards Australia, 2004, 12). Like many management mantras the cyclical key elements of a risk management plan are identification of risks, evaluation of risks, and designing a risk management program,

followed by implementation and review of the strategy. This process assists in choosing the most efficient and effective management of risk while monitoring the resources required. While the complexity level of such analysis varies from an engineering and scientific analysis of nuclear power plants to 'slips and trips' in workplaces, the basic management strategies can be simply stated.

The risk can be:

(a) *avoided* by not undertaking the activities that give rise to the risk;
(b) *controlled* so the unwanted event is less likely to occur or if it occurs is less damaging;
(c) *accepted* and resources marshalled to respond to the event if it occurs; or
(d) *transferred* to another person (for example, an independent contractor) or the consequences of the risk transferred if it occurs (for example, insurance). (Standards Australia (a) (2004)).

These strategies, often in combination, are used to manage risks in outsourcing of government services. Some risks will be so slight yet expensive to manage that they are accepted and borne when they occur. Other risks are so difficult and expensive to manage that a decision is made not to provide the service at all (for example, very expensive and low success medical surgery or medication), but most risks are controlled by management processes to minimise the occurrence of a risk event and its consequences (e.g. fraud prevention through internal financial controls).

The strategies of particular interest for this paper are those which transfer the liability to another person or entity or which transfers the monetary consequences of the risk event. The risk transfer can occur by transferring the activity to a third party, such as outsourcing the risky task to an independent contractor who is responsible for any losses. The risk is then managed by the independent contractor and, in theory, is financed through the purchase price of the services from government. The paper will continue further analysis of this issue in relation to community service outsourcing shortly.

Another strategy is to transfer the consequences of the risk to a third party; most commonly this is the transfer of risk to an insurer for a premium. If an adverse event occurs, then the insurer will make good the actual loss suffered to the extent agreed to in prior contract. The paper will return to this issue in the context of the 'civil liability' crisis and how this became an expensive and often unattainable option.

A less commonly recognised transfer of the consequences of risk is the use of an indemnity. An indemnity is a legal undertaking to hold another harmless against a loss which they might suffer as a result of an act done at the request of the person giving the indemnity. For example, A contracts for B to provide services to C, B gives an undertaking to A to keep them harmless against any court action that anyone might bring against them for providing services to C. The risk is transferred to B who must bear the direct cost of the risk and its consequences. In a normal market, B would price the risk and include this in the price to A for the provision of services to C or in some cases the cost may be passed on to C.

The risk management strategy of risk transfer has some limitations associated with its use. Although the financial consequences of risk might be transferred by insurance, it does not diminish the overall level of risk. In many instances, the preferred option would be to prevent the harmful event from occurring, rather than compensating after the event. For example, it is better to prevent a 'slip or trip' of a person than pay compensation for a broken

leg. Further, where risky activities are outsourced to another party, a new risk arises that the risk may not be effectively transferred. An example is an insurance policy that is not honoured by an insurance company because of some legal technicality, insolvency of the insurer or the person giving the indemnity. It may be that the outsourced deliverer is carelessly chosen and not technically competent, causing injury which results in liabilities for government.

While these are the risk management strategies available to for profit and nonprofit organisations, governments have a number of other strategies uniquely within their power to use. These strategies, tended to be overlooked in the trend to adopt private enterprise models of public service delivery, but have revived as a partial solution to the hard insurance market. The paper now turns to examine these special attributes of government for dealing with risk and then how the civil liability crisis revived some of these strategies.

Special Attributes of Government for Dealing with Risk

Government possesses three attributes in the management of risks which do not arise in the private sector. These attributes are inherent to the special place of government in our society and should not be underestimated. First, the Crown (understood as the executive government) has historically enjoyed a wide immunity from liability, often summed up in the legal maxim ‘the King can do no wrong’. Traditionally, the Crown was immune from liability in tort and presumed immune from the operation of statutes (Kneebone, 1998, 284). Both immunities have gradually been reduced over time by the decision of governments themselves.

In Australia, all jurisdictions have enacted legislation[i] removing the common law immunity of the Crown in tort. With the exception of Victoria (where direct liability is excluded), the legislation has been interpreted as covering both direct and vicarious liability of the Crown. The effect of this is that where a tortious liability arises, the same laws – substantive and procedural, statutory and otherwise – will apply as if the commonwealth, state or territory were a normal legal subject, instead of being the Crown (Maguire v Simpson, 1977; Groves v Commonwealth, 1982). The ability of the Crown to exempt itself or its officers from liability by virtue of legislative instrument is available and still widely used in relation to administrative acts. For example, legislation often exempts officers from personal civil liability for acts or omissions done honestly without negligence under the particular legislation. This is not available to the private sector unless government provides a special legislative provision.

Second, governments control or have the ability to significantly influence the apportionment of risk across society. The state has the power to control and order legal liability, but it chooses to exercise less control. The laws of contract, negligence, civil and professional liability and statutory liabilities are all within the power of state parliament to alter, apart from federal constitutional constraints. Governments have long provided schemes for risk allocation in relation to injury by workers and injury caused by motor vehicles. While the schemes differ, many spread the financial consequences of the risk across large sections of society or taxpayers, may direct it to those with deep pockets, those who are morally responsible or let it rest with the injured party. For example, workers compensation schemes are funded through apportionment of claims across employers who pass on their costs to consumers of their goods and services, as well as taxpayers in cases where there are unfunded shortfalls in employer contributions. The cost of motor vehicle third party injuries is passed on to motorists through compulsory insurance and motor vehicle registrations and,

again, to the taxpayer if unfunded. In certain circumstances, those at fault can be sued for compensation by the injured party. Clearly the issue of whether government or the market is more able to efficiently manage such schemes, in particular the handling of claims to avoid inappropriate compensation payments, is an ongoing debate. (Calabresi, 1970)

A recent and dramatic example of the state's ability to control the apportionment of risk is the civil liability acts passed in each Australian state and territory which were in response to the civil liability crisis. They are testament to the wide ranging power of the state to alter the apportionment of risk across society. For example the legislation made:

- Participants in dangerous recreational activities,
- The intoxicated,
- Those committing crimes whilst being injured, and
- Those injured as a result of lack of notice of hazards by local governments

bear the costs of injury themselves. (Clark and McInnes, 2004; Douglas, Mullins, Grant, 2004; Villa, 2004).

Under the legislative scheme, the risks of such activities, even if contributed or caused by another was to be borne by the injured party. Further, if recovery of compensation was permitted, then the amount of compensation was capped to specified levels decided by the state. The paper will return to examine what principles might be used to guide the allocation of legal liability risks of outsourced human services latter.

Third, state and federal governments are substantial organisations that until recently almost entirely self insured (self financed) their risks with the ability to pass on the costs to the community through taxation or other compulsory contribution schemes. Because of their size and financial capacity, governments can be sophisticated players in the management of insurance with a complex mix of directed self funding pools of contributions and re-insurance through the global insurance markets. This option is rarely available on such a scale to private enterprise.

Recently, all Australian governments have taken advantage of this attribute. In 1998 the Commonwealth Government moved from a largely uncoordinated self insurance basis to the establishment of Comcover which sought to manage all the insurance needs of the Commonwealth Government departments. The Queensland Government established a co-ordinated insurance provision in 2001 with the establishment of the Queensland Government Insurance Fund (QGIF). Both are essentially self funding insurance pools with participating agencies contributing a premium each year to cover the likely costs of overall claims and re-insurance to external insurance carriers as judged appropriate. The re-insurance is characterised by:

- Being for large, unexpected/unpredictable catastrophic events some of which may be outside the financial means of the state;
- Being used where a claims handling mechanism is required; and
- The deductible/excess being set as high as possible to reduce the cost of premiums. (Queensland Treasury, 1994)

These characteristics combined with risk management strategies enabled all Australian governments during the nineties to comfortably manage their risks. By 2001 it had stabilised into a rather sophisticated self insurance process with the re-insurance of its own large risks and the use of risk management strategies to manage its day to day risks. However, the civil

liability crisis upset some of its risk strategies and had an even greater impact on the general business community and in particular nonprofit organisations.

The Civil Liability Crisis

A range of factors have contributed to the 'public liability crisis' driving the current wave of civil liability reform. Of these, particular attention has been given to the dramatic increase in public liability insurance premiums by the emergence of a 'hard' insurance market. A hard insurance market is one in which premiums rise without relation to the insured's history or profile and insurers become more selective about the risks they insure. After a decade of relative stability, public liability insurance premiums began to rise by an average of 10% in 2000, followed by further rises of 19% in 2001, 44% in 2002 (ACCC, 2003, 6) and 17% in 2003 (ACCC, 2005, 15). In 2004, the average premium fell by 4%, 'reversing the trend of substantial increases since 2000' (ACCC, 2005, 15). For the year ending 2005, insurers estimate a decrease of 5% (ACCC, 2005, 15). These rises affected the ability of many organisations to pay increases in insurance premiums, or to obtain insurance for certain events. In the public sector, local governments were particularly affected, forcing them to cancel a wide variety of community events (ALGA, 2002).

The significance of insurance cycles on the public liability crisis cannot be underestimated. Insurance is a competitive market with countless buyers, a small number of sellers which is driven by domestic and global market forces that are renowned for their cyclical nature. The 'hard' market was the result of local factors, such as past underpricing and the removal of insurers from the market (for example, HIH), but primarily driven by unexpected events (for example, September 11 USA terrorist incident) and international insurance capital contractions (Trowbridge & Deloitte, 2002, 9-11). There is little, if anything, that governments at any level can do to curtail such global market trends in the insurance market by legislation or policy. The option of nationalised insurance/compensation schemes does not fit in with new public management dogma.

Another significant factor stimulating the reform process is the development of the common law of negligence. From the 1960s to the 1990s, there was significant judicial expansion of the law of negligence; the courts considerably extended the circumstances in which negligence may have been found to have occurred and the scope of damages recoverable (Clark & McInnes, 2004,2). This expansion was particularly felt by public authorities (see, for example, *Wyong Shire Council v Shirt*, 1980; *Nagle v Rottnest Island Authority*, 1993; *Pyrenees Shire Council v Day*, 1998; *Crimmins v Stevedoring Industry Finance Committee*, 1999; *Brodie v Singleton Shire Council*, 2001). The recent legislative intervention into the area suggests that the community is not prepared to accept the level of compensation which the judiciary, and the legal profession generally, has come to regard as appropriate (Spigelman, 2002, 433). Although there are signs that the High Court is now considering retracing its steps so that the law of negligence "accords with what people really do, or can be expected to do, in real life situations" (*Tame v New South Wales* 2002; *Annetts v Australian Stations Pty Ltd* 2002 at 354 per McHugh J), such a judicial retreat does not assist in the resolution of a long tail of liability claims which still face public sector organisations.

Other factors identified as contributing to the public liability crisis have included the increased litigious mindset of individuals in the community, the development of specialist plaintiff law firms, the deregulation of legal fees and the enactment of legislation governing class actions (Clark & McInnes, 2004, 2-3; Trowbridge & Deliotte, 2002, 7-8).

Nonprofit organisations were quite vocal in their pleas to government for assistance in the civil liability crisis and appeared to be unable to cope with the hardening insurance market. In September 2001, the Queensland State Government requested the Queensland Events Corporation to investigate the difficulties being experienced by community event organisers

(Deloitte Touche Tohmatsu 2001). The survey indicated that 41.6% of respondents had faced increases in premiums of more than 50% in the past three years and that 21% would have to cancel or scale down their events due to the cost or lack of viability of insurance. Sport and recreation organisations experienced rises of between 40-900% and others were not able to obtain insurance for some of their 'high risk' activities (Sports Federation of Queensland 2001).

A Queensland Council of Social Services survey of its 800 primarily community service provider members, released in July 2001, reported that approximately 50% of 357 respondents indicated that premiums had or would increase (QCOSS, 2001). The average rise was between 30-40%. Some organisations could not find an insurer; others decided to let policies such as property and volunteer protection lapse. The Community Centres and Family Support Network Association Queensland South East Queensland Region (2003) survey of community centres found similar results and reported the closure of some centres.

By the end of 2001, the State Government was forced into a number of pragmatic reactions to the fact that vital community organisations were unable to obtain or afford insurance cover. For example, in December 2001, the State Government pledged to underwrite public liability insurance premiums for Parents and Citizens' Associations, which faced premiums as high as $1 million (Morley 2001). It also provided $80,000 in emergency funding to ensure that the Blue Light discos for youth, conducted by the Queensland Police Service, were not cancelled by a 700% increase in insurance premiums (Morley 2001). A Queensland Parliamentary Library Research Brief (Dixon 2002) chronicles the disruption caused in local communities and the pressure put on the state government through the media to address the situation. However, such responses were curtailed in preference to a national approach to the problems which involved Australian governments at all levels.

The State and Federal Governments formed a national forum which commissioned a *Review of the Law of Negligence* known as the Ipp Report (Ipp, Crane & Sheldon, 2002). The report recommended wide ranging new risk apportionment legislation to curb the rise of personal injury litigation which spawned the civil liability legislation described in the previous section. In relation to the concerns raised by nonprofit organisations, the report devoted a chapter to nonprofit organisations and another section to the issue of volunteer liability. It recommended that there be no change to the liability of volunteers as it was unable to find cases, claims or insurance-related difficulties arising out of such situations (Ipp, Crane & Sheldon 2002, 70). However, at the second Ministerial Meeting on Public Liability Insurance on 30 May 2002, there was agreement for the protection of volunteers despite the Ipp Report's recommendations; subsequently legislation was introduced into all jurisdictions (McGregor-Lowndes, 2003).

The Report was not sympathetic to the concerns of nonprofit organisations regarding their liability exposure generally and recommended that such nonprofit organisations should not have their liability for negligent actions specially limited. The reason given for this position was:

> "that it would not, on balance, be in the public interest to provide the NPO sector as such with general limitations of, or a general exemption from, liability for negligently-caused personal injury and death." (Ipp, Crane & Sheldon 2002, 60)

The review noted that nonprofit organisations provide a diverse range of services to the public with significant risks to the public of suffering and personal injury, often to the underprivileged and vulnerable members of society. The risks were no different from those

facing for-profit organisations, and nonprofits should face incentives to take care in their operations and be responsible to those suffering injury because of the nonprofit's fault.

The review also failed to accord any weight to the issues of many nonprofit organisations being able to pass on its costs of liability. Nonprofit organisations only have four sources of income: (1) philanthropists through gifts, (2) funders which are mainly governments and (3) earned income largely from those who use their services or buy their products and (4) interest on endowments. It is extremely difficult to fund administration expenses such as insurance from philanthropic donations as the general public and philanthropic foundations are generally loath to give funds for administrative rather than direct service delivery. It is often difficult to pass on costs through earned income to its clients because its services are freely given or clients cannot afford any pricing increase. Reliance must be placed on unrelated business income whose allocation is in the discretion of the nonprofit organisation such as a charity gambling or other special event. Government funders of services were largely unwilling to increase funding to nonprofit organisations to cover the increased cost of insurance, and like philanthropic funders, principally finance only direct service delivery rather than indirect costs such as administration and insurance. (Grocott, 2004)

In consequence many nonprofit organisations experienced difficulties in purchasing and funding insurance coverage and some small organisations even closed. Others reduced their services to save costs while still others reduced services for which they could not obtain insurance or which was only available at high premium levels with large deductibles. (Queensland Council of Social Service, 2001; Community Centres and Family Support Network Association Queensland South East Queensland Region, 2003; McGregor-Lowndes, 2003).

The paper is now able to begin examining the insurance and indemnity requirements imposed by several large Queensland government departments at the time of the insurance crisis and largely remain unaltered. It is examined in the context of government managing their risk of legal liability flowing back to government from the outsourcing of community welfare services.

Imposed Insurance and Indemnity Provisions

Agreements between governments and nonprofit organisations for the provision of community services have usually contained provisions for specified insurances to be taken out by the contractor and for an indemnity in favour of the government. Appendix 1 contains a range of provisions taken from a selection of Queensland Government Departments funding community services. Unlike the Commonwealth, there is no standard form of contract that is available for use by Departments (refer item 1 in Appendix 1). The severity of the clauses for nonprofit organisations varies significantly from the all encompassing indemnity of the Multicultural Affairs and Health grant agreements to relatively modest requirements of the Department of Families and the new Department of Communities.

The liability of contracting departments is quite limited due to a number of other legal measures almost uniformly adopted and recent case law. Agreements construct the relationship not as a legal "agency" where the principle is responsible for the authorised acts of an agent or a legal "partnership" where partners are jointly and severally liable. (McGregor-Lowndes & Turnour, 2003). Rather the relationship is that of grantor and grantee or independent contactor, where liability primarily lies with the grantee or independent contractor. Further, in the recent case of *Aguis v State of New South Wales* (2001), a client of a government funded disability service was injured by an accident with an urn of boiling

water and sued the government. The association had no public liability insurance at the time, despite the funding agreement requiring such insurance. Three judges of the New South Wales appeal court decided that the department did not owe a duty of care to the injured client because it funded the service, nor a duty to ensure that the association had the contracted insurance in place to protect the client from economic loss. The indemnity clause probably operated to allow the government to claim its legal costs from the association in this case, but this was futile as the association was declared insolvent.

The usual provisions contractually bind the nonprofit organisation into managing part of their liabilities by insurance. It will be noted that there are differences in the nature of the clauses with respect to the amount and type of insurance required. This is reasonable given that the risk exposure will vary with the nature of the activities to be undertaken. However, specifying an amount of a type of insurance in a standard contract does not take into account the way in which nonprofit organisations may choose to treat and manage their risks. It imposes an unwarranted inflexibility on the nonprofit organisation. Insurance is just one tool of risk management options and there may be other ways to manage risk which are more efficient in the circumstances.

Insurance during the height of the hard insurance market was unavailable to some nonprofit organisations. If the department was unwilling to omit the insurance provision, then a funding contract could not be signed. Some of the larger nonprofit organisations (for example, the denominational churches) sought to manage risks without the usual insurance arrangements. Many have sufficient asset reserves and cash flows to be able to self finance lower level risks, only taking out insurance for large unpredictable risks. However, it requires the department to alter the terms of their contract to omit the insurance provision which they were generally reluctant to do. In any case, few departments appear to have the technical capability to assess and monitor the self insurance risk management strategy. As large nonprofit organisations which can adopt such self insurance usually have multiple government funding sources, only one department needs to insist on regular insurance for the arrangements to be made difficult, if not impossible.

Drafting clauses, such as that reflected in the latest standard contract of the Department of Communities and the Commonwealth whereby insurance provisions are negotiated individually and placed in an appendix to each contract, offer a solution to this issue. It does require increased technical sophistication on the part of departmental officers to assess risk management treatment other than insurance.

The reluctance of some departments to either change their insurance provisions or inability to increase funding to allow for increased insurance premiums led to a number of undesirable practices on the part of nonprofit organisations and departments. Nonprofit organisations were under pressure to find some means to meet the conditions in order to access departmental funding without which they would have to close or drastically reduce their services. Departmental field officers on the frontline were only too aware that a service provider who closed would cause dislocation of services, particularly where there was no readily available alternate service provider. Given these pressures it is unsurprising that a range of strategies arose to circumvent the contractual provisions and lack of increased funding for insurance premiums. These practices have not been widely documented due to their sensitive nature, but have been gathered by observation of the researchers in their interactions with nonprofit organisations and funding departments. It is also salient to note that the recent draft of the Commonwealth standard contract reflects terms to address these practices by tighter wording and specifications. The extent of the practices can only be estimated. However, in the case of the foreign insurers, mentioned below, there is an

indication that some of the practices were widespread.

As noted previously, the associated risk of relying on insurance to manage risk is that an insurance company may not be able to fund the consequences of the risk. An example of this is HIH insurance collapse. While the Australian Prudential Regulatory Authority (APRA) authorises general insurance companies that operate in Australia, it is possible for insurance companies that are based in foreign jurisdictions to operate in Australia without authorisation and outside the *Australian Insurance Act 1973* (Cth). A number of such companies entered the Australian market and flourished in the area of "community centres and community groups and businesses associated with the leisure industry, such as amusement parks and horse riding establishments" (ASIC v Triton Underwriting Insurance Agency, 2003 at para 6; NCOSS, 2003). The size of such operations appears to be significant as in a case taken by ASIC against one of these insurers, the evidence disclosed that one company had written more than 10,000 policies (ASIC v Triton Underwriting Insurance Agency, 2003 at para 18.).

Whilst offering to insure nonprofit organisations rejected by other mainstream Australian insurers, including offering lower premiums than the standard market, these insurers were questionable as to whether they had the capacity to perform their part of the insurance bargain if a substantial claim eventuated. They were located in jurisdictions such as the Cayman Islands, the Dominican Republic and the Philippines where regulation of insurance is minimal. A claim would probably have to be enforced in that jurisdiction rather than Australia which would be difficult and expensive. The terms of the insurance contract were also not regulated by the Australian insurance statute which further adds to the complexity. Again, it is not the practice of departments to vet insurance companies of nonprofit organisations and this may leave governments in effect without a viable policy. Nonprofit organisations appear to have decided that some insurance is better than none, and in any case it appeared to satisfy the department and they could receive their funding. This issue is reflected in clause 16.1.2 of the Commonwealth precedent agreement where insurance is now restricted to APRA or Auditor-General approved insurance companies (Appendix 1).

Another variation on this theme is for the nonprofit organisation which can only obtain insurance at an unaffordable premium to do so. It then cancels the policy after the first month and recovers the premium. A further variation is to pay by monthly instalments and then stop paying or cancel the policy. This gives the nonprofit organisation evidence of insurance being taken out at the signing of the contract with the department and allows funding to be received. It is clearly a breach of the spirit, if not the terms of the funding agreement. A desperate ploy, but in the absence of tighter inspection by the departments, a seemingly successful one until an insurable event occurs. Again, the Commonwealth precedent agreement reflects wording to thwart this loophole (Clause 16.1.1 &16.2.1-Appendix 1).

The old Department of Families funding conditions merely required "all normal and appropriate insurances for the services to be taken out" (Clause 6 (H) Appendix 1). Some during the insurance crisis unilaterally decided that no insurance was now "normal" and was not the appropriate way to manage risks given the cost of the premiums. In any case, if a court was called to interpret such a clause, it may well have decided that it was so imprecise as to be incapable of definite meaning. The current approach taken by the Department has much to recommend it and is further discussed below.

Indemnities, particularly stringent ones are difficult to risk manage. They are usually onerous where one party is in a position of dominance and effectively forces the other party to accept

it. Some indemnities are wider than others in their drafting. For example, the Multicultural Affairs Queensland Grant precedent uses the words "arising from any claim" (Clause 11(a) Appendix 1) not just a claim for the default of the service provider. This can be compared to the milder Commonwealth grant precedent which is restricted to a claim arising from the direct fault of the service provider in relation to the conduct of the contract (Clause 15.1.1 Appendix 1). There are many ways to deal with the risk of an indemnity such as building into the contractual arrangements a "pricing" of the indemnity (which rarely occurs in a power imbalance situation), managing the primary risks which could give rise to the indemnity or seeking to insure the indemnity.

Unlike contracts for Public Private Partnerships, no account is made for the pricing of such human service outsourcing indemnities to be included in the contract price (Department of Treasury and Finance, Victoria Government, (1999); Institution of Engineers and Australian Chamber of Commerce and Industry of Western Australia, (2001)). This should prompt governments before shifting risk to another to ascertain whether it is cost effective to do so, or whether it would be more efficient to retain the risk itself and manage it. It is suggested that because government departments are in such a powerful contractual position they merely impose the indemnity of the nonprofit organisation. Unfortunately this is not necessarily a perfect solution without further monitoring. This is because most nonprofit organisations do not have the net asset backing to stand behind such wide indemnities and second, their insurances may not extend to covering the potential liability either.

Most insurance policies exclude from the contract "any liability assumed under any contract or agreement" which has not been previously agreed to by the insurer. Such clauses in government contracts which seek an indemnity would require the insurer's approval. It is common practice for lessors and mortgagors to require insurance over the property leased and mortgaged and for their interest to be formerly noted on the policy before the transaction is finalised. This is usually satisfied by production of a certificate of currency with the interest note being produced to the lessor or mortgagor. This is not the practice by departments and it appears few nonprofit organisations take the trouble to seek such approval of their insurers (Handley, 2004). In a hard insurance market the inclination of many is not to disclose such matters which may further complicate the insurance negotiations. If governments ever tried to rely on such insurance to cover an indemnity liability they could be met with a credible defence by the insurer and often the legal expense of disputing the claim may outweigh the actual claim itself. This leaves both the government and the nonprofit organisation in a difficult position. The vast majority of nonprofit organisations do not have assets sufficient to satisfy a claim let alone the accompanying legal costs involved. The recent Commonwealth grants precedent in Clause 16.2.1 provides a mechanism to allow the Department to sight evidence that all insurances are in order.

The point of this above analysis is to indicate the hard insurance market and accompanying civil liability crisis heightened the issues with respect to government departments seeking to manage their legal liability risks through risk transfer mechanisms such as insurance and indemnities. It fostered in some cases unproductive and inappropriate practices in both nonprofit organisations and departments. Risk may not have been properly managed or allocated between the parties to the possible detriment of both parties and the intended beneficiaries would not have been well served either. The paper now turns to policy implications and possible lines of solution to these issues.

Policy Implications and Possible Solutions

Governments occupy a dominant and powerful contractual bargaining position in relation to

nonprofit organisations. The market for human service funding is a monopsony market (opposite of a monopoly) where it is the only significant funder (Lyons, 1997; Ryan 1997). Nonprofit organisations are price and condition takers. The great majority of them are small and poorly resourced and reliant on government funding as their main source of revenue (Lyons 2001). It is not surprising in this situation there is a tendency for governments to impose broad indemnity clauses and specific insurance requirements to shift as much of the risk as possible to nonprofit organisations. The cost of such risks is then borne by the nonprofit organisations. Unlike Public Private Partnership infrastructure contracts with the for profit sector, such risks are not costed in contractual negotiations, largely due to the absence of external financiers such as banks who insist of risk pricing.

In the case of insurance, this risk management tool is easily specified by a description of the types and amount of insurance and easily verified by production of an insurance agreement. By way of comparison, if the department were to choose to impose "management" as the risk treatment, then to verify compliance it would have to specify and then continuously monitor internal management procedures to manage the risk. This strategy has high transaction costs in both writing the terms into the agreement and monitoring adherence to them.

Holding for the moment the assumption that government policy objectives are best served by such having such risk transfer strategies in place, there are a number of incremental contractual reforms that departments should consider. These relate to the issues previously discussed where inappropriate practices have grown up to evade the insurance provisions during the civil liability crisis.

If insurance is required, then it should be accompanied by greater specification as to the nature of the insurance and fidelity of the insurer. A provision that the insurer is subject to Australian law and APRA approved is appropriate. Further, a power to demand the inspection of a policy together with a certificate of currency at any time through the term of the agreement is warranted. The commercial practice of requiring a formal notation of the funder's interest in such policies and notification by the insurer of any termination of the insurance policy would also be appropriate. As previously mentioned the Commonwealth model grant contract has been subsequently drafted to minimise these practices, but generally Queensland departments do not have such a model and do not yet appear to have revised their individual contractual terms.

While it is understandable that departments are reluctant to allow great variation in the terms of their model funding contract, more flexibility could be provided for insurance provisions by moving them to agreement's schedules. This allows for negotiation and appropriate description of the insurances without altering the formal standard contractual document. This has occurred in the recent Department of Communities funding agreements and would allow required flexibility for self insuring organisations such as large religious institutions.

Apart from Government occupying a dominant position as a contracting party, it also has the unique power of being able to specify the allocation of risk. All Australian governments used this power extensively as a policy response to the civil liability crisis to alter liability rules, cap legal compensation payments and even protect certain parties from any liability whatsoever. Exercising such powers is not easy given that legislation is usually involved and may affect the interests of powerful interest groups and stakeholders.

Consideration of risk apportionment has the potential to challenge the assumption that the best way to manage risk in such situations is to use government's vastly superior power to

impose risk transfers without pricing them into contracts. In fact, practice shows that government's strategy will presently be thwarted by defective implementation with nonprofits having insufficient assets to meet indemnities, unenforceable insurance contracts and significant shirking of contractual terms. If it did strictly enforce and monitor conditions, there may be an even greater contraction of market participants, particularly in rural and regional areas.

To examine the policy implications of allocating risk to the cheapest cost avoider, the paper first turns to a brief explanation of the concept. It then suggests factors to be considered in such an application of apportionment of legal liability in the delivery of community welfare services.

Allocation of risk is a contested field. Some argue that the party who attracts some kind of fault for the injury should bear the costs and this is the traditional basis of tort law. The common law looks for a duty, a breach of that duty that causes the injury and the person who owes the duty is liable to compensate the injured party (for example, the motorists who causes another to suffer an injury because they failed to keep a proper lookout for other vehicles). Others have proposed non-fault liability where the costs of adverse risk consequences are spread over certain parties who benefit from the activity (for example, third party motor vehicles injuries being spread across all drivers – but not pedestrians). Still further, the state may spread the cost over all of society through taxpayer assumption of liability in a nationalised scheme.

Calabresi (1970) argued that the efficient/optimal allocation of risk should be the economic and social objective pursued by the courts and governments. This means that risks should be allocated to the party that is best positioned to know about the risks and take precautions designed to avoid the event/accident. It is a search for the "cheapest cost avoider".

For example, a woman attempting to use an ATM late at night in an unlit shopping centre car park is attacked by criminals and suffers personal injury. She could pursuant to the common law sue those who directly caused her injuries and were at "fault" – the criminals. However, most criminals do not have the resources to be able to compensate the victim and so the victim is left to bear the loss. Other resolutions to the issue might be that she bears the cost herself, or a taxpayer funded criminal compensation scheme assess and pay compensation, or the private insurance market provide insurance for such events or any number of variations or combinations. However, a Calabresi approach would look not only to compensation after the event (such as insurance) but a cost effective mechanism of prevention or mitigation of the risk.

Using Calabresi's argument, the shopping centre owner might be the cheapest cost avoider and therefore liable for the injury compensation. The owner operates the car park to attract business to the shops and could pass on the injury costs as part of this business, spreading the loss over many thousands of customers. The proprietor also is in the best position to avoid the risk by providing lighting and other security measures to protect customers and the level at which such risk management strategies need to be implemented. The owner is a much better loss preventer and loss distributor than the individual (Luntz 2001).

It is suggested that governments when negotiating contracts with nonprofit organisations for the delivery of community welfare services should consider who is best placed to be loss preventer and loss distributor. It is a different approach to merely offloading risk to the weakest party with no preventive aspect. Nonprofit organisations have the following relevant

characteristics:

1. They generally cannot pass on risk costs through prices to clients or consumers.
2. Often the goods produced by nonprofit organisations are, in an economic sense, public goods which have free rider issues.
3. Even if they could pass on the costs, from an equity perspective it is often (but not always) inappropriate to pass costs to the beneficiaries who are poor and the objects of government benevolence.
4. It is also inappropriate to pass the actual primary cost of defaults in service delivery to beneficiaries, both from an equity perspective and ability to bear the loss.
5. Nonprofits have difficulty generating resources from philanthropic sources for indirect expenses such as risk management.
6. Governments, as third party funders with social obligations have an interest in cost effective provision of appropriate services to citizen beneficiaries and there are implications for inappropriate delivery (political and social consequences) unlike some purely business market transactions.
7. Governments will probably ultimately bear the financial consequences of service failure through further reliance of the beneficiary on government welfare and support services.
8. Nonprofits do not have great control over risks which are inherent to what they do and avoiding risks, such as not treating HIV positive people, is not an appropriate risk management response as it completely negates their mission. It is inappropriate (unlike the movement of for profit capital) to simply move to a less risky environment in which to carry on a different business to generate returns.
9. Debt financiers' requirements carry great weight in the normal market as they force contractors to price risk. Debt financiers are absent from nonpropfit markets and governments rarely even consider, let alone take an account of the insurance costs and pricing of the risk for providing an indemnity by a nonprofit organisation.
10. Nonprofit organisations in the main are poorly equipped to negotiate sophisticated insurance arrangements, nor to arrange their own insurance pools, particularly where volunteer organisations are involved.
11. As highlighted in the recent insurance crisis, insurance companies do not isolate the risks of nonprofit organisations when determining insurance premiums and it has been claimed that nonprofit organisations cross subsidise other sectors in the general insurance risk pool (Ipp, Crane, & Sheldon, 2002).

These issues are important in the consideration of the most efficient loss preventer and distributor. In terms of loss prevention, the beneficiaries are clearly not suited to being the sole loss preventers given their general condition and financial resources. As noted above, the primary loss is that legal liability is borne by government for the outsourcing of the services. This would presumably arise through some negligence or carelessness on the part of the department in their management of the outsourcing. This is clearly within the remit of government departments to manage through application of appropriate risk management prevention (rather than transfer) strategies.

Government with its access to sophisticated self financing insurance pools and taxes may be

in the best position to be a loss distributor compared to a multitude of small and diverse nonprofit service providers, impoverished clients receiving public goods and lack of dedicated private insurance pools serving nonprofit community service enterprise.

Further, as contractual development of Public Private Partnerships has shown when governments are forced to start 'pricing' the risks, then a rational decision about whether it is cheaper for them to retain the risk or to have others bear the risk for a price comes into consideration (Department of Treasury and Finance, Victoria Government, (1999); Institution of Engineers and Australian Chamber of Commerce and Industry of Western Australia, (2001)). As noted above the private market for such risks is not well developed and uncertainty about the ascertainment of risk may lead to a high margin being charged. This points to government retaining the risk for internal management.

The Victorian government appears to have adopted an approach which accords with these principles. It arranges insurance for its directly funded services in relation to the funded services (Department of Human Services, 2000). It is able to directly manage the appropriateness and fidelity of such insurance and take advantage of its inherent attributes as a large and sophisticated insurance operative. It can also monitor the adverse events involving those that it seeks to benefit with the provision of services.

One issue that has arisen to the detriment of nonprofit organisations in such an arrangement is that their insurance for activities that are not directly funded by the government can become complicated in delineation of the activities and risk profiles. It is sometimes complex to arrange policies for a small residue of activities, but could be remedied by the organisation buying additional insurances from the government at commercial rates.

Conclusion

The outsourcing of welfare service delivery by governments to nonprofit organisations is a growing part of the new public management. Governments occupy a powerful contractual position from which to dictate the terms of these contracts to nonpropfit organisations. They have used this power to transfer risk to such organisation without proper pricing of the acceptance of such risk or consideration of who is in the best position to manage the risk, and play the role of loss preventer and distributor.

In Queensland, a number of departments in their contract for outsourced service provision transferred their primary risk to nonprofit organisations. On the surface this represents a cheap and verifiable solution to government risk of legal liability. However, it is a risk management strategy which is not preventive, but merely avoids the cost of the injury or mischief.

The insurance crisis had severe impacts on nonprofit organisations because of their inherent characteristics. Funding departments refusal to alter formal funding conditions to allow other means of risk management or fund the increase insurance premiums also added to the difficulties for nonprofit organisations. The practices that grew up on both sides of the contractual divide to deal with the situation provide a very flawed and short term solution to the critical issues. Suggestions were made as to reform of contractual terms and practices which have already largely been reflected in the latest commonwealth model grant agreement.

The paper also argued that governments should use their ability to influence the apportionment of risk. It was argued that the goal of apportionment of risk should be the

promotion of the most efficient loss preventer and distributor. In the particular situation and with the characteristics of nonprofit organisations, it was argued that government may be the most efficient loss preventer and distributor of the liability it faces for outsourced service delivery.

References

ASIC v Triton Underwriting Insurance Agency, (2003) NSWSC 1145.

Australian Competition and Consumer Commission (ACCC), (2003) *Public Liability and Professional Indemnity Insurance Monitoring Report*, ACCC Publishing Unit, Canberra.

Australian Competition and Consumer Commission (ACCC), (2004) *Public Liability and Professional Indemnity Insurance Second Monitoring Report*, ACCC Publishing Unit, Canberra.

Australian Competition and Consumer Commission (ACCC), (2005) *Public Liability and Professional Indemnity Insurance Fifth Monitoring Report*, ACCC Publishing Unit, Canberra.

Australian Local Government Association (ALGA), (2002) Submission to ministerial meeting on public liability insurance issues, available at http://www.alga.asn.au/submissions/2002/publicLiabilitySub.php

Bernstein, PL, (1996) *Against the Gods: The Remarkable Story of Risk*, John Wiley, New York.

Calabresi G, (1970) *The Cost of Accidents: A legal and economic analysis,* New Haven: Yale University Press.

Chicken, J and Posner, T, (1998) *The Philosophy of Risk*, London: Thomas Telford Publishing.

Clark, SS and McInnes, R, (2004) "Unprecedented Reform: The New Tort Law" *Insurance Law Journal*, Vol. 15, No. 2, 1-18.

Commonwealth of Australia Management Advisory Committee, (2004) *Connecting Government: Whole of Government Responses to Australia's Priority Challenges*, Commonwealth of Australia, Canberra.

Commonwealth of Australia, (1996) *Guidelines for Managing Risk in the Australian Public Service*, Canberra.

Community Centres and Family Support Network Association Queensland South East Queensland Region, (2003) S*tretched to the Limit? Insurance Survey 2003*, Brisbane.

Deloitte Touche Tohmatsu*, Queensland Events Corporation Event Insurance Review*, December (2001), as reported in the *Liability Insurance Taskforce Report*, February 2002, 16-17.

Department of Treasury and Finance, Victoria Government, (1999), *Private Provision of Public Infrastructure: Risk Identification and Allocation Project – Survey report.*

Department of Human Services, Victorian Government, (2000), *Insurance Guide for Non-Government Organisations*, Melbourne.

Dixon, N, (2002) *Public Liability Insurance, Queensland Parliamentary Library Research Brief No 2002/07*, Brisbane.

Douglas, R, Mullins, G, Grant, S, (2004) *The Annotated Civil Liability Act 2003 (QLD)*, Lexis Nexis Butterworths, Australia.

Grocott, S, (2004) *The Insurance Industry Response to rising Public Liability Insurance Premiums impacting on Nonprofit Organisations throughout Australia*, CACOM Working Paper No. 65, UTS, Sydney.

Handley, S, (2004) Insurance: *What's it all about? A guide for not for profit organisations*, National Council of Social Services, Sydney.

Herman, M, Head, G, Jackson, P & Fogarty, T, (2004) Managiong Risk in Nonprofit Organisations – A Comprehensive Guide, John Wiley & Sons Inc, New Jersey.

Industry Commission, (1996) *Competitive tendering and contracting by public sector Agencies,* Australian Government Publishing Service, Melbourne, VIC.

Institution of Engineers and Australian Chamber of Commerce and Industry of Western Australia, (2001) *Effective Risk Allocation in Major Projects: Rhetoric or Reality?,* available at http://www.ieaust.org.au/./policy/publications_by_year3.html, viewed 28 Sept 2005.

Ipp DA, Crane, P & Sheldon D (2002), *Review of the Law of Negligence Report*, Ipp Report, Canberra.

Kneebone, S, (1998) *Tort Liability of Public Authorities*, LBC Information Services, North Ryde, NSW.

Luntz H, (2001) "Torts Turnaround Downunder" *Oxford University Commonwealth Law Journal* Vol 1 Part 1, 95-106.

Lyons M, (1997) "Contracting For Care: What Is It And What Is At Issue?", *Third Sector Review*, Vol 3, Special Issue, 5-21.

Lyons, M. (2001). *Third Sector*. Allen & Unwin, Sydney.

Management Advisory Board, (1996) "Guidelines for Managing Risk in the Australian Public Service", *Management Advisory Board/Management Improvement Advisory Committee Report 22*. Canberra, ACT.

McGregor-Lowndes, M and Turnour, M, (2003) "Recent Developments in Government Community Service Relations: Are You Really My Partner" *Journal of Contemporary Issues in Business and Government,* Vol. 9, No. 1, 31-42.

McGregor-Lowndes, M, (2003) "Australian Volunteer Protection Provisions", *Australian Journal on Volunteering*, Vol. 8, No. 2, 42-53.

McGregor-Lowndes, M, and Carroll, P, (2001) "A Standard for Regulatory Compliance? Industry Self-regulation, the Courts and AS3806-1998", *Australian Journal of Public Administration*, Vol. 60, No.4, 80-92.

McGregor-Lowndes, M, Hough, A, and Ryan, C, (2004) "Charitable Governance: the ICSA draft principles of good governance for charities", *Keeping Good Companies*: *Journal of Chartered*

Secretaries Australia, Ltd, Vol 56, No 8, 494-499.

McPhee, I, (2003) “Risk Management and Governance”, *Canberra Bulletin of Public Administration*, No. 106, 1-8.

March, J, and Shapira, Z, (1987) “Managerial Perspectives on Risk and Risk Taking”, *Management Science*, Vol. 33, No.11, 1404-1418.

Meagher, G, and Healy, K, (2003) “Caring, controlling, contracting and counting: governments and non-profits in community services”, *Australian Journal of Public Administration,* Vol. 62, No. 3, 40-51.

Meltz, D, (1997) “Contracting for Care: A Legal Overview”, *Third Sector Review,* Vol. 3, Special Issue, 181-203.

Morley, P, (2002) ‘Bulk-buy insurance to save charities’, *Sunday Mail*, 17 February 2002, 5.

NCOSS, (2003) *Submission for Review on Unauthorised Insurers to APRA*, Sydney, http://www.ncoss.org.au/insurance .

Pearson, D, (2003) “Public sector contracting of not-for-profit organisations for the delivery of community services”, *The Journal of Contemporary Issues in Business and Government,* Vol. 9, No.1, 43-50.

Peirson, G, Brown, Easton & Howard, (2002) “Business Finance”, 8th ed., McGraw-Hill, Roseville, N.S.W.

Queensland Audit Office, (2000) *Governance and risk management self assessment program - Departments*, State of Queensland Audit Office, Brisbane, QLD

Queensland Council of Social Services, (2001) *The Cost of Community Service – Insurance Survey 2001*, Brisbane.

Queensland Government, (2002) *Report Liability Insurance Taskforce*, Brisbane.

Queensland Treasury, *(1994) Guidelines on Risk Management and Insurance*. Queensland Treasury, Brisbane.

Queensland Treasury*, (2004) Audit Committee Guidelines - Improving Accountability and Performance*. Queensland Treasury, Brisbane.

Queensland, (2005) *Queensland Budget Papers 2005-06*, available at http://www.budget.qld.gov.au/html/budget-papers/index.html, viewed 28 Sept. 2005.

Ryan, N (1997) “Contracting Community Services in Queensland”, *Third Sector Review*, Vol 3, Special Issue, 23-44.

Seidenstat, P, (ed), (1999) *Contracting Out Government Services*, Praeger, Westport, Connecticut, London.

Smith, SR, and Lipsky, M, (1993) *Nonprofits for hire: the Welfare State in the age of contracting.* Harvard University Press, Cambridge, MA.

Sports Federation of Queensland, (2001) *2001 Sports Insurance Survey Summary*, Brisbane.

Standards Australia, (1998) 'Compliance programs', *Standards Australia*, SAI Global, Homebush,

NSW.

Standards Australia, (a) (2003) *Good Governance Principles AS 8000* , SAI Global, Homebush, NSW.

Standards Australia, (b) (2003) *Fraud and Corruption Control AS 8001* , SAI Global, Homebush, NSW.

Standards Australia, (c) (2003) *Organisational Codes of Conduct AS 8002*, SAI Global, Homebush, NSW.

Standards Australia, (d) (2003) *Corporate Social responsibility AS 8003*, SAI Global, Homebush, NSW.

Standards Australia, (e) (2003) *Whistleblower Protection Programs for entities AS 8004*, SAI Global, Homebush, NSW.

Standards Australia, (a) (2004) *Australian/New Zealand Standard: Risk Management AS/NZ 4360:2004*, SAI Global, Homebush, NSW.

Standards Australia, (b) (2004) *Guideline for Managing Risk in outsourcing, utilizing the AS/NZ 4360:2004 process, HB 240-2004,* SAI Global, Homebush, NSW.

Trowbridge Consulting and Deloitte Touche Tohmatsu, (2002) *Public Liability Insurance: Analysis for Meeting of Ministers 27 March 2002*, Sydney, NSW.

Vann, B and Hayford, O, (2004) "Risk Allocation and the standardisation of contracts in public private partnerships", *Keeping Good Companies*, Vol. 56 No. 7, 408-411.

Villa, D, (2004) *Annotated Civil Liability Act 2002 (NSW)*, Law Book Co, Sydney.

Cases

Agius v State of New South Wales [2001] NSWCA 371

ASIC v Triton Underwriting Insurance Agency [2003] NSWSC 1145

Groves v Commonwealth (1982) 150 CLR 113

Maguire v Simpson (1977) 139 CLR 362

Wyong Shire Council v Shirt (1980) 146 CLR 40

Nagle v Rottnest Island Authority (1993) 177 CLR 423

Pyrenees Shire Council v Day (1998) 192 CLR 330

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council (2001) 206 CLR 512

Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317

Appendix 1

Commonwealth

Funding Deed (Long Form) prepared by the Australian Government solicitor for use by Commonwealth agencies and nonprofit organisations for program funding.

15. Indemnity

15.1 General indemnity

15.1.1 You indemnify (and keep indemnified) Us against any:

a. cost or liability incurred by Us;

b. loss of or damage to our property; or

c. loss or expense incurred by Us in dealing with any claim against Us, including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used, or disbursements paid by Us;

arising from:

d. an act or omission by You where there was fault on the part of the person whose conduct gave rise to that cost, liability, loss, damage, or expense;

e. any breach by You of this Deed;

f. use or Disposal of the Assets; or

g. the use by Us of the Activity Material or Existing Material, including any claims by third parities about the ownership or right to use Intellectual Property rights in Activity material or Existing Material.

15.2 Reduction of scope

15.2.1. Your liability to indemnify Us under this clause 15 will be reduced proportionally to the extent that any fault on Our part contributed to the relevant cost, loss, damage, expense, or liability.

15.3. Preservation of other rights

15.3.1. Our right to be indemnified under this clause 15 is in addition to, and not exclusive of, any other right, power, or remedy provided by law, but We are not entitled to be compensated in excess of the amount of the relevant liability, cost, damage, loss, or expense.

15.4. Meaning of 'fault'

15.4.1. In this clause 15, "fault" means any negligent or unlawful act or omission or wilful misconduct.

15.5. Survival

15.5.1 This operation of this clause 15 survives the expiration or earlier termination of the Term of this Deed.

16. Insurance

16.1. Obligation to insure

16.1.1. You must, for as long as any obligations remain in connection with this Deed, have insurance as specified in the Schedule.

16.1.2. All insurance under this clause 1 and paragraph 7.5.1.d. is to be taken out with an insurer recognised by the Australian Prudential Regulation Authority or regulated by a State/Territory Auditor-General.

16.2. Evidence of insurance

16.2.1 Whenever requested, You must provide us, within 10 Business Days of the request, with evidence satisfactory to Us that You have complied with Your obligation to insure.

16.3. Survival

16.3.1. The operation of this clause 16 survives the expiration or earlier termination of the Term of this Deed.

Multicultural Affairs Queensland

Grant Agreement precedent (2002) used by Queensland Department of Premier for project funding of multicultural affairs.

11. INDEMNITY

The Organisation:

a) indemnifies the Department, its officers, employees, and agents (collectively referred to as 'the indemnified") from and against any loss, damage or expense (including legal costs) arising from any claim, action, suit, demand or proceeding that may be made or brought by any person against the indemnified in consequence of or arising out of the Project; and

b) releases and discharges the indemnified from any such claim, action, suit, demand or proceeding which, but for these provisions, might be brought against or made upon the indemnified, except any action brought or made due to a negligent act or omission of the Department.

22. DISPUTES

The Organisation shall, for the term of this Agreement, take out and/or maintain the following insurances:-

a) A Public Liability insurance policy for a sum of not less than ten million dollars arising from any one event in respect of accidental death of or accidental bodily injury to persons, or accidental damage to property, arising out of or in the course of the Project;

b) A Worker's Compensation insurance policy in accordance with the *WorkCover Queensland Act 1996* (Qld).

Queensland Department of Employment and Training

Performance and funding agreement (2002-03) for Queensland Department of Employment and Training and ITAB.

15. Indemnity and Insurance

15.1 The ITAB hereby indemnifies the department, its officers, employees, servants and agents from and against any and all loss, damage and expense arising from any claim, demand, action, suit or proceeding that may be made or brought by any person against the department, its officers, employees, servants and agents for or in respect of personal injury to or the death of any person or loss or damage arising out of or as a consequence of any default, unlawful act or omission or any negligence by the ITAB, its employees or agents in the performance of its functions.

15.2 The ITAB will take out and maintain the following insurance for the term of this Agreement with an insurance company licensed by the Australian Prudential Regulation Authority (APRA) to operate in Australia:

(a) a professional indemnity policy and a public liability policy of not less than five million dollars ($5,000,000.00) arising out of any one event in respect of death, injury, loss or damage howsoever sustained to any person or property; and

(b) damage and compensation insurance in relation to ITAB employees, in accordance with the WorkCover Queensland Act 1996.

15.3 The ITAB will provide evidence of those matters specified in clause 15.2 within 14 days of being so requested by the department.

Queensland Health Department

(a) General Service Agreement (2002-03) for Queensland Health and nonprofit organisations.

13. Indemnity and Insurance

13.1 The Funded Organisation must indemnify and keep indemnified Queensland Health and all its servants and agents so that Queensland Health is not liable for any claims or damages that arise from the Funded Organisation carrying out its obligations under this Agreement;

13.2 The Funded Organisation must take out, or have in place, effective insurance cover to the satisfaction of Queensland Health for the term of this Agreement. This may include the following insurance:

13.2.1 WorkCover employee accident insurance as required by a law of the State of Queensland or the Commonwealth of Australia.

13.2.2 The Funded Organisation shall ensure that any volunteers are covered by appropriate insurance;

13.2.3 If the funded amount or any part of the funded amount is for the purpose of funding re-construction, occupation or maintenance or property, the Funded Organisation must arrange and maintain a public liability insurance policy for a sum or not less than one million ($1,000,000) dollars arising from any one event in respect to accidental death and/or accidental bodily injury to person, or accidental damage to property.

13.2.4 Compulsory Third Party and, where appropriate when replacement costs are considered, comprehensive/property insurance for motor vehicles and other assets that may be used by the Funded Organisation in carrying out its objectives under this Agreement.

13.3 The Funded Organisation must be able to satisfy Queensland health that it has effective insurance cover as set out in this Agreement within seven (7) days of receiving Queensland Health's written request.

(b) Home and Community Care (2002-03) growth funding agreement for HACC service provision.

11. INSURANCE

11.1 The Service Provider must take out and maintain with a reputable insurer) for the term of this Agreement the following insurances:

(a) workers' compensation insurance in accordance with the WorkCover Queensland Act 1996;

(b) comprehensive insurance for vehicles;

(c) building and contents insurance;

(d) public liability insurance for not less than $5 million arising from any one event; and

(e) directors' liability insurance (if the Service Provider is a company).

11.2 The service Provider must, if requested, supply evidence of the currency of all insurance to Queensland Health within 7 days from the date of the request.

12. LIABILITY & INDEMNITY

12.10 Any liability incurred by the Service Provider in providing the Services shall be and remain the liability of the Service Provider and not Queensland Health.

12.2 The Service Provider indemnifies Queensland Health, its officers, employees and agents against all actions, proceedings, claims and demands that may be brought by any person in respect of, or arising directly or indirectly from, the provision of the Services by the Service Provider, including all costs, damages and expenses (including legal fees) reasonably incurred by Queensland Health, its officers, employees or agents in defending any action, proceedings, claim or demand.

Queensland Department of Families

Standard Conditions of Funding (2002-03)
See attached.

Clause 6

(h) all normal and appropriate insurances for the service be taken out and maintained, including public liability insurance.

Queensland Department of Communities

Clause 14.6
Indemnity

You indemnify the State of Queensland against any claim by third parties against the State arising from the use by the State of the Material or Existing Material, including any claims by third parties about the ownership or right to use the Intellectual Property Rights in the material or Existing Material in Australia.

Clause 16

You must obtain insurance.

You must effect and maintain the insurance specified in Item 1.4 of Schedule 1. Copy of insurance policy.

Upon request, You will provide the Department with a copy of any insurance policy obtained in accordance with clause 16.1 and a certificate of currency.

[i] See *Crown Proceedings Act 1980* (Qld), s 9; *Crown Proceedings Act 1988* (NSW), s 5; *Crown Proceedings Act 1992* (SA), s 5; *Crown Suits Act 1947* (WA), s 5; *Crown Proceedings Act 1958* (Vic), 23; *Crown Proceedings Act 1993* (TAS), s 5; *Crown Proceedings Act 1992* (ACT), s 5; *Crown Proceedings Act 1993* (NT), s 5; *Judiciary Act 1903* (Cth), 56, 64.